1-03

ERIC P. BROTHERS AND WILLS, O'NEILL & MELLK,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BOUND BROOK, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, an English, journalism and drama teacher, and his law firm sought payment from respondent Board for legal fees incurred by the teacher defending himself against a criminal harassment charge brought by a student. The Board contended the acts underlying the criminal charge did not arise out of and in the course of the performance of teaching duties.

The ALJ found that petitioner's behavior was not professionally appropriate. The ALJ concluded that the criminal charges specified in the complaint did not arise out of and in the course of the performance of petitioner's duties as a teacher. The ALJ concluded that petitioner was not entitled to reimbursement from respondent Board for the course of defending against the criminal proceedings subsequent to the complaint.

The Commissioner noted that petitioner had not satisfied the requisite legal standard which would entitle him to indemnification of his legal fees and expenses pursuant to *N.J.S.A.* 18A:16-6.1. The Commissioner adopted the findings and determination in the Initial Decision as his own.

January 3, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8515-01

AGENCY REF. NO. 446-10/01

ERIC P. BROTHERS and WILLS, O'NEILL & MELLK,

Petitioners,

v.

BOARD OF EDUCATION OF THE BOROUGH OF BOUND BROOK, SOMERSET COUNTY,

Respondent.

G. Robert Wills, Esq., for petitioner (Wills, O'Neill & Mellk, attorneys)

John E. Collins, Esq., for respondent (Parker, McCay & Criscuolo, attorneys)

Record Closed: October 1, 2002 Decided: November 15, 2002

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners seek payment from respondent ("Board") for legal fees incurred by a teacher defending himself against a criminal harassment brought by a student. The Board rejected

payment alleging that the acts underlying the criminal charge did not arise out of and in the course of the performance of teaching duties.

On November 20, 2001, this matter was transmitted to the Office of Administrative Law as a contested cause pursuant to *N.J.S.A.* 52:14B to –15 and *N.J.S.A.* 52:14F-1 to –13. Prehearing conferences were scheduled for May 17 and May 24, but adjourned because of scheduling conflicts. The prehearing was conducted on June 3 and a Prehearing Order entered on June 5. The Prehearing Order provided a briefing schedule in anticipation of cross-motions for summary decision. Oral argument relative to the motions was heard on October 1, 2002.

The hearing record closed October 1, 2002.

FACTUAL CONSIDERATIONS

The parties are in virtual agreement that the material facts in this matter are:

Eric Brothers ("Brothers") was an English, journalism and drama teacher at Bound Brook High School during the 1999-2000 school year. In addition to teaching structured classes Brothers also was the Director of the school's Drama Club.

C.B. was a sophomore at Bound Brook High School during the 1999-2000 school year. C.B. was a member of the Drama Club that year, participating in the Club's first semester production of the play "Every Man." C.B. was to also play a role in the Club's second semester play, "Carousel."

In early February 2000, Brothers informed members of the Drama Club that he would be leaving Bound Brook High School in March for a job in another school district. On February 14, 2000, Brothers and C.B. exchanged e-mail addresses and began e-mail correspondence on February 16. E-mail continued on a regular basis through the weekend of February 26 and 27.

Brothers sent C.B. the following e-mail on February 26 at 10:51 p.m.:

> Hey pretty girl! Wouldn't it be nice if I could pop out of your computer screen right now? How would you explain that to your mother? I bet you have cute PJs. I guess I should stop right there, right? Why do I get nervous when I see your name on my e-mail list? Why do I get nervous when I don't see your name on my e-mail list? Do you know what I saying" (I know I don't)

The next school day was Monday, February 28. Brothers met C.B. at noon in the hall of the school near Brother's classroom and C.B.'s locker. Brothers asked C.B. into his classroom. No one else was in the room. Brothers told C.B. that he was developing strong feelings for her and Brothers believed she had feelings for Brothers. C.B. replied that she did not, that her feelings for Brothers were not on that level, and they were only friends. As C.B. was leaving the room Brothers apologized.

After that school day and after play practice Brothers again apologized to C.B. and asked C.B. to keep the matter between them.

The next day C.B. and her mother went to the Bound Brook Police Department to report the incidents. Based upon the information provided by C.B. a complaint was prepared by the police charging Brothers with harassment, in violation of *N.J.A.C.* 2C:33-4(a).

> The text of the complaint is:
>
> within the jurisdiction of this Court, with purpose to harass another, make or cause to be made a communication of communications in a manner likely to cause annoyance or alarm by sending electronics mail to victim C.B. over a two week period suggestive of a teacher-student physical relationship between them and by having two conversations in school on 2/28/200 with the victim wherein he expressed his personal feelings for the victim and that he wanted their conversation kept secret from other people which caused the victim to feel scared, hurt and distrustful of him in violation of *N.J.S.A.* 2C-33-4a.

A trial held in Bound Brook Municipal Court on November 16 and 20, 2000. At the conclusion of the trial the municipal court judge found Brothers "guilty to the harassment charge." On appeal to the Superior Court, Law Division, the conviction of Brothers was reversed.

Petitioner, Wills, O'Neill & Mellk submitted its bill for legal services rendered to Brothers in defending Brothers against the criminal complaint. The invoice details 94.70 hours of professional services at $175 per hour ($16,572.50) and disbursements of $1,237 for a total legal fee and disbursements of $17,809.50.

ANALYSIS AND CONCLUSION

Although Wills, O'Neill & Mellk directed its bill to the Bound Brook Board of Education the statute addresses reimbursement to any person holding an office, position or employment for the cost of defending against criminal action "instituted against any such person for any such act or omission [arising out of and in the course of the performance of the duties of such office, position, employment]" when the criminal action is "dismissed or result in a final disposition in favor of such person . . .". *N.J.S.A.* 18A:16-6.1. The cost of defending the criminal action includes reasonable counsel fees and expenses of the original trial and all appeals.

The issue in this matter is, "Did the charged acts of harassment against Brothers arise out of and in the course of the performance of his duties as teacher in Bound Brook High School?"

Counsel for the respective parties suggest that this matter is controlled by the decisions in *Bower v. Board of Education of the City of East Orange,* 149 *N.J.* 416 (1997) and *Board of Education of Florham Park v. Utica Mutual Insurance Company, et al.* 172 *N.J.* 300 (2002). The Court in the *Board of Education of Florham Park* case, *Id.* at p. 309, mention the two-part standard for determining whether board of education employees are entitled to indemnification of counsel fees as explained in *Bower.* The Court did not address the question of whether the charged acts arose out of and in the course of the performance of the duties of the position. The majority opinion addressed the final disposition of charges in favor of the Board's employee as the trigger of the board's liability and the liability of the 2 insurance companies insuring the board.

In *Bower v. Board of Education of the City East Orange, supra,* the question of whether the charged act on omission or which the criminal charges were based "arose out of and in the

favor of the employee **and** 2) any act or omission upon which the criminal charge is based must arise out of and during the course of the employee's performance of the duties and responsibilities of his position.

Here, there is no dispute that the first prong of the requisite test was satisfied by the Superior Court's reversal of petitioner's Municipal Court conviction. Thus, the remaining issue is whether the underlying criminal charges arose within the legitimate scope of petitioner's teaching duties. A reasoned reading of the record here, including the transcript of the Municipal Court hearing,[1] which provides evidence with respect to the specific conduct of petitioner which formed the basis of the criminal charges brought against him,[2] compels the Commissioner to conclude that it cannot credibly be argued that such actions of petitioner *arose out of* the performance of the duties and responsibilities of his employment as a high school English, journalism and drama teacher. *See Scirrotto v. Warren Hills Board of Education*, 272 *N.J. Super.* 391 (App. Div. 1994). Consequently, petitioner has not satisfied the requisite legal standard which would serve to entitle him to indemnification of his legal fees and expenses pursuant to *N.J.S.A.* 18A:16-6.1.

Accordingly, the Initial Decision of the OAL is adopted for the reasons stated therein and the instant Petition of Appeal is dismissed.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 1|03|03

Date of Mailing: 1|03|03

[1] Hearing was conducted on November 16, 2000 and November 20, 2000 in Bound Brook Municipal Court, Somerset County.

[2] Contrast *Bower, supra.*

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

2-03

Z.K., on behalf of minor child, E.K.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

January 3, 2003

OAL DKT. NO. EDU 9273-01
AGENCY DKT. NO. 338-8/01

Z.K., on behalf of minor child, E.K.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, including the advisement of failure to appear transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4 and a copy of a notification sent to petitioner by OAL on November 23, 2002, providing 13 days to submit an explanation for such nonappearance, have been reviewed. There being no explanation filed by petitioner, this matter is no longer deemed to be a contested matter before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED. *

COMMISSIONER OF EDUCATION

Date of Decision: 1|03|03

Date of Mailing: 1|03|03

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

5-03

3-03

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

January 3, 2003

OAL DKT. NO. EDU 1466-02
AGENCY DKT. NO. 481-11/01

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

The record of this matter, including the advisement of failure to appear transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4 and a copy of a notification sent to petitioner by OAL on August 20, 2002, providing 13 days to submit an explanation for such nonappearance, have been reviewed. There being no explanation filed by petitioner, this matter is no longer deemed to be a contested matter before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED. *

COMMISSIONER OF EDUCATION

Date of Decision: 1|03|03

Date of Mailing: 1|03|03

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

4-03

4-03

C.E.E., on behalf of minor child, T.J.E.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF RAHWAY, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

January 3, 2003

OAL DKT. NO. EDU 9274-01
AGENCY DKT. NO. 343-9/01

C.E.E., on behalf of minor child, T.J.E.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF RAHWAY, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and advisement of failure to appear transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4, along with copies of notifications sent to the parties by OAL on October 16, 2002, providing petitioner 13 days to submit an explanation for such nonappearance, have been reviewed. There being no explanation filed by the parties, this matter is no longer deemed to be a contested matter before the Commissioner and is hereby dismissed with prejudice.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1|03|03

Date of Mailing: 1|03|03

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

5-03

5-03

FRANKLIN LAKES EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FRANKLIN LAKES, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning Education Association alleged that the Board assigned the duties of a certified school nurse to an unqualified and uncertified person, now acting in the position of a certified school nurse.

The ALJ determined that the Association conceded that the school health aide was not performing the duties specifically reserved to the certified school nurse. The Association, however, alleged that the Board did not provide adequate school nursing services to the school in question. The ALJ determined that that was not an issue raised in the verified petition and no amended petition was submitted. Therefore, based on the Association's concession that the school health aide was not performing the duties of a school nurse and, further, based on statement of a supervisor that the health aide was supervised by a certified school nurse and himself, the ALJ found that there were no genuine issues of material fact to be resolved. The ALJ granted summary decision to the Board. The petition was dismissed.

The Commissioner adopted the Initial Decision as his own.

January 6, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
GRANTING SUMMARY DECISION

OAL DKT. NO. EDU 1596-02

AGENCY DKT. NO. 498-12/01

FRANKLIN LAKES EDUCATION ASSOCIATION,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF FRANKLIN LAKES, BERGEN COUNTY,

Respondent.

Kathleen A. Naprstek, Esq., appearing for Petitioner
(Zazzali, Fagella & Nowak, attorneys)

Maria A. Giammona, Esq., appearing for Respondent
(Fogarty & Hara, attorneys)

Record Closed: August 20, 2002 Decided: November 18, 2002

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

STATEMENT OF THE CASE

This matter was opened for consideration by counsel for Respondent, Board of Education of Franklin Lakes, (Respondent or Board), on motion for summary decision

pursuant to *N.J.A.C.* 1:1-12.5. An extension of time in which to file an initial decision was sought by the undersigned and was granted.

This application is predicated on two legal issues which, Respondent asserts, are dispositive of the matter. Moreover, Respondent contends that the facts relating to the two issues are undisputed. Those issues are:

a) that the Board is not required to have a certified school nurse physically present when a non-certified school nurse performs services supplemental to those provided by the certified school nurse; and

b) the school health aide is neither performing the duties of a certified school nurse nor performing duties that are required to be supervised by a certified school nurse.

In its opposition to the application for summary decision, Petitioner concedes that the school health aide is not performing the duties specifically reserved to the certified school nurse but goes on to assert that there remains a significant dispute over whether the Board provides adequate school nursing services to the students assigned to the specific school in question, an issue not raised in the verified petition.

Petitioner also raises the issue of the adequacy of the services to be provided by the school health aide, also an issue which was not asserted in the verified pleading. Moreover, Petitioner asserts ". . . it is anticipated that many more of Respondent's special education students and those with specific medical needs will be assigned to space outside of the school buildings to which . . . certified school nurses are assigned for the 2002-03 school year in violation of *N.J.S.A.* 18A:40-3.3. Once again, this issue was not raised in the pleadings.

Petitioner did, however, allege violation of the following statutes:

> *N.J.S.A.* 18A:6-38, which gives the state board the authority to issue certificates and direct or supervise, among other

things, the rendering of nursing services to students in public schools operated by boards of education:

N.J.S.A. 18A:27-2, which prohibits employment without a certificate; and

N.J.S.A. 18A:40-1 *et seq.*, which deals with the promotion of health and prevention of disease.

None of these statutes deals with the adequacy of services rendered by school nurses or school health aides. In addition, Petitioner has conceded that the school health aide is not performing duties required to be performed or supervised by a certified school nurse.

Petitioner alleges violations of the following regulations in the pleadings:

N.J.A.C. 6:11-3.1, which states that certification is required for any employee who is performing duties regulated through certification rules;

N.J.A.C. 6:11-4.6, which governs paraprofessional approval;

N.J.A.C. 6:11-11.7, which set forth the requirements to obtain a certificate as a school nurse in elementary, secondary and vocational schools; and

N.J.A.C. 6A:16-2.1, dealing with the appointment and duties of school physicians and nurses, as well as the development of a plan for the provision of nursing services including the circumstances under which non-certified school nurses may be assigned.

The provisions of *N.J.A.C.* 6:11-3.1 require determination of whether a school health aide must be certified. School districts are permitted by regulation to supplement the services provided by the certified school nurse with non-certified registered nurses who are assigned to the same school building or complex as the certified nurse. See also *N.J.S.A.* 18A:40-3.3.

In the case at bar, Pizzolo, the school health aide, is a registered nurse who is supervised by, among others, one of the two certified school nurses employed by the district, according to the affidavit of Dr. John Caliso, Supervisor of Special Services. Pizzolo has been assigned in accordance with her job description and does not perform the duties of a certified school nurse, according to Caliso.

Although *N.J.S.A.* 18A:40-3.3 is implicated in the determination of whether school health aides are required to be certified, it is not one of the statutes of which Petitioner alleged violation in the pleadings. Accordingly, the issue raised in Petitioner's responding papers regarding the "appropriate provider" for medical needs of special education students and students requiring specialized medical care is beyond the four corners of the pleadings.

It is well-established that summary decision is granted when the papers and discovery filed in a case, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law.

In this case, Petitioner filed a verified petition, which by its very nature is limited to the facts within the personal knowledge of the person signing the petition. These are the facts to which Respondent must reply. Respondent/Movant asserts that, given the nature of a verified petition, certified discovery and the response brief, it is clear that Petitioner seeks to allege a completely new cause of action, in its response to this application, that the services provided by the district were inadequate, which was not contemplated, even remotely in the context of the pleadings as filed. I do so **FIND**.

At this juncture, before any proofs have been taken and before hearing has been begun, the appropriate course would have been to seek leave to amend pleadings. This was not done.

Accordingly, based on Petitioner's concession that the school health aide is not performing the duties of a certified school nurse and further, based on the uncontroverted statement of Caliso that Pizzolo is supervised by a certified school nurse and Caliso himself, I **FIND** that there are no genuine issues of material to be resolved in this matter. I **CONCLUDE**, therefore, that summary decision in favor of Respondent is appropriate.

ORDER

It is, therefore, hereby **ORDERED** that summary decision be and hereby is **GRANTED** in favor of Respondent; it is further **ORDERED** that this petition be and hereby is **DISMISSED.**

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

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

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

November 15 2002
DATE

Maria Mancini La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

Receipt Acknowledged:

November 22 2002
DATE

M. Kathleen Duncan (Ea)
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 22 2002

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

jb

OAL DKT. NO. EDU 1596-02
AGENCY DKT. NO. 498-12/01

FRANKLIN LAKES EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FRANKLIN LAKES, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon careful and independent review of the record in this matter, the Commissioner determines to affirm the Initial Decision of the Administrative Law Judge, for the reasons set forth therein. Accordingly, the Petition of Appeal is dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 1|06|03

Date of Mailing: 1|06|03

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

6-05

6-03

BOARD OF EDUCATION OF THE MORRIS COUNTY VOCATIONAL SCHOOL DISTRICT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF SCHOOL-TO-CAREER AND COLLEGE INITIATIVES AND THOMAS A. HENRY,	:	DECISION
RESPONDENTS.	:	

January 6, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 9651-02

AGENCY DKT. NO. 441-10/01

MORRIS COUNTY VOCATIONAL SCHOOL DISTRICT,

Petitioner,

v.

NEW JERSEY DEPARTMENT OF EDUCATION, OFFICE OF SCHOOL-TO-CAREER AND COLLEGE INITIATIVES; and THOMAS A. HENRY,

Respondents.

John N. Mills, Esq., for petitioner
(Mills & Mills, attorneys)

Kimberly Lake Franklin, Deputy Attorney General, for respondents
(David Samsom, Attorney General of New Jersey, attorney)

Record Closed: November 20, 2002 Decided: November 21, 2002

BEFORE **KEN R. SPRINGER**, ALJ:

This matter was transmitted to the Office of Administrative Law on December 19, 2001, for a hearing pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13.

The parties have agreed to settle this matter and have prepared the attached consent order indicating the terms of settlement.

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

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

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

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

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

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

Nov. 21, 2002
DATE

KEN R. SPRINGER, ALJ

Receipt Acknowledged:

11-25-02
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DEC 2 2002
DATE

OFFICE OF ADMINISTRATIVE LAW

al

DAVID SAMSON
Attorney General of New Jersey
Attorney for Respondents,
Department of Education
R.J. Hughes Justice Complex
PO Box 112
Trenton, New Jersey 08625

By: Kimberley Lake Franklin
Deputy Attorney General
(609) 633-1402

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2002 NOV 20 P 4:06

MORRIS COUNTY VOCATIONAL SCHOOL DISTRICT,	:	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW
Petitioner,	:	OAL DOCKET NO. EDUOT 09651-01N
V.	:	Agency Ref. No. 441-10/01
NEW JERSEY DEPARTMENT OF EDUCATION, OFFICE OF SCHOOL-TO-CAREER and COLLEGE INITIATIVES; and THOMAS A. HENRY	:	**CONSENT ORDER OF SETTLEMENT**

Petitioner, Morris County Vocational School District ("Morris County" or "Petitioner"), through its Attorney, John M. Mills III, Esquire of the firm Mills & Mills and Respondent, New Jersey Department of Education, Office of School-to-Career and College Initiatives; and Thomas Henry ("Department" or "Respondent") through its attorney, the Honorable David Samson, Attorney General of the State of New Jersey, Kimberley Lake Franklin, Deputy Attorney General, appearing, hereby stipulate to the following terms of settlement:

1. On or about May 10, 2001 petitioner was advised that an internal review of the Tech-Prep grant program disclosed that the program was eligible for award consideration.

2. On or about June 26, 2001 Dr. Thomas A. Henry advised petitioner that the Office of School-to-Career Initiatives will not be certifying Morris County as eligible for continued funding for FY 2001 and that all costs associated with the FY 2000 Tech Prep award were disallowed. This decision was based on petitioner's failure to submit required reports documenting the progress of program goals for the FY 2000 grant year. Petitioner was further advised to reimburse the Department of Education ("Department") the sum of $96, 231.

3. On or about October 11, 2001 Morris County filed a petition in appeal of this determination. Morris County explained the late filings by detailing personnel problems existing in the district during the relevant time period.

4. The Petition was subsequently transferred to the Office of Administrative Law as a contested case.

6. The parties thereupon entered into discussions to amicably resolve this matter in the public interest.

7. The Department conducted subsequent reviews of the program and determined that, although the petitioner was clearly responsible for the failure to submit required reports in a timely matter and admitted to such, the district has taken significant measures to improve their administration and the grant management

process. In addition, the review revealed that all required reports had ultimately been submitted to the Department and that all proposed activities of the grant had been completed.

8. Based on the settlement discussions and the review of the program, the Department has determined that petitioner shall not be required to reimburse the Department $96, 231 for FY 2000 costs and shall receive certification for FY 2001 Tech-Prep funding. This decision is based on the district's subsequent demonstrated improvement efforts and the related hardship that this would have placed on the district if ordered to return the funds. This decision is based upon the following conditions:

A. The Department shall provide increased monitoring of all related grant programs, including Perkins, at the Morris County Vocational School District.

B. The monitoring shall include on-site visits.

C. All required reports will be made on a timely basis.

9. The parties agree that this Stipulation of Settlement fully resolves all issues between them arising from the Petition filed in this matter under Docket No. EDUOT 09651-01N.

DAVID SAMSON
Attorney General of the State
of New Jersey
Attorney for Respondent,
N.J. Department of Education

Kimberley Lake Franklin, DAG

DATED: 11/18/2002

MILLS & MILLS
John M. Mills
Attorney for Petitioner,
Morris County Vocational
School District

John M. Mills, Esq.

DATED: 11-14-02

SO ORDERED THIS 20th DAY OF Nov 2002

HONORABLE KENNETH R. SPRINGER, A.L.J.

OAL DKT. NO. EDU 9651-02
AGENCY DKT. NO. 441-10/01

BOARD OF EDUCATION OF THE MORRIS COUNTY VOCATIONAL SCHOOL DISTRICT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF SCHOOL-TO-CAREER AND COLLEGE INITIATIVES AND THOMAS A. HENRY,	:	DECISION
RESPONDENTS.	:	

The record of this matter and settlement transmitted by the Office of Administrative Law have been reviewed. Because this agency is a party to the present case, the settlement, pursuant to *N.J.A.C.* 1:1-19.1(c) and (d), is deemed to be the final decision in this matter.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1|06|03

Date of Mailing: 1|06|03

7-03

7-03

T.L.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF PINE HILL, CAMDEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

January 6, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

WITHDRAWAL

OAL DKT. NO. EDU 6708-02

AGENCY DKT. NO. 319-10/02

T.L.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF PINE HILL, CAMDEN COUNTY,

Respondent.

Lee Gingsburg, Esq., for petitioner (Camden Regional Legal Services, Inc.)

Anthony Padovani, Esq., for respondent (Sahli and Padovani, attorneys)

Record Closed: November 15, 2002 Decided: November 20, 2002

BEFORE **JOHN SCHUSTER III**, ALJ:

This matter consists of an appeal by petitioner from the decision to expel by the respondent Board of Education on Sept. 10, 2002 and a request for emergent relief to have the petitioner reinstated to student status.

PROCEDURAL HISTORY

This matter was transmitted to the Office of Administrative Law (hereinafter "OAL") for determination as a contest the case on October 10, 2002[1]. Thereafter, this Administrative Law Judge conducted a telephone conference call with both attorneys on October 31, 2002, at which time a settlement conference was scheduled for November 15, 2002. However, on November 14, 2002, by letter of his attorney, petitioner, who is now 19 years of age, indicated that he no longer wished to pursue his appeal, requested the settlement conference be canceled and further requested this matter be dismissed. The hearing record closed based on that request.

I, therefore, **CONCLUDE** that this matter is no longer a contested case before the OAL.

I make that **CONCLUSION** after having considered the request of petitioner in this matter. I also **CONCLUDE** that the withdrawal by petitioner is appropriate at this time based upon the foregoing. It is **ORDERED** that the withdrawal of petitioner is granted and this matter is herewith **DISMISSED**.

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

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

[1] The matter was assigned to the Administrative Law Judge by the Acting Director of the OAL pursuant to *N.J.S.A.* 52:14F-5(o).

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

November 20, 2002
DATE

JOHN SCHUSTER III, ALJ

Receipt Acknowledged:

11-25-02
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

NOV 26 2002
DATE

OFFICE OF ADMINISTRATIVE LAW

lam

CAMDEN REGIONAL LEGAL SERVICES, INC.

745 MARKET STREET
CAMDEN, NEW JERSEY 08102-1117
PHONE (856) 964-2010 FAX (856) 338-9227
TDD (856) 964-1204 (For hearing or speech impaired)

LARRY D. DeCOSTA
EXECUTIVE DIRECTOR

DAVID T. RAMMLER
SUPERVISING ATTORNEY
SONIA BELL, ESQ.
ALAN W. LESSO, ESQ.
GRAYCE E. WIGGINS, ESQ.
LEE GINSBURG, ESQ.
DAVID PODELL, ESQ.

MARIANNE R. BROWN
SUPERVISING ATTORNEY
CYNTHIA L. GEHRING, ESQ.
NICHOLAS A. JONES, ESQ.
LINDA M. GOFF, ESQ.

November 14, 2002

VIA FAX # (609) 588-6536

The Honorable John Schuster
Administrative Law Judge
Office of Administrative Law
9 Quakerbridge Plaza
Post Office Box 049
Trenton, NJ 08625-0049

RECEIVED
2002 NOV 14 P 3:02
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

Re: *T.L. v. Borough of Pine Hill Board of Education,*
Docket No. EDUOS-06708-02S
Agency Reference No. 319-10/02

Dear Judge Schuster:

I am writing to inform you that petitioner, T.L., wishes to withdraw his hearing request in the above-referenced matter. The reason for this request is that T.L. has informed me that he no longer wishes to pursue his appeal. While the reason for T.L.'s decision remains unclear to me, it appears that T.L. is extremely depressed as a result of the circumstances surrounding this case and no longer has the will to fight respondent's decision to exclude him from receiving any type of educational services. Therefore, I believe it is appropriate to cancel the settlement conference that is scheduled for November 15, 2002 at 1:00 P.M. and to dismiss the case.

Despite the foregoing, I feel compelled to state that both myself and T.L.'s mother, Sheila Lomax, strongly disagree with T.L. and we are not certain that he fully comprehends the consequences of his decision. We also believe that the reasons behind his decision are not rational or reasonable. However, since T.L. is currently 19 years old and he has not been adjudicated to be incompetent, I am not aware of any authority that

would allow the case to go forward even though T.L.'s mother would be willing to step in as the Petitioner. In fact, since T.L. has informed that he still wants to attend school in Respondent's district, both Ms. Lomax and myself believe that substituting Ms. Lomax as Petitioner would not be a futile gesture. This is because if the decision of the Court were to require Respondent to place T.L. in their district, T.L. has informed me that he would in fact attend.

I apologize for not being able to inform you of this development sooner. However, T.L. did not reach a final decision on this matter until today.

Based on the foregoing, I assume that tomorrow's settlement conference will be canceled and the case dismissed. However, if you believe that it would still be useful or appropriate to meet with you, both myself and Ms. Lomax remain willing and able to attend the conference without T.L.

Thank you for your attention to this matter. I would greatly appreciate it if you or your secretary could get back to me and my adversary (Mr. Padovani) as soon as possible with your response to this letter. My direct telephone number is (856) 964-2010, extension 246.

Sincerely,

Lee Ginsburg, Esquire

Cc: Anthony Padovani, Esquire (Via Fax# 609-561-3056)
Torrance Lomax
Sheila Lomax

OAL DKT. NO. EDU 6708-02
AGENCY DKT. NO. 319-10/02

T.L.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF PINE HILL, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon careful and independent review of the record in this matter, the Commissioner affirms the Initial Decision for the reasons set forth therein. Accordingly, the Petition of Appeal and Motion for Emergent Relief are hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 1|06|03

Date of Mailing: 1|06|03

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

8-03

C.B., on behalf of minor child, M.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PENNSAUKEN, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

November 8, 2002

OAL DKT. NO. EDU 2485-01
AGENCY DKT. NO. 65-3/01

C.B., on behalf of minor child, M.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PENNSAUKEN, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 11/8/02

Date of Mailing: 1/6/03

9-05

C.Z., on behalf of minor child, L.C.Z.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSBOROUGH, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

November 8, 2002

OAL DKT. NO. EDU 4694-01
AGENCY DKT. NO. 153-5/01

C.Z., on behalf of minor child, L.C.Z.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSBOROUGH, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 11/8/02

Date of Mailing: 1/7/03

10-03

HANNAH EDGE,

PETITIONER,

V.

BOARD OF EDUCATION OF THE LENAPE REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

AND

HANNAH EDGE,

PETITIONER,

V.

BOARD OF EDUCATION OF THE LENAPE REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY,

RESPONDENT.

AND

HANNAH EDGE,

PETITIONER,

V.

BOARD OF EDUCATION OF THE LENAPE REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY,

RESPONDENT.

November 8, 2002

OAL DKT. NOS. EDU 08396-96; 03821-97 AND 10802-97 (CONSOLIDATED)
AGENCY DKT NOS. 307-7/96; 53-2/97 AND 403-10/97

HANNAH EDGE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE LENAPE REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	
AND		
HANNAH EDGE,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE LENAPE REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY,	:	
RESPONDENT.	:	
AND		
HANNAH EDGE,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE LENAPE REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY,	:	
RESPONDENT.	:	
	:	

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

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 11/8/02

Date of Mailing: 1/7/03

11-03

DAVID ANDERSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF PLEASANTVILLE, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

November 8, 2002

OAL DKT. NO. EDU 08024-00
AGENCY DKT. NO. 295-8/00

DAVID ANDERSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF PLEASANTVILLE, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 11/8/02

Date of Mailing: 1/8/03

12-03

CHRISTOPHER WANNEMACHER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE PASSAIC COUNTY MANCHESTER REGIONAL HIGH SCHOOL DISTRICT, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

November 8, 2002

OAL DKT. NO. EDU 9913-00
AGENCY DKT. NO. 383-9/00

CHRISTOPHER WANNEMACHER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE PASSAIC COUNTY MANCHESTER REGIONAL HIGH SCHOOL DISTRICT, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

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

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 11/8/02

Date of Mailing: 1/8/03

13-03

GEOFFREY BRIGNOLA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE RED BANK REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

November 8, 2002

OAL DKT. NO. EDU 676-00
AGENCY DKT. NO. 11-1/99

GEOFFREY BRIGNOLA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE RED BANK REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 11/8/02

Date of Mailing: 1/8/03

16-03

J.R., on behalf of minor child, C.M.K.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WESTVILLE, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

January 9, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 2848-02
AGENCY DKT. NO. 121-4/02

J.R., O/B/O C.M.K,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF WESTVILLE, GLOUCESTR COUNTY,
Respondent.

Jeffrey H. Pooner, Esq., for petitioner

Russell E. Paul, Esq., for respondent

Record Closed: December 16, 2002 Decided: December 17, 2002

BEFORE **DOUGLAS H. HURD**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on May 17, 2002, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

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

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

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

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

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

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

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

December 17, 2002
DATE

DOUGLAS H. HURD, ALJ

Receipt Acknowledged:

December 19, 2002
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 20 2002
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/lam

Russell E. Paul, Esquire
39 South Broad Street
Woodbury, NJ 08096
(856) 848-2100
Attorney for Respondent
Westville Board of Education

J.R., On Behalf of Minor, C.M.K.	:	DEPARTMENT OF EDUCATION
	:	BUREAU OF CONTROVERSIES
vs.	:	AND DISPUTES
	:	
Board of Education of the Borough of Westville, Gloucester County	:	AOL DOCKET NO. EDUOS 02848-02S
	:	AGENCY REF. NO. 121-4/02
	:	
	:	CONSENT ORDER

THIS MATTER being scheduled for Administrative Hearing before the Court on Monday, December 16, 2002, and

THE PARTIES having amicably resolved the matters in dispute, in advance of same, desiring to set forth their Agreement for the purpose of entering into a Consent Order,

IT IS AGREED that the Board of Education of the Borough of Westville, County of Gloucester was seeking payment of tuition from Joann Reiber on behalf of a minor, C.M.K., in the amount of $2,450.00, and Joann Reiber on behalf of a minor, C.M.K., has offered to pay tuition to the Board of Education of the Borough of Westville in the amount of $2,000.00 with payments to be made at $200.00 per month, starting on January 1, 2003, until paid in full.

NOW THEN THEREFORE, it is ORDERED this day of December, 2002 as follows:

1. Joann Reiber is Ordered to pay the amount of $2,000.00 in tuition on behalf of the minor, C.M.K., to the Westville Board of Education with payments to be made at $200.00 per month commencing on January 1, 2003, until said amount is paid in full. The Board of Education of the Borough of Westville agrees to accept said lesser amount of tuition and payment of same as aforesaid in full and complete satisfaction of any claim for tuition.

2. This Order shall be effective immediately.

3. In the event the payments are not made pursuant to this Order in a timely fashion, the Board of Education of the Borough of Westville shall be allowed to file this Order with the Superior Court of New Jersey as a Judgment.

DOUGLAS H. HURD, JUDGE AOL

I have read and agree to entry of the above-captioned Consent Order.

JOANN M. REIBER

BARBARA GLASS
Board Secretary

OAL DKT. NO. EDU 2848-02
AGENCY DKT. NO. 121-4/02

J.R., on behalf of minor child, C.M.K.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WESTVILLE, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/9/03

Date of Mailing: 1/9/03

17-03

ENGLEWOOD TEACHERS' ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY, AND JOYCE BAYNES, SUPERINTENDENT,	:	DECISION
RESPONDENTS.	:	
	:	

December 30, 2002

OAL DKT. NO. EDU 5176-01
AGENCY DKT. NO. 89-4/01

ENGLEWOOD TEACHERS' ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY, AND JOYCE BAYNES, SUPERINTENDENT,	:	DECISION
RESPONDENTS.	:	
	:	

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

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 12/30/02

Date of Mailing: 1/09/03

18-03

ANN BRAUN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF EAST BRUNSWICK TOWNSHIP, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

December 30, 2002

OAL DKT. NO. EDU 2396-01
AGENCY DKT. NO. 74-3/01

ANN BRAUN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF EAST BRUNSWICK TOWNSHIP, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 12/30/02

Date of Mailing: 1/10/03

19-03

BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
M.A.D., on behalf of minor child, C.B.,	:	DECISION
RESPONDENT.	:	
	:	

December 30, 2002

OAL DKT. NO. EDU 8983-00
AGENCY DKT. NO. 360-9/00

BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
M.A.D., on behalf of minor child, C.B.,	:	DECISION
RESPONDENT.	:	

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

IT IS SO ORDERED.

Judith Weiss

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 12/30/02

Date of Mailing: 1/10/03

20-03

JOHN HOFFMAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF DEPTFORD, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

December 30, 2002

OAL DKT. NO. EDU 10343-98
AGENCY DKT. NO. 461-10/98

JOHN HOFFMAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF DEPTFORD, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 12/30/02

Date of Mailing: 1/10/03

21-03

T.A.M. and D.M.M., on behalf of minor child, M.C.M.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF CHATHAMS, MORRIS COUNTY AND VINCENT D. YANIRO,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

December 30, 2002

OAL DKT. NO. EDU 7056-01
AGENCY DKT. NO. 239-7/01

T.A.M. and D.M.M., on behalf of minor child, M.C.M.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF CHATHAMS, MORRIS COUNTY AND VINCENT D. YANIRO,	:	DECISION
RESPONDENTS.	:	

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

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 12/30/02

Date of Mailing: 1/10/03

23-03

B.A., on behalf of minor child, B.A., III,	:	
PETITIONER,	:	
V.		
	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LYNDHURST, BERGEN COUNTY,	:	DECISION
	:	
RESPONDENT.		
	:	

1/13/03

AGENCY DKT. NO. 328-10/02

B.A., on behalf of minor child, B.A., III,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LYNDHURST, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

This matter having been opened before the Commissioner of Education by way of a Petition of Appeal, filed on October 18, 2002, claiming that petitioner and his son are domiciled in the Township of Lyndhurst so as to entitle the child to attend school in the Lyndhurst School District free of charge pursuant to *N.J.S.A.* 18A:38-1, and seeking an Order requiring the Board of Education of the Township of Lyndhurst to admit petitioner's son, B.A., III, to Lyndhurst High School; and

The Commissioner having advised petitioner and the Board that *N.J.S.A.* 18A:38-1 requires that no child shall be denied admission to the District's schools during the pendency of proceedings in a residency dispute; and

The Commissioner having directed the Board by notices dated October 21, 2002 and November 22, 2002 to file an Answer to the petition; and

Lucy Erminio having acknowledged receipt of service of the November 22, 2002 notice by signing the certified delivery receipt on behalf of the Board; and

As of this date, the Board not having filed an Answer to the petition, and each count of the petition having therefore been deemed to be admitted; and

Petitioner having averred that he and his son are domiciled in the Township of Lyndhurst at 640 Riverside Avenue, and that his son sometimes sleeps at his grandmother's house, who also resides in Lyndhurst, when petitioner works late; now therefore

IT IS ORDERED on this 10th day of January 2003 that summary decision shall be granted in favor of petitioner. Petitioner's son, B.A., III, is therefore deemed to be domiciled in the Lyndhurst School District so as to entitle him to attend school free of charge in that District, pursuant to *N.J.S.A.* 18A:38-1. *

COMMISSIONER OF EDUCATION

Date of Decision: 1/13/03

Date of Mailing: 1/13/03

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

CHARLIE OUTLAW,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

January 15, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU-3868-02
AGENCY DKT. NO. 117-4/02

CHARLIE OUTLAW,
Petitioner,
v.

DEPARTMENT OF EDUCATION,
Respondent.

Anthony Mazza, Esq., for petitioner
(Bendit Weinstock, P.C.)

Kathleen Asher, DAG, for respondent
(David Samson, Attorney General of New Jersey, attorney)

Record Closed: November 21, 2002 Decided: November 22, 2002

BEFORE **SANDRA ANN ROBINSON,** ALJ:

This matter was transmitted to the Office of Administrative Law on May 9, 2002, for determination as a contested case. A settle conference was scheduled for November 22, 2002.

Prior to the settlement conference, the parties agreed to an amicable resolution of the matter and submitted a written Order of Settlement. Having reviewed the record and the settlement terms, I **FIND:**

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

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

Therefore, I **CONCLUDE** that the agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the settlement terms, and it is **FURTHER ORDERED** that the proceedings in this matter be concluded.

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

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

November 22, 2002
DATE

Sandra Ann Robinson
SANDRA ANN ROBINSON, ALJ

Receipt Acknowledged:

December 3 2002
DATE

M. Kathleen Duncan (by)
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 9 2002
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cml

BENDIT WEINSTOCK
A PROFESSIONAL CORPORATION
COUNSELLORS AT LAW
80 MAIN STREET
WEST ORANGE, N.J. 07052
(973) 736-9800
Attorneys for Petitioner
File #29050 M

CHARLIE OUTLAW, Petitioner, vs. DEPARTMENT OF EDUCATION, Respondents.	:STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW :OAL DKT. NO.: EDE OA 03868-02N AGENCY REF. NO.: 117-4/02 : : : ORDER OF SETTLEMENT : :

WHEREAS, Petition, Charlie Outlaw ("Petitioner") and Respondent, New Jersey Department of Education ("Department"), have mutually agreed to settle the above-captioned matter, with Anthony Mazza, Esq. Appearing on behalf of Petitioner and David Samson, Attorney General of New Jersey, by Kathleen Asher, Deputy Attorney General, appearing on behalf of Respondent, and;

WHEREAS, this matter arose from the Department of Education,

Office of Criminal History Review's finding that petitioner was disqualified from employment with the Department pursuant to a conviction for a disqualifying offense dating back to July 13, 1964; and;

WHEREAS, the parties to this matter have entered into discussions to amicably resolve this mater in the public interest; and;

WHEREAS, the settlement of this matter shall not constitute precedent in other pending or future litigation, and for good cause being shown;

IT IS ON THIS 22nd DAY OF November , 2002

ORDERED THAT:

1. The criminal record of the petitioner Charlie Outlaw was expunged pursuant to a court order of the Honorable Michael L. Ravin, J.S.C., Essex Count, filed on August 23, 2002. KEA

2. The petitioner, is hereby not disqualified from continued employment regarding any employment supervised or governed by the Department only as it pertains to the particular conviction which took place on July 13, 1964;

3. Any further or pending action to disqualify the petitioner from employment supervised or governed by the Department only with regard to the conviction of July 13, 1964 is hereby dismissed.

4. Petitioner will need to re-apply for a criminal history background check with the Department of Education, Criminal History

Review Unit in order to confirm his eligibility for any and all employment with the Department.

SANDRA ANN ROBINSON
Administrative Law Judge

I hereby consent to the
form and entry of this order.

Kathleen Asher, DAG
Attorney for Respondent

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OAL DKT. NO. EDU 3868-02
AGENCY DKT. NO. 117-4/02

CHARLIE OUTLAW,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

The record of this matter and settlement transmitted by the Office of Administrative Law have been reviewed. Because this agency is a party to the present case, the settlement, pursuant to *N.J.A.C.* 1:1-19.1(c) and (d), is deemed to be the final decision in this matter.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/15/03

Date of Mailing: 1/15/03

27-03

G.B., on behalf of minor child, Y.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOUTH PLAINFIELD, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

January 16, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 332-02S
AGENCY REF. NO. 513-12/01

G.B. o/b/o Y.S.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF SOUTH PLAINFIELD, MIDDLESEX COUNTY,

Respondent.

No appearance by or for Petitioner

John P. Nuttall, Esq., appearing for Respondent (Schwartz Simon Edelstein Celso & Kessler, LLP, attorneys)

Record Closed: October 25, 2002 Decided: November 27, 2002

BEFORE **ISRAEL D. DUBIN**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner has appealed the determination by Respondent Board of Education of the Borough of South Plainfield (Board) that his cousin, Y.S., was not entitled to a free public education in the district. Petitioner claims that Y.S., who is a citizen of and currently resides in Brazil, should be entitled to attend Respondent's schools because she will be residing with him

in South Plainfield, where he has been paying school taxes for eighteen years. Respondent answered that unless and until he obtained legal guardianship over the child, enrollment in the district's schools would be denied.

On December 16, 2001, Petitioner filed with the Commissioner of Education an appeal from the Board's determination and requested a hearing pursuant to *N.J.S.A.* 18A:6-9. On January 30, 2002, the Department of Education transmitted this matter to the Office of Administrative Law as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

On October 16, 2002, Respondent filed a motion asking that the appeal be dismissed for failure to prosecute. Petitioner did not file any responding papers or return telephone messages left by this Administrative Law Judge's secretary. Since Petitioner had filed his appeal *pro se*, rather than decide the motion on the papers, the undersigned scheduled the matter for hearing on October 25, 2002, and it was heard on that date at the Office of Administrative Law, Quakerbridge Road, Mercerville, New Jersey. The record was closed at the conclusion of the hearing.

FACTUAL DISCUSSION

The material facts are essentially undisputed. Therefore, the factual statements contained herein are the **FINDINGS OF FACT** made with respect to this matter.

On October 24, 2001, Petitioner submitted a "Sworn Statement/Affidavit of Applicant/Guardian Domiciliary of South Plainfield" with Respondent Board of Education seeking to enroll his thirteen-year-old cousin, Y.S., in the school district. In support of his application, Petitioner stated that Y.S., a citizen and resident of Brazil, was living with her grandmother because her father was unemployed and could not support her. Since Petitioner and his wife had the financial means to care for her, it was their intention to bring her to the United States and provide her with a more stable life. However, they did not intend to do so until after Respondent approved her admission to the district's schools.

By letter dated November 26, 2001, Petitioner was advised that Respondent had denied Y.S. admission to the school district on the grounds that she did not satisfy the requirements of *N.J.S.A.* 18A:38-1(b)(1). By way of explanation, Respondent pointed out that the affidavit disclosed Y.S.'s mother was employed and had been granted custody of her on September 6, 2001. Additionally, her father had certified that he would be providing all of the support she required. It was also clear that Y.S.'s grandmother had the present ability to raise and care for her in Brazil. Consequently, Petitioner had failed to establish a family or economic hardship that would warrant the girl's enrollment in the district.

Upon receiving the file from the Department of Education, the undersigned scheduled a prehearing telephone conference for March 26, 2002. During that conference, Petitioner stated that he was attempting to obtain legal guardianship over Y.S. He was therefore granted additional time to get his affairs in order and a status conference call was scheduled for May 23, 2002 at 4:00 p.m. However, the status conference could not be conducted because Petitioner was not available to receive the call.

By letter dated May 31, 2002, the undersigned advised Petitioner that given his failure to receive the call or respond to a message left on his answering machine, it had been assumed that he had been unable to adopt or obtain legal guardianship of Y.S. He was therefore asked to withdraw his appeal without prejudice by June 14, 2002, thereby enabling the Court and the Board to devote precious time and energy to other matters.

June 14th came and went without a response from Petitioner and a second status conference call was scheduled for August 13, 2002. Once again, the conference operator was unable to reach the Petitioner at the phone number he had provided. On October 16, 2002, Respondent filed a motion asking that the appeal be dismissed for failure to prosecute. When Petitioner did not file any responding papers or return telephone messages, the matter was set down for a plenary hearing on October 25, 2002.

DISCUSSION OF THE LAW

Absent exigent circumstances, a petitioner's failure to prosecute an appeal should result in its dismissal. *R.J. v. Board of Education of the Lower Camden County Regional School District*, 97 *N.J.A.R.*2d (EDU) 155 (1996); *N.O. v. Board of Education of the Bridgewater-Raritan School District*, 96 *N.J.A.R.*2d (EDU) 746 (Comm. of Ed., 1996). In fact, that is exactly what occurred in *R.J.*, in which the ALJ stated:

> Inasmuch as R.J. made no effort to contact the judge until the time and date of the scheduled hearing despite the fact that she had adequate notice, I **FIND** that R.J. had been dilatory in prosecuting her appeal and unresponsive to communications from the Department of Education and this judge. Accordingly, I **CONCLUDE** that R.J. has abandoned prosecution and has failed to show good cause why that failure should be excused.

The Initial Decision was affirmed by the Commissioner of Education.

The same result is warranted in this matter. Pursuant to *N.J.A.C.* 1:1-14.4,

> If after appropriate notice, neither a party nor a representative appears at any proceeding scheduled by the Clerk or judge, the judge shall hold the matter for one day before taking any action. If the judge does not receive an explanation for the nonappearance within one day, the judge may ... direct the Clerk to return the matter to the transmitting agency for appropriate disposition.

As related above, following the prehearing conference call of March 26, 2002, Petitioner missed two consecutive status conference calls without an explanation. Moreover, he failed to appear for the plenary hearing scheduled for and held on October 25, 2002, again without explanation or excuse. Therefore, I **FIND** that Petitioner has for all intents and purposes abandoned his appeal and **CONCLUDE** that Respondent's Motion to Dismiss should be granted.

Yet, even if Petitioner had appeared on that date, he would have been hard-pressed to make his case on the facts presented. The issue in this matter is whether R.B. is entitled to a free education under *N.J.S.A.* 18A:38-1, which provides that public schools shall be free to persons over five and under twenty years of age who are "domiciled within the school district." *See V.R.*

o/b/o A.R. v. Hamburg Bd. of Educ., 2 *N.J.A.R.* 283, 287 (Educ. 1980), *aff'd*, State Bd., 1981 *S.L.D.* 1533, *rev'd on other grounds, sub nom Rabinowitz v. New Jersey State Bd. of Educ.*, 550 *F. Supp.* 481 (D.N.J. 1982) (New Jersey requires local domicile, as opposed to mere residence, in order for a student to receive a free education). Therefore, a determination of the child's domicile is the crucial element in a case such as this.

In the October 24, 2001 "Sworn Statement/Affidavit of Applicant/Guardian Domiciliary of South Plainfield" Petitioner filed with the Board, he stated that Y.S. was a citizen of and residing in Brazil. In fact, he expressly stated that he did not intend to bring her to the United States to live with him until the Board approved her admission to its schools. He later confirmed her status and his intentions during a prehearing conference call on March 26, 2002. He has not contacted the Board or my chambers, much less submitted proof of legal guardianship over his cousin since that time. Consequently, I **FIND** that Y.S. is not domiciled in South Plainfield and **CONCLUDE** that she is not entitled to a free education under *N.J.S.A.* 18A:38-1.

DECISION AND ORDER

Accordingly, the Borough of South Plainfield Board of Education's Motion to Dismiss is **GRANTED** and it is therefore **ORDERED** that the appeal filed by G.B. on behalf of his cousin, Y.S., be and is hereby **DISMISSED**.

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

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

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

November 27, 2002
DATE

ISRAEL D. DUBIN, ALJ

Receipt Acknowledged:

Dec. 4 2002
DATE

M. Kathleen Leonard (by)
DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DEC 5 2002
DATE

OFFICE OF ADMINISTRATIVE LAW

IDD/mamf

EXHIBITS

For Petitioner:

None.

For Respondent:

R-1 Motion to Dismiss with attached Exhibits "A" through "F"

OAL DKT. NO. EDU 332-02
AGENCY DKT. NO. 513-12/01

G.B., on behalf of minor child, Y.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOUTH PLAINFIELD, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Upon careful and independent review of the record, the Commissioner concurs with the Administrative Law Judge that this matter is appropriately dismissed as a result of petitioner's failure to prosecute.

Accordingly, the Initial Decision of the OAL is adopted for the reasons stated therein and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 1/16/03

Date of Mailing: 1/16/03

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

28-03

IN THE MATTER OF THE TENURE	:	
HEARING OF TRACEY ABERNATHY,	:	
A/K/A TRACEY RADEMACHER, MIDDLESEX	:	COMMISSIONER OF EDUCATION
COUNTY VOCATIONAL SCHOOL DISTRICT,	:	DECISION
MIDDLESEX COUNTY.	:	
	:	

January 21, 2003

AGENCY DKT. NO. 361-11/02

IN THE MATTER OF THE TENURE :
HEARING OF TRACEY ABERNATHY, :
A/K/A TRACEY RADEMACHER, MIDDLESEX : COMMISSIONER OF EDUCATION
COUNTY VOCATIONAL SCHOOL DISTRICT, : DECISION
MIDDLESEX COUNTY. :
:

This matter was opened before the Commissioner of Education on November 12, 2002 through the certification of tenure charges alleging incapacity to return to work, or unbecoming conduct, against a tenured teacher of the handicapped at the New Brunswick Vocational and Technical High School campus of the Board of Education of the Middlesex County Vocational School District.

The Commissioner directed respondent, via both certified and regular mail on November 12, 2002, to file an Answer to the tenure charges against her.[1] Such communication clearly provided respondent notice that, pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4, an individual against whom tenure charges are certified shall have *15 days from the date such charges are filed with the Commissioner* to file a written response to the charges, and that failure to answer within the prescribed period, where no extension has been applied for and granted, or where there has been no submission by the charged employee of a responsive filing indicating that she does not contest the charges, **will** result in the charges being deemed admitted by the charged employee. Because no reply has been received from respondent in response to the

[1] The return receipt indicates that respondent received such notice on December 2, 2002.

Board's charges, each count of the charges against respondent is deemed to be admitted. *N.J.A.C.* 6A:5-3(c).

The Commissioner's review of the tenure charges certified against respondent by the Board and the statement of evidence in support of those charges indicate that respondent sustained an injury to her left ankle and foot on or about January 2, 2001 resulting in medical treatment, including surgery. Although respondent's doctor recommended in July 2001 that she return to work with light duty, respondent did not return to work in September 2001. Respondent underwent a second surgery on or about October 29, 2001; her physician anticipated a return date of February 14, 2002. On or about that date, however, her doctor performed a follow-up examination and indicated that respondent had sustained a permanent disability which prevented her return to work. Thereafter, by letter dated February 28, 2002, Joseph C. Colombo, the Superintendent, contacted respondent requesting clarification of her work status and offering respondent a barrier-free accommodation as an inducement to return to work. Respondent did not reply to the Superintendent. On or about April 3, 2002, respondent applied for unemployment benefits, certifying that she is unable to return to work. By letter dated April 9, 2002, the Superintendent again contacted respondent to discuss her future employment with the district and her unemployment application. The letter stated, in pertinent part,

> If it is your wish to terminate your employment with us and thereby become eligible for unemployment benefits, please complete the enclosed certification form and return it to my office.
>
> I have tried numerous times during the past two weeks to contact you, without success. If we do not hear from you we will have no choice but to proceed with tenure charges based upon your inability to work. Therefore, please contact me immediately. (Statement of Tenure Charges, Exhibit I, Correspondence of Joseph C. Colombo)

Respondent did not reply to the Superintendent's request. She has been absent from her teaching position since January 4, 2001 with no communication or indication as to when or if she will be able to return to employment.

Deeming such charges to be admitted, and noting that respondent has chosen not to deny the specific allegations contained therein, the Commissioner finds that the Board has demonstrated that respondent is incapable of fulfilling her duties as a teacher, and that respondent's actions constitute unbecoming conduct, warranting her dismissal from her tenured position.

IT IS ORDERED this 21st day of January 2003 that summary decision shall be granted to the Board, and respondent shall be dismissed from her tenured position as a teacher in the Board's employ as of the date of this order. This matter shall be referred to the State Board of Examiners pursuant to *N.J.A.C.* 6:11-3.6 for action against respondent's certificate as it deems appropriate.[2]

COMMISSIONER OF EDUCATION

Mailed 1/22/03

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

26-03

JOHN COOKE,

PETITIONER,

V.

BOARD OF EDUCATION OF THE MIDDLESEX COUNTY VOCATIONAL TECHNICAL SCHOOL DISTRICT, MIDDLESEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner, riffed auto body repair teacher, alleged the respondent Board retained less senior individuals in positions for which he was qualified.

The ALJ found that petitioner never acquired any seniority in the areas of culinary arts or industrial arts, which would have obligated respondent to hire him in any of the positions he sought from 1996 through 2001. The ALJ noted that each vocational endorsement is a separate seniority category and petitioner earned seniority only in the area of his endorsement (auto body repair) in which he actually served. *N.J.A.C.* 6:3-5.1(17)(i). Thus, the ALJ found that respondent did not retain teaching staff members in positions for which petitioner was qualified who were less senior than he in violation of petitioner's seniority and tenure rights. The ALJ granted respondent's motion for summary decision and dismissed petitioner's appeal.

The Commissioner adopted the Initial Decision for the reasons expressed therein; the petition was dismissed.

January 15, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6105-01

AGENCY DKT. NO. 318-8/01

JOHN COOKE,

Petitioner,

v.

BOARD OF EDUCATION OF THE MIDDLESEX COUNTY VOCATIONAL TECHNICAL SCHOOL DISTRICT, MIDDLESEX COUNTY,

Respondent.

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

Anthony B. Vignuolo, Esq., for respondent (Borrus, Goldin, Foley, Vignuolo, Hyman, Stahl and Clarkin, attorneys)

Record Closed: September 4, 2002 Decided: December 5, 2002

BEFORE **JOSEPH F. MARTONE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner is a teaching staff member at respondent's school district, and was subjected to a reduction in force. Petitioner claims that respondent Board of Education retained staff members in positions for which he was qualified who are less senior than he in violation of his

tenure rights. The matter was transmitted to the Office of Administrative Law (OAL) on September 7, 2001, for hearing as a contested case. The matter was assigned to me on September 28, 2001, and a telephone prehearing conference was scheduled for November 20, 2001. The November 20, 2001 prehearing telephone conference was adjourned at the request of the attorney for petitioner due to his unavailability and was rescheduled for December 6, 2001. As a result of that telephone prehearing conference, the matter was scheduled for hearing on July 17 and 18, 2002.

At a status conference held on April 4, 2002, the attorneys agreed to prepare a Stipulation of Facts within 30 days and to report to me whether the matter was able to be decided by motion or if a hearing would be required. In July 2002, the attorneys reported that the matter should be the subject of a motion for summary decision, and the scheduled hearing dates were adjourned. A motion for summary decision was filed by attorney for respondent on July 24, 2002, and opposition to the motion was filed on September 3, 2002. The record was closed on September 4, 2002. By order of extension, the time limit for filing the initial decision was extended until December 5, 2002.

FACTUAL DISCUSSION

Based upon the certification of Joseph C. Columbo, Superintendent for respondent school district (R-2), and the certification of John W. Cooke, petitioner herein (P-1), it appears that most of the underlying facts in this matter are not disputed. Thus, for the purpose of deciding the within motion, the facts set forth herein are determined to be the facts in this matter.

Petitioner has been a teaching staff member with respondent since September 1988 (P-1 and R-2). At that time, petitioner was hired under an emergency certification because he was in the process of completing courses for permanent certification (P-1). He is certified as a teacher of Auto Body Repair and served full-time in that position through school year 1994-95.

Petitioner was placed on sabbatical for school year 1995-96 (R-2), even though the collective bargaining agreement at the time required at least seven years of teaching before a

sabbatical could be taken (P-1). Petitioner received the sabbatical because of his illness due to exposure in the auto body shop (P-1).

Petitioner's certification asserts that at the time of his sabbatical year he was told by the Superintendent and the Board President that because of his illness due to exposure in the auto body shop, they would try to find him another position (P-1, paragraph 3).

On May 9, 1996, the Board of Education approved petitioner's return from sabbatical leave to resume his position as teacher of auto collision repair technology for the school year 1996 through 1997 (R-2A).

By letter dated April 29, 1996, petitioner applied for the position of Commercial Foods Instructor at respondent's Woodbridge Campus (R-2B). However, at the time he submitted his application, he had not yet obtained his certification as a Commercial Foods Instructor, and did not do so until March 1997 (R-2C). On June 13, 1996, the respondent appointed Mary T. Boychuk to the position of Commercial Foods Instructor at the Woodbridge campus and petitioner was advised of this by letter dated June 18, 1996 (R-2D).

By letter dated October 6, 1997, petitioner applied for the position of Culinary Arts/Commercial Foods Instructor at respondent's New Brunswick campus. By letter dated December 12, 1997, petitioner was advised that Patricia Paustian was appointed to that position. (R-2E)

By letter dated January 10, 2000, petitioner applied for the position of Teacher of Production Manufacturing at the vocational schools. The position required a certificate of Teacher of Industrial Arts, which petitioner did not hold. By letter dated April 13, 2000, petitioner was advised that the position was filled by Christopher Clancy (R-2F).

By letter dated July 31, 2001, petitioner applied for the position of Teacher of Food Services for the 2001-2002 school year. By letter dated September 14, 2001, petitioner was advised by respondent that the position had been filled by another teaching staff member, Enzo Paterno. (R-2G.)

In May 2001, the Board of Education determined that a reduction in force was necessary effective July 2001, and abolished petitioner's position as Teacher of Auto Body Repair. (R-2, paragraph 12.)

Respondent contends that petitioner was employed exclusively in his area of certification as a Teacher of Auto Body Repair during his tenure as a teaching staff member for respondent Vocational Schools, and that petitioner was employed in no other capacity (R-2, paragraph 13). However, petitioner asserts that after his sabbatical leave and his return to auto body repair, he again became ill and was subsequently given other assignments for the balance of the 1999-2000 and 2000-2001 school year, although none were in the area of culinary arts or industrial arts (P-1, paragraph 8).

LEGAL DISCUSSION AND ANALYSIS

The issue in this matter is whether petitioner obtained seniority during his employment with respondent which would have obligated respondent to hire petitioner in one of the other teaching positions for which he applied.

N.J.A.C. 6:3-5.1(17)(i) provides the standards for determining seniority and states:

> Any person holding an instructional certificate with subject area endorsements shall have seniority within the secondary category only in such subject area endorsements under which he or she has actually served.

In this matter, it is undisputed that petitioner was employed exclusively as a Teacher of Auto Body Repair in the area of auto body repair during his entire tenure as a teaching staff member for respondent. There is nothing in the record before me nor any other proofs or evidence to the effect that petitioner held any other position or served in any other capacity during his tenure as a teaching staff member. Even if petitioner had obtained additional certifications during the course of his employment, if he was never actually employed in any of those subject areas, he could not acquire any seniority with respect to those subject area

endorsements. As a result, I **FIND** that petitioner never acquired any seniority in the areas of culinary arts, or industrial arts which would have obligated respondent to hire him in any of the positions he sought from 1996 through 2001.

I also note that petitioner did not raise any issue concerning respondent's determination to eliminate the auto body repair course of instruction.

It is undisputed that with respect to petitioner's first application for a position as a Commercial Food instructor, which he submitted in April 1996, he was clearly not qualified for the position because he did not obtain his certification as a Commercial Food Instructor until March 1997. As to the three subsequent positions which petitioner sought from 1997 to 2001, and for which he was not hired, petitioner acquired no seniority which would have obligated respondent to hire him for any of these positions.

Petitioner asserts that it was because he became ill based on his continued exposure to exhaust, fumes and dust, and because he repeatedly but unsuccessfully attempted to have respondent correct these problems, that the school district granted him a sabbatical before he was entitled to receive it. He also contends that under these circumstances, he began to take courses toward certification in other areas, particularly Commercial Food Instruction, with the knowledge of blessing of the administration, and based on the presumption that other positions would be made available to him in view of the foregoing circumstances. Despite the fact that he was in the process of obtaining certifications in the areas for which he applied, he was not appointed to these positions in favor of others who usually had no experience in the School District. Thus, it is argued that petitioner has some equitable entitlement to positions which he applied for and was qualified. Petitioner contends that the question in this matter is whether representations made to petitioner by the agents of respondent should bind respondent to provide another position to petitioner for which he applied, was qualified, but was rejected. Therefore, petitioner contends that there is a dispute as to material fact.

However, each vocational endorsement is a separate seniority category and petitioner earned seniority only in the area of his endorsement. See, *Tote v. Mercer County Vocational-Technical School Board of Education*, 87 *S.L.D.* 11. The seniority of a vocational teacher is

limited and cannot be extended to other endorsements. *Hudson County Area Vo-Tech Ed. Assn. v. Hudson County Area Vo-Tech Board of Education*, 86 *S.L.D.* 106. While petitioner now claims some entitlement to positions for which he applied during his tenure as an Auto Body Instructor, I **FIND** that at no time did he ever acquire any seniority in those positions nor did he ever grieve or appeal the denial of his application to fill any other positions. Thus, I **FIND** that petitioner had no legal entitlement to any of these other positions nor to any seniority in any other area of separate employment at the time the positions were filled. I **FIND** that petitioner acquired no seniority in the other assignments given to him in the 1999-2000 and 2000-2001 school years after his return from sabbatical because none of the assignments were in the areas of his certifications.

Based upon the foregoing, I **FIND** that respondent did not retain teaching staff members in positions for which petitioner is qualified who are less senior than he in violation of petitioner's seniority and tenure rights. Therefore, I **CONCLUDE** that respondent's motion for summary decision should be granted and an initial decision should be issued in favor of respondent in this matter.

DECISION AND ORDER

For the reasons stated above, it is hereby **ORDERED** that the actions of respondent were correct and should be **AFFIRMED,** and petitioner's appeal is hereby **DISMISSED.**

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

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

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

December 5, 2002
DATE

JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

12/6/02
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 9 2002
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

mph

APPENDIX

LIST OF WITNESSES:

For petitioner:

None

For respondent:

None

LIST OF EXHIBITS:

For petitioner:

P-1 Certification of John W. Cooke

P-2 Petitioner's Brief in opposition to motion for summary decision

For respondent:

R-1 Notice of Motion for Summary Decision

R-2 Certification of Joseph C. Colombo, with the following attachments:

- A. Letter to petitioner dated May 9, 1996
- B. Petitioner's letter dated April 29, 1996
- C. Petitioner's Teacher of Food Production certificate dated March 1997
- D. Letter to petitioner dated June 18, 1996
- E. Petitioner's letter dated October 6, 1997
- F. Letter to petitioner dated April 13, 2000
- G. Petitioner's letter dated July 31, 2001

R-3 Respondent's Brief in support of Motion

R-4 Respondent letter memorandum dated September 9, 2002

OAL DKT. NO. EDU 6105-01
AGENCY DKT. NO. 318-8/01

JOHN COOKE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MIDDLESEX COUNTY VOCATIONAL TECHNICAL SCHOOL DISTRICT, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon careful and independent review of the record in this matter, the Commissioner concurs with the Administrative Law Judge that the Board's motion for summary decision is properly granted in its favor. Accordingly, the Initial Decision is adopted for the reasons expressed therein; the Petition of Appeal is dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 1/15/03

Date of Mailing: 1/15/03

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

22-03

BOARD OF EDUCATION OF THE BOROUGH OF BLOOMSBURY, HUNTERDON COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,	:	DECISION
RESPONDENT.	:	

December 30, 2002

OAL DKT. NO. EDU 6260-00
AGENCY DKT. NO. 131-4/00

BOARD OF EDUCATION OF THE BOROUGH OF BLOOMSBURY, HUNTERDON COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,	:	DECISION
RESPONDENT.	:	

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

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 12/30/02

Date of Mailing: 1/10/03

37-03

37-03

BOARD OF EDUCATION OF THE VILLAGE, OF RIDGEWOOD, BERGEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF PARAMUS, BERGEN COUNTY; BOARD OF EDUCATION OF THE BOROUGH OF EAST RUTHERFORD, BERGEN COUNTY; AND Ke.A. AND L.A., parents of K.A., V.A. AND T.A.,	:	DECISION
RESPONDENTS.	:	

January 29, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 1888-00
Agency Dkt. No. 367-12/99

BOARD OF EDUCATION OF THE VILLAGE OF RIDGEWOOD,

Petitioner,

v.

BOARD OF EDUCATION OF PARAMUS, BOARD OF EDUCATION OF EAST RUTHERFORD, BERGEN COUNTY AND Ke.A. AND L.A. parents of K.A. AND V.A. AND T.A., BERGEN COUNTY,

Respondents.

Peter P. Kalac, Esq., for petitioner
(Kalac, Newman, Lavender & Campbell, attorneys)

Joanne Butler, Esq., for Paramus Board of Education, respondent
(Schenck, Price, Smith & King, attorneys)
Mitzy Galis-Menendez, Esq., for East Rutherford Board of Education, respondent
(Chasan, Leyner, Bariso & Lamparello, attorneys)

Record Closed: December 3, 2002 Decided: December 17, 2002

BEFORE **THOMAS E. CLANCY**, ALAJ:

This case was transmitted to the Office of Administrative Law (OAL) on March 8, 2000 for resolution as a contested case pursuant to *N.J.S.A.* 52:14B-1 *et seq.* and *N.J.S.A.* 52:14F-1 *et seq.*

During the pendency of the case at the Office of Administrative Law, the parties settled their differences as provided in the attached Stipulation of Settlement, 3 attorneys' letters dated November 21, 2002, November 22, 2002 and December 3, 2002, respectively, and their 3 enclosures, Resolutions by the Boards of Education involved in this case.

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

Accordingly, I **CONCLUDE** that the attached documents meet the requirements of *N.J.A.C.* 1:1-19.1.1, and I hereby **APPROVE** same. In conjunction therewith, I **ORDER** compliance with their contents and that these proceedings be and are hereby **TERMINATED**.

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

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

12/17/02
DATE

Thomas E. Clancy
THOMAS E. CLANCY, ALAJ

Receipt Acknowledged

12-20-02
DATE

M. Kathleen Duncan
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 31 2002
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

KALAC, NEWMAN, LAVENDER & CAMPBELL
A Professional Corporation
1115 Green Grove Road
Neptune, New Jersey 07753
(732) 922-2005 -
Attorneys for Petitioner

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
OAL Docket No. EDUOS-01888-00N
Agency Ref. No. 367-12/99

BOARD OF EDUCATION OF
THE VILLAGE OF RIDGEWOOD,
Bergen County,

Petitioner,

-vs-

PARAMUS BOARD OF EDUCATION,
Bergen County, and EAST RUTHERFORD
BOARD OF EDUCATION, Bergen
County, and KeA and I.A, parents of
KA, VA and TA,

Respondents

STIPULATION OF SETTLEMENT

WHEREAS, a controversy has arisen between the petitioner, Board of Education of the Village of Ridgewood, and respondents, Paramus Board of Education and East Rutherford Board of Education regarding the district of residence and the educational placement of KA, VA and TA, students determined to be homeless by the Bergen County Superintendent of Schools, and

WHEREAS, the parties have now adjusted their differences, it is agreed between the parties that:

- Paramus Board of Education will assume the educational responsibility for KA, VA and TA for the 2000-01 school year.
- Village of Ridgewood Board of Education will not seek reimbursement for tuition and transportation costs expended for KA, VA and TA to attend Paramus school district for any school year prior to 2000-01.
- Village of Ridgewood Board of Education agrees to the dismissal of its Petition, with prejudice.
- Paramus Board of Education agrees to the dismissal of its Counterclaim and Crossclaim, with prejudice.

This Stipulation shall be subject to ratification by the Boards of Education of Village of Ridgewood, Paramus, and East Rutherford. A form of the Boards' Resolutions are attached hereto as Exhibits "A", "B" and "C", respectively

Attest

By _____
Secretary

Date 8/27/02, 2002

VILLAGE OF RIDGEWOOD BOARD OF EDUCATION

By _____
President

Attest

By _____
Secretary

Date 4/30, 2001

PARAMUS BOARD OF EDUCATION

By _____
President

Attest

By _____
Secretary

Date 9/26, 2002

EAST RUTHERFORD BOARD OF EDUCATION

By _____
President

OAL DKT. NO. EDU 1888-00
AGENCY DKT. NO. 367-12/99

BOARD OF EDUCATION OF THE VILLAGE, OF RIDGEWOOD, BERGEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF PARAMUS, BERGEN COUNTY; BOARD OF EDUCATION OF THE BOROUGH OF EAST RUTHERFORD, BERGEN COUNTY; AND Ke.A. AND L.A., parents of K.A., V.A. AND T.A.,	:	DECISION
RESPONDENTS.	:	

The record,[1] Stipulation of Settlement,[2] and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1|29|03

Date of Mailing: 1|29|03

[1] Petitioner notified the Administrative Law Judge by letter of December 3, 2002 of its rescission of that part of the Verified Petition which identified Ke.A. and L.A. as parties to the instituted action, thereby rendering Ke.A. and L.A. nonparticipants in this matter.

[2]The Commissioner notes that the petitioning Board and each of the two respondent Boards submitted resolutions approving the Stipulation of Settlement.

38-03

KEARNY EDUCATION ASSOCIATION, on behalf of itself and the members named herein, SANDRA SIINO, SALLY ANN ROESSLER, RUSSELL IUCULANO, MARY ANN PALO, NANCY DONNELLY, KATHLEEN PUORRO, AND ALLAN STOPHERD,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY,	:	
RESPONDENT.	:	

January 29, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 11367-95

AGENCY REF. NO. 273-7/95

KEARNY EDUCATION ASSOCIATION, o/b/o SANDRA SIINO, SALLY ANN ROESSLER, RUSSELL IUCALANO, MARY ANN PALO, NANCY DONNELLEY, KATHLEEN PUORRO & ALLAN STOPHERD,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY, NEW JERSEY,

Respondent.

Kathleen A. Naprstek, Esq., for petitioner (Zazzali, Fagella & Nowak, Kleinbaum & Friedman, attorneys)

Kenneth J. Lindenfelser, Esq., for respondent

Record Closed: December 11, 2002 Decided: December 17, 2002

BEFORE **THOMAS E. CLANCY,** ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on October 5, 1995 for resolution as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. It concerns alleged violations of teachers' tenure rights and seniority rights.

During the pendency of this case at the Office of Administrative Law, it was consolidated with four other cases bearing the following OAL Docket Numbers: EDU 11368-95, EDU 11221-96, EDU 7910-97 and EDU 9811-98. These four other cases were terminated at the OAL by way of Initial Decision/Settlements rendered by the undersigned towards the end of April 2000.*

With respect to the substance of this case (EDU 11367-95), the parties have settled their differences as provided in the attached seven documents designated as: (A) Letter dated April 9, 2000 and its companion Partial Stipulation of Settlement; (B) Stipulation of Settlement as to Sandra Siino and Sally Ann Roessler; (C) Stipulation of Settlement as to Nancy Donnelley; (D) Stipulation of Settlement as to Allan Stopherd; (E) Letter dated March 22, 2002 (with two attachments) from petitioners' attorney; (F) Notification of Withdrawal dated March 22, 2002 executed by petitioner's attorney on behalf of Mary Ann Palo (with two attachments); (G) Letter from respondent's attorney dated July 23, 2002 with two certified Resolutions by the Kearny Board of Education concerning petitioners Nancy Donnelley and Allan Stopherd; and (H) Addendum to previous Stipulation of Settlement dated March 22, 2002.

Having carefully scrutinized the contents of the above-referenced documents, I **FIND**: (a) that they are consistent with the law, (b) that they fully dispose of all issues in controversy, and (c) that they were voluntarily entered into by the parties.

Accordingly, I **CONCLUDE** that the attached documents meet the requirements of *N.J.A.C.* 1:1-19.1 and I hereby **APPROVE** same. In conjunction therewith, I **ORDER** that the parties comply with their contents and that these proceedings be and are hereby **TERMINATED**.

*Attached please find document labeled (A) resolving the four other cases.

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

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

12/17/02
DATE

Thomas E. Clancy
THOMAS E. CLANCY, ALJ

Receipt Acknowledged:

12-20-02
DATE

M. Kathleen Duncan /CR
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 31 2002
DATE

ACTING DIRECTOR AND ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

pb

(A)

KENNETH J. LINDENFELSER
ATTORNEY AT LAW
570 Kearny Avenue
KEARNY, NEW JERSEY 07032
Tel. (201) 998-9500
Fax (201) 997-4557

April 09, 2000

Hon. Thomas E. Clancy, A.L.J.
State of New Jersey
Office of Administrative Law
185 Washington Street
Newark, NJ 07102

Re: **KEA (Siino; Roessler; Iuculano; Palo; Donnelly; Puorro & Stopherd) v. KBOE**
OAL Docket No. EDU 11367-95;
White and Van Oostendorp v. KBOE
OAL Docket No. EDU 11368-895;
Siino v. KBOE
OAL Docket Nos. EDU 11221-96;
EDU 07910-97 and
EDU 09811-98

Dear Judge Clancy:

The above matters all stem from a RIF by the KBOE in April of 1995 and have been consolidated. Enclosed please find a Partial Stipulation of Settlement which fully resolves OAL Docket Nos. EDU 11368-95; EDU 11221-96; EDU 07910-97 and EDU 09811-98. It also partially resolves the one remaining docket No. EDU 11367-95.

The parties are continuing to narrow the issues and to negotiate a possible resolution regarding the remaining claims. It is the hope of both counsel to have this matter concluded without the need for a hearing within the next several weeks.

I wish to acknowledge and thank Your Honor for the patience you have shown in this matter. Please contact my office in the event you have any concerns or require anything additional at this time.

Yours very truly

Kenneth J. Lindenfelser
Attorney for the KBOE

KJL:kat
Enc.
cc: Kathleen A. Naprstek, Esq.

ZAZZALI, ZAZZALI, FAGELLA & NOWAK
One Riverfront Plaza
Newark, New Jersey 07102-5410
(973) 623-1822
Attorneys for Petitioners

KEARNY EDUCATION ASSOCIATION, on behalf of itself and the members named herein, SANDRA SIINO, SALLY ANN ROESSLER, RUSSELL IUCULANO, MARY ANN PALO, NANCY DONNELLY, KATHLEEN PUORRO and ALLAN STOPHERD, Petitioners, v. BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY, Respondent.	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMNISTRATIVE LAW AGENCY REF. NO. 273-7/95 OAL DKT NO. EDU 11367-95
PATRICIA L. WHITE and JUDITH VAN OOSTENDORP, Petitioners, v. BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY, Respondent.	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW AGENCY REF. NO. 310-7/95 OAL DKT NO. EDU 11368-95
SANDRA SIINO, Petitioner, v. BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY, Respondent.	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW AGENCY REF. NO. 229-6/96 OAL DKT NO. EDU 11221-96
SANDRA SIINO, Petitioner, v. BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY, Respondent.	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW AGENCY REF. NO. 227-6/97 OAL DKT NO. EDU 07910-97

SANDRA SIINO, Petitioner, v. BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY, Respondent.	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW AGENCY REF. NO. 335-7/98 OAL DKT NO. EDU 09811-98 PARTIAL STIPULATION OF SETTLEMENT

The above-captioned matter having been brought before the Commissioner of Education upon Petitions of Appeal, petitioners Sandra Siino, Sally Ann Roessler, Patricia L. White and Judith Van Oostendorp and respondent Board of Education of the Town of Kearny hereby agree to amicably resolve the disputes between them, now pending before this court, subject to the terms and conditions set forth below:

1. For purposes of this agreement, Respondent Board of Education of the Town of Kearny shall hereinafter be referred to as the Board.

2. Petitioner Siino holds an instructional certificate with endorsements as an Elementary School Teacher (K-8) and Nursery School Teacher.

3. Petitioner Siino has been employed by the Board in a tenurable position since September 16, 1987. Pursuant to her service with the Board under her elementary endorsement, Siino had acquired tenure status prior to June 30, 1995, which tenure status extends to all subjects that she is authorized to teach under all her endorsements to her instructional certificate.

4. As of June 30, 1995, Siino had also acquired 3.98 years

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FAGELLA & NOWAK
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

of seniority as an elementary teacher.

5. Siino has been employed by the Board during the past four school years (1995-96, 1996-97, 1997-98 and 1998-99) and has acquired an additional 3.5 years of seniority as an elementary teacher. Thus, as of June 30, 1999, Siino has acquired 7.48 years of seniority as an elementary teacher.

6. Petitioner White holds an instructional certificate with endorsements as a Teacher of Social Studies (K-12), Elementary School Teacher (K-8), Nursery School Teacher and Reading Teacher/Specialist.

7. Petitioner White has been employed by the Board in a tenurable position since September 1, 1988. Pursuant to her service with the Board under her elementary and reading teacher endorsements, White had acquired tenure status prior to June 30, 1995, which tenure status extends to all subjects that she is authorized to teach under all her endorsements to her instructional certificate.

8. As of June 30, 1995, White had also acquired 5.0 years of seniority as an elementary teacher and 3.0 years of seniority as a reading teacher.

9. White has been employed by the Board during the past four school years (1995-96, 1996-97, 1997-98 and 1998-99) and has acquired an additional 4.0 years of seniority as an elementary teacher and as a reading teacher. Thus, as of June 30, 1999, White has acquired 9.0 years of seniority as an elementary teacher and 7.0 years of seniority as a reading teacher.

10. Petitioner Van Oostendorp holds an instructional

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certificate with endorsements as an Elementary School Teacher (K-8) and Nursery School Teacher.

11. Petitioner Van Oostendorp has been employed by the Board in a tenurable position since September 1, 1986. Pursuant to her service with the Board under her elementary and reading teacher endorsements, Van Oostendorp had acquired tenure status prior to June 30, 1995, which tenure status extends to all subjects that she is authorized to teach under all her endorsements to her instructional certificate.

12. As of June 30, 1995, Van Oostendorp had also acquired 6.0 years of seniority as an elementary teacher and 3.0 years of seniority as a reading teacher.

13. Van Oostendorp has been employed by the Board during the past four school years (1995-96, 1996-97, 1997-98 and 1998-99) and has acquired an additional 4.0 years of seniority as an elementary teacher and as a reading teacher. Thus, as of June 30, 1999, Van Oostendorp has acquired 10.0 years of seniority as an elementary teacher and 7.0 years of seniority as a reading teacher.

14. Petitioner Roessler holds an instructional certificate with endorsements as an Elementary School Teacher (K-8).

15. Petitioner Roessler has been employed by the Board in a tenurable position since September 1, 1989. Pursuant to her service with the Board under her elementary endorsement, Roessler had acquired tenure status prior to June 30, 1995, which tenure status extends to all subjects that she is authorized to teach under her endorsements to her instructional certificate.

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ATTORNEYS AT LAW

16. As of June 30, 1995, Roessler had also acquired 3.0 years of seniority as an elementary teacher.

17. During the past four school years (1995-96, 1996-97, 1997-98 and 1998-99), and as a result of a reduction in force effectuated by the Board, Roessler has been employed outside the district as a full-time associate media specialist.

18. Roessler shall be reappointed to a full-time 10 month position as an elementary teacher in the Kearny School District for the 1999-2000 school year commencing September 1, 1999, subject to any 60 day notice which she may be contractually required to give to her current employer.

19. Roessler shall be credited with 4.0 additional years of seniority as an elementary teacher. Thus, as of June 30, 1999, Roessler has acquired 7.0 years of seniority as an elementary teacher.

20. Roessler sustained a significant salary loss as a result of her reduction in force and her subsequent employment outside the district.

21. In lieu of a cash settlement, the Board agrees to award Roessler 100 sick days and to place her on Step 15*/Equivalency 6 of the Salary Guide for the 1999-2000 school year, which shall be deemed to constitute back pay.

22. Neither the Board nor any agents, officers, representatives, or employees of the Board shall retaliate or take adverse action based upon the petitioners' filing or pursuit of this litigation.

23. These petitioners shall withdraw the Petitions of

ZAZZALI, ZAZZALI,
FAGELLA & NOWAK
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

Appeal presently pending before the Office of Administrative Law and Commissioner of Education, under the following Docket Numbers: Agency Ref. No. 310-7/95 and OAL Dkt. No. EDU 11368-95; Agency Ref. No. 229-6/96 and OAL Dkt. No. EDU 11221-96; Agency Ref. No. 227-6/97 and OAL Dkt. No. EDU 07910-97; and Agency Ref. No. 335-7/98 and OAL Dkt. No. EDU 09811-98.

24. This Settlement Agreement resolves those claims by petitioners Sandra Siino, Sally Ann Roessler, Patricia L. White and Judith Van Oostendorp arising from the Board's failure to recognize their tenure rights in effectuating reductions in force effective June 30, 1995 and thereafter.

25. This Agreement contains all the terms of the parties' agreement and cannot be modified or changed unless all parties agree to do so in writing.

ZAZZALI, ZAZZALI, FAGELLA & NOWAK, P.C.
Attorneys for Petitioners, Sandra Siino,
Sally Ann Roessler, Patricia L. White
and Judith Van Oostendorp

Kathleen A. Naprstek
By: Kathleen A. Naprstek, Esq.

3/17/00
Dated:

KENNETH J. LINDENFELSER, ESQ.
Attorney for Respondent, Board of
Education of the Town of Kearny

By: Kenneth J. Lindenfelser, Esq.

4/7/00
Dated:

ZAZZALI, ZAZZALI,
FAGELLA & NOWAK
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

(B)

ZAZZALI, FAGELLA & NOWAK
One Riverfront Plaza
Newark, New Jersey 07102-5410
(973) 623-1822
Attorneys for Petitioners

KEARNY EDUCATION ASSOCIATION, on behalf of itself and the members named herein, SANDRA SIINO, SALLY ANN ROESSLER, RUSSELL IUCULANO, MARY ANN PALO, NANCY DONNELLY, KATHLEEN PUORRO and ALLAN STOPHERD, Petitioners, v. BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY, Respondent.	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMNISTRATIVE LAW AGENCY REF. NO. 273-7/95 OAL DKT NO. EDU 11367-95 STIPULATION OF SETTLEMENT AS TO PETITIONERS SANDRA SIINO AND SALLY ANN ROESSLER

The above-captioned matter having been brought before the Commissioner of Education upon a Petition of Appeal, petitioners Sandra Siino and Sally Ann Roessler and respondent Board of Education of the Town of Kearny hereby agree to amicably resolve this dispute between them, now pending before this court, subject to the terms and conditions set forth below:

1. For purposes of this agreement, Respondent Board of Education of the Town of Kearny shall hereinafter be referred to as the Board.

2. Petitioner Siino holds an instructional certificate with endorsements as an Elementary School Teacher (K-8) and Nursery School Teacher.

3. Petitioner Siino has been employed by the Board in a tenurable position since September 16, 1987. Pursuant to her service with the Board under her elementary endorsement, Siino had acquired tenure status prior to June 30, 1995, which tenure

status extends to all subjects that she is authorized to teach under all her endorsements to her instructional certificate.

4. As of June 30, 1995, Siino had also acquired 3.98 years of seniority as an elementary teacher.

5. Siino has been employed by the Board during the past four school years (1995-96, 1996-97, 1997-98 and 1998-99) and has acquired an additional 3.5 years of seniority as an elementary teacher. Thus, as of June 30, 1999, Siino has acquired 7.48 years of seniority as an elementary teacher.

6. Petitioner Roessler holds an instructional certificate with endorsements as an Elementary School Teacher (K-8).

7. Petitioner Roessler has been employed by the Board in a tenurable position since September 1, 1989. Pursuant to her service with the Board under her elementary endorsement, Roessler had acquired tenure status prior to June 30, 1995, which tenure status extends to all subjects that she is authorized to teach under her endorsements to her instructional certificate.

8. As of June 30, 1995, Roessler had also acquired 3.0 years of seniority as an elementary teacher.

9. As of June 30, 1995, Roessler had also accumulated 30.5 days of unused sick leave pursuant to her employment with respondent.

10. During the past four school years (1995-96, 1996-97, 1997-98 and 1998-99), and as a result of a reduction in force effectuated by the Board, Roessler has been employed outside the district as a full-time associate media specialist.

11. Roessler shall be reappointed to a full-time 10 month

position as an elementary teacher in the Kearny School District for the 1999-2000 school year commencing September 1, 1999, subject to any 60 day notice which she may be contractually required to give to her current employer. She shall be placed on Step 15*/Equivalency 6 of the Salary Guide for the 1999-2000 school year.

12. Roessler shall be credited with 4.0 additional years of seniority as an elementary teacher for the past four (4) school years (1995-96 through 1998-99 school years). Thus, as of June 30, 1999, Roessler has acquired 7.0 years of seniority as an elementary teacher.

13. Roessler shall also be credited with 15 days of paid sick leave time for each of the past four (4) school years (1995-96 through 1998-99 school years), consistent with N.J.S.A. 18A:30-7.

14. The Board shall also credit Roessler with an additional 5 paid sick days for the 1999-00 school year and an additional 5 paid sick days for the 2000-01 school year.

15. Neither the Board nor any agents, officers, representatives, or employees of the Board shall retaliate or take adverse action based upon the petitioners' filing or pursuit of this litigation.

16. These petitioners shall withdraw this Petition of Appeal presently pending before the Office of Administrative Law and Commissioner of Education, under the above-captioned docket and agency numbers.

17. This Settlement Agreement resolves those claims by

petitioners Sandra Siino and Sally Ann Roessler arising from the Board's failure to recognize their tenure rights in effectuating reductions in force effective June 30, 1995.

18. This Agreement contains all the terms of the parties' agreement and cannot be modified or changed unless all parties agree to do so in writing.

ZAZZALI, FAGELLA & NOWAK, P.C.
Attorneys for Petitioners
Sandra Siino and Sally Ann Roessler

Kathleen A. Naprstek
By: Kathleen A. Naprstek, Esq.

12/28/00
Dated:

KENNETH J. LINDENFELSER, ESQ.
Attorney for Respondent, Board of
Education of the Town of Kearny

By: Kenneth J. Lindenfelser, Esq.

12/28/00
Dated:

(c)

ZAZZALI, FAGELLA, NOWAK,
KLEINBAUM & FRIEDMAN
One Riverfront Plaza
Newark, New Jersey 07102-5410
(973) 623-1822
Attorneys for Petitioners

KEARNY EDUCATION ASSOCIATION, on behalf of itself and the members named herein, SANDRA SIINO, SALLY ANN ROESSLER, RUSSELL IUCULANO, MARY ANN PALO, NANCY DONNELLY, KATHLEEN PUORRO and ALLAN STOPHERD, Petitioners, v. BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON OF KEARNY, HUDSON COUNTY, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW Agency Ref. No. 273-7/95 OAL Dkt No. EDU 11367-95 STIPULATION OF SETTLEMENT AS TO PETITIONER NANCY DONNELLY

The above-captioned matter having been brought before the Commissioner of Education upon a Petition of Appeal, petitioner Nancy Donnelly and respondent Board of Education of the Town of Kearny hereby agree to amicably resolve this dispute between them, now pending before this court, subject to the terms and conditions set forth below:

1. For purposes of this agreement, Respondent Board of Education of the Town of Kearny shall hereinafter be referred to as the Board.

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2. Petitioner Donnelly holds an instructional certificate with an endorsement as a Teacher of Home Economics.

3. Petitioner Donnelly has been employed by the Board in a tenurable position since on or about September 1, 1983. Pursuant to her service with the Board under the aforementioned teaching certification and endorsement, Donnelly had acquired tenure status prior to June 30, 1995, which tenure status extends to all subjects that she is authorized to teach under her endorsements to her instructional certificate.

4. As of June 30, 1995, Donnelly had also acquired 11.81 years of seniority as a teacher.

5. During these past seven (7) school years (1995-96, 1996-97, 1997-98, 1998-99, 1999-2000, 2000-2001 and 2001-2002), and as a result of a reduction in force effectuated by the Board, Donnelly has been employed outside the district as a full-time home economics teacher.

6. The parties agree that Donnelly should have been retained in a full-time 10 month position as a teacher in the Kearny School District for these past seven (7) school years (1995-96, 1996-97, 1997-98, 1998-99, 1999-2000, 2000-2001 and 2001-2002), and the Board offered to reinstate her to a newly created home economics position, effective February 4, 2002, which position Donnelly declined.

7. Taking into account the mitigation of damages by Donnelly's employment in another position during these past seven (7) school years, the parties agree that the Board shall pay Donnelly the gross amount of $35,000.00, subject to ~~stadard~~ standard and ordinary payroll deductions, which shall be deemed to constitute the gross back pay award less mitigation of damages for the past seven (7) school years.

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A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

8. The parties agree that neither party is responsible for the payment of the other party's attorneys fees in connection with this matter.

9. Neither the Board nor any agents, officers, representatives, or employees of the Board shall retaliate or take adverse action based upon the petitioner's filing or pursuit of this litigation.

10. This Settlement Agreement resolves any and all claims, including civil rights claims, by petitioner Nancy Donnelly arising from the Board's termination of her employment, which took effect June 30, 1995, and regarding the petitioner's allegation that the Board acted unlawfully in terminating her employment and in failing to retain petitioner instead of any other employee in a full-time position.

11. The parties agree that this Settlement Agreement is contingent upon its approval by the Commissioner of Education.

12. This Agreement contains all the terms of the parties' agreement and cannot be modified or changed unless all parties agree to do so in writing. In the event, however, that this Agreement requires some modification to facilitate its approval by the Commissioner of Education, the parties agree to make such modification in a timely fashion in order to effectuate the intent of the parties as to this agreement.

ZAZZALI, FAGELLA, NOWAK,
KLEINBAUM & FRIEDMAN
Attorneys for Petitioner, Nancy Donnelly

ZAZZALI,
FAGELLA, NOWAK,
KLEINBAUM
& FRIEDMAN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

Kathleen A. Naprstek
By: Kathleen A. Naprstek, Esq.

3/22/02
Dated:

3m

KENNETH J. LINDENFELSER, ESQ.
Attorney for Respondent, Board of
Education of the Town of Kearny

By: Kenneth J. Lindenfelser, Esq.

Dated: 3/22/02

ZAZZALI,
FAGELLA, NOWAK,
KLEINBAUM
& FRIEDMAN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

(D)

ZAZZALI, FAGELLA, NOWAK,
KLEINBAUM & FRIEDMAN
One Riverfront Plaza
Newark, New Jersey 07102-5410
(973) 623-1822
Attorneys for Petitioners

KEARNY EDUCATION ASSOCIATION, on behalf of itself and the members named herein, SANDRA SIINO, SALLY ANN ROESSLER, RUSSELL IUCULANO, MARY ANN PALO, NANCY DONNELLY, KATHLEEN PUORRO and ALLAN STOPHERD, Petitioners, v. BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON OF KEARNY, HUDSON COUNTY, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW Agency Ref. No. 273-7/95 OAL Dkt No. EDU 11367-95 STIPULATION OF SETTLEMENT AS TO PETITIONER ALLAN STOPHERD

The above-captioned matter having been brought before the Commissioner of Education upon a Petition of Appeal, petitioner Allan Stopherd and respondent Board of Education of the Town of Kearny hereby agree to amicably resolve this dispute between them, now pending before this court, subject to the terms and conditions set forth below:

1. For purposes of this agreement, Respondent Board of Education of the Town of Kearny shall hereinafter be referred to as the Board.

3N

2. Petitioner Stopherd holds an instructional certificate with an endorsement as a Teacher of Machine Shop.

3. Petitioner Stopherd has been employed by the Board in a tenurable position since September 5, 1973. Pursuant to his service with the Board under the aforementioned teaching certification and endorsement, Stopherd had acquired tenure status prior to June 30, 1995, which tenure status extends to all subjects that he is authorized to teach under his endorsements to his instructional certificate.

4. As of June 30, 1995, Stopherd had also acquired 22.0 years of seniority as a teacher.

5. As of June 30, 1995, Stopherd had also accumulated 172 ½ days of unused sick leave pursuant to his employment with respondent.

6. During the past seven (7) school years (1995-96, 1996-97, 1997-98, 1998-99, 1999-2000, 2000-2001 and 2001-2002), and as a result of a reduction in force effectuated by the Board, Stopherd has been employed outside the district in positions not related to education.

7. The parties agree that Stopherd should have been retained in a full-time 10 month position as a teacher in the Kearny School District for the past seven (7) school years (1995-96, 1996-97, 1997-98, 1998-99, 1999-2000, 2000-2001 and 2001-2002). The Board thus agrees to reinstate Stopherd to the position of teacher for the past seven (7) school years (1995-96, 1996-97, 1997-98, 1998-99, 1999-2000, 2000-2001 and 2001-02) at the following annual salaries:

1995/96	$55,112.00
1996/97	$56,112.00

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ATTORNEYS AT LAW

1997/98	$58,496.00
1998/99	$61,145.00
1999/00	$63,095.00
2000/01	$65,195.00
2001/02	$67,295.00

8. Taking into account the mitigation of damages by Stopherd's employment in other positions during these past seven (7) school years, the parties agree that the Board shall pay Stopherd the gross amount of $25,000.00, which shall be deemed to constitute the gross back pay award of $426,450.00 less mitigation of damages and deductions for Stopherd's share of his pension contributions for the past seven (7) school years as set forth in paragraph 11 below.

9. The Board agrees to recognize and credit Stopherd with 7.0 additional years of seniority as a teacher for the past seven (7) school years (1995-96 through 2001-02 school years). Thus, as of June 30, 2002, Stopherd will have acquired 29.0 years of seniority as a teacher.

10. Stopherd shall also be credited with 15 days of paid sick leave time for each of the past seven (7) school years (the 1995-96 through 2001-02 school years), consistent with N.J.S.A. 18A:30-7. Thus, as of June 30, 2002, Stopherd shall have accumulated 277 ½ days of unused sick leave pursuant to his employment with respondent.

11. The parties agree that Stopherd shall pay his share of any contributions to the Teachers' Pension and Annuity Fund for the past seven (7) school years (the 1995-96 through 2001-02 school years) and that the monies for said payment shall be

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ATTORNEYS AT LAW

deducted from his gross back pay award of $424,150.00 less mitigation of damages, as set forth in paragraph 8 above. The parties agree that the Board shall not be liable for Stopherd's share thereof, that Stopherd shall not be liable for the Board's share thereof, that the State will contribute the Board's share of pension contributions if it agrees to do so, and that if the State does not contribute the Board's share of pension contributions, the Board shall contribute its share of such contributions.

12. The parties agree that neither party is responsible for the payment of the other party's attorneys fees in connection with this matter.

13. Neither the Board nor any agents, officers, representatives, or employees of the Board shall retaliate or take adverse action based upon the petitioner's filing or pursuit of this litigation.

14. This Settlement Agreement resolves any and all claims, including civil rights claims, by petitioner Allan Stopherd arising from the Board's termination of his employment, which took effect June 30, 1995, and regarding the petitioner's allegation that the Board acted unlawfully in terminating his employment and in failing to retain petitioner instead of any other employee in a full-time position.

15. The parties agree that this Settlement Agreement is contingent upon its ~~acceptance by the Teachers' Pension and Annuity Fund and its~~ approval by the Commissioner of Education.

16. This Agreement contains all the terms of the parties' agreement and cannot be modified or changed unless all parties agree to do so in writing. In the event, however, that this Agreement requires some modification to facilitate its acceptance by the Teachers' Pension and Annuity Fund and its approval by the Commissioner of in any separate and future application for pension benefits

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A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

Education, the parties agree to make such modification in a timely fashion in order to effectuate the intent of the parties as to this agreement.

17. Petitioner shall retire from employment with the Board, effective at the conclusion of the 2001-02 school year.

ZAZZALI, FAGELLA, NOWAK,
KLEINBAUM & FRIEDMAN
Attorneys for Petitioner, Allan Stopherd

Kathleen A. Naprstek
By: Kathleen A. Naprstek, Esq.

3/22/02
Dated:

KENNETH J. LINDENFELSER, ESQ.
Attorney for Respondent, Board of
Education of the Town of Kearny

By: Kenneth J. Lindenfelser, Esq.

3/22/02
Dated:

ZAZZALI, FAGELLA, NOWAK, KLEINBAUM & FRIEDMAN

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

ONE RIVERFRONT PLAZA
NEWARK, N.J. 07102-5410
TELEPHONE: (973) 623-1822
FACSIMILE: (973) 623-2209

150 WEST STATE STREET
TRENTON, N.J. 08608
TELEPHONE: (609) 392-8172
FACSIMILE: (609) 392-8933

PLEASE REPLY TO NEWARK

ANDREW F. ZAZZALI (1925-1969)

ANDREW F. ZAZZALI, JR.
ROBERT A. FAGELLA**
KENNETH I. NOWAK***
RICHARD A. FRIEDMAN
PAUL L. KLEINBAUM*
EDWARD H. O'HARE*

SPECIAL COUNSEL
WILLIAM A. PASCARELL ◊

KATHLEEN A. NAPRSTEK*
JASON E. SOKOLOWSKI
COLIN M. LYNCH
VINCENT J. NOLAN, III
KIMBERLY SCURTI LOWE**

OF COUNSEL
EDWARD M. SUAREZ, JR.

* (N.J. & PA. BAR)
** (N.J. & N.Y. BAR)
*** (N.J., N.Y. & D.C. BAR)
◊ (N.Y. BAR ONLY)

January 22, 2002

Mary Ann Palo
96 Harrison Road
Wayne, NJ 07470

Re: Kearny Educ. Assoc., et al v. Kearny Bd. of Ed.
OAL Dkt No. EDU-11367-95
Our File No. 21326.127

Dear Ms. Palo:

By letters dated May 4, 2001, June 13, 2001 and August 28, 2001 (copies of which are enclosed) I had contacted you to advise that after the long and arduous discovery phase of this case, I had reached the conclusion that you do not have a viable claim to any position with the Kearny Board of Education following the Spring 1995 RIF and that it would be appropriate to effectuate your withdrawal from this action. I thus requested that you contact me immediately if you had any information which was contrary to this conclusion, or, in the alternative, acknowledge your agreement to withdraw from this case.

Unfortunately, I have never received a response to my letters. At the direction of Administrative Law Judge Thomas Clancy, I am thus advising you that if I do not hear from you to the contrary by February 5, 2002, I will assume that you do not contest your withdrawal from this litigation and will so notify the Court.

Should you have any questions, please feel

Very tru

Kathleer

KAN:kn
enclosures
via certified mail/RRR (7000 1670 0004 6051 0902
cc: Barbara Gray Kratt, NJEA
Fran Davis, KEA

7000 1670 0004 6051 0902

U.S. Postal Service
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(Domestic Mail Only; No Insurance Coverage Provided)

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PS Form 3800, May 2000 See Reverse for Instructions

(E)

ZAZZALI, FAGELLA, NOWAK, KLEINBAUM & FRIEDMAN

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

ONE RIVERFRONT PLAZA

NEWARK, N.J. 07102-5410

TELEPHONE: (973) 623-1822

FACSIMILE: (973) 623-2209

150 WEST STATE STREET

TRENTON, N.J. 08608

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COLIN M. LYNCH
VINCENT J. NOLAN, III
KIMBERLY SCURTI LOWE**
NICOLE M. SCARMATO**

OF COUNSEL
EDWARD M. SUAREZ, JR.

* (N.J. & PA. BAR)
** (N.J. & N.Y. BAR)
*** (N.J., N.Y. & D.C. BAR)
◊ (N.Y. BAR ONLY)

March 22, 2002

Honorable Thomas Clancy
Office of Administrative Law
185 Washington Street
Newark, NJ 07102

Re: Kearny Educ. Assoc., et al v. Kearny Bd. of Ed.
OAL Dkt No. EDU-11367-95
Our File No. 20954.000

Dear Judge Clancy:

Please be advised that petitioners Russell Iuculano and Kathleen Puorro hereby request their withdrawal from the above-captioned matter. Enclosed please find copies of correspondence between myself and those individuals on which they have indicated their desire for withdrawal.

I have forwarded several letters to petitioner Mary Ann Palo with regard to my determination that she does not have a viable claim against the Kearny Board of Education in this matter, and requesting her consent to a withdrawal from the action; I have received no response. Upon your advice, I sent my most recent correspondence via certified mail to her last known address. That correspondence was returned "unclaimed." A copy is enclosed. Kindly advise whether you would require any additional efforts to effectuate her withdrawal from this action.

Thank you for your continued cooperation.

Very truly yours,

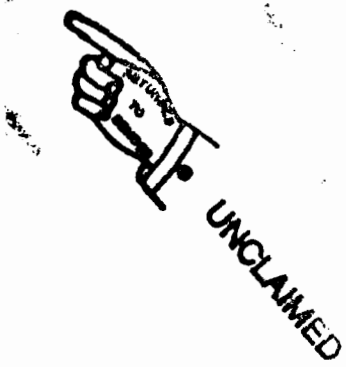
Kathleen A. Naprstek

KAN:kn
enclosures
cc: Kenneth J. Lindenfelser, Esq.

CERTIFIED MAIL

ZAZZALI, FAGELLA NOWAK, KLEINBAUM, &
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
ONE RIVERFRONT PLAZA
NEWARK, N.J. 07102-5410

7000 1670 0004 6051 0902



Mary Ann Palo
Harrison Road
Wayne, NJ 07470

L-N-a 1/23/02
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ZAZZALI, FAGELLA & NOWAK
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
ONE RIVERFRONT PLAZA
NEWARK, N.J. 07102-5410
(973) 623-1822
FACSIMILE: (973) 623-2209

TRENTON OFFICE
150 WEST STATE STREET
TRENTON, N.J. 08608
(609) 392-8172
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PLEASE REPLY TO NEWARK

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SPECIAL COUNSEL
WILLIAM A. PASCARELL****

* (N.J. & PA. BAR)
** (N.J. & N.Y. BAR)
*** (N.J., N.Y. & D.C. BAR)
**** (N.Y. BAR ONLY)

June 13, 2001

Russell Iuculano
32 Rutgers Lane
Parsippany, NJ 07054

Re: Kearny Educ. Assoc., et al v. Kearny Bd. of Ed.
OAL Dkt No. EDU-11367-95
Our File No. 21326.127

Dear Mr. Iuculano:

By letter dated May 4, 2001, I advised you that after the long and arduous discovery phase of this case, I had reached the conclusion that you do not have a viable claim to any position with the Kearny Board of Education following the Spring 1995 RIF and that it would be appropriate to effectuate your withdrawal from this action. I also requested that you contact me immediately if you had any information which was contrary to this conclusion.

To date, you have not indicated that you possess any contradictory information and I therefore assume that you are amenable, albeit somewhat reluctantly, to withdrawing from this case. Toward that end, I am respectfully requesting that you kindly acknowledge your agreement to withdraw from this case, based upon the information set forth in my May 4th letter, on the enclosed copy of this letter, and return same to me in the addressed stamped envelope which I have enclosed for your convenience.

Thank you for your continued cooperation. Should you have any questions, please feel free to call me.

Very truly yours,
ZAZZALI, FAGELLA & NOWAK

By: _____
Kathleen A. Naprstek

KAN:kn
enclosures
cc: Barbara Gray Kratt, NJEA
Fran Davis, KEA

I hereby request my withdrawal from the above-captioned matter currently pending before the Commissioner of Education/Office of Administrative Law.

_____
Russell Iuculano

(F)

NOTIFICATION OF WITHDRAWAL

OAL DKT. # EDU 11367-95

I, Kathleen A. Napratek, attorney for Mary Ann Palo, do hereby withdraw my client's request for a hearing in the above matter without prejudice. In so doing, I have advised Administrative Law Judge Thomas E. CLANCY that I have been unsuccessful throughout the duration of this case in having Ms. Palo participate in the substance of this case, as pointed out in my attached letter dated January 22, 2002

Kathleen A. Napratek

Kathleen A. Napratek

3/22/02

ZAZZALI, FAGELLA & NOWAK
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
ONE RIVERFRONT PLAZA
NEWARK, N.J. 07102-5410
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TRENTON OFFICE
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TRENTON, N.J. 08608
(609) 392-8172
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AILEEN M. O'DRISCOLL*
EDWARD H. O'HARE*
JASON E. SOKOLOWSKI
COLIN M. LYNCH
VINCENT J. NOLAN, III

SPECIAL COUNSEL
WILLIAM A. PASCARELL****

* (N.J. & PA. BAR)
** (N.J. & N.Y. BAR)
*** (N.J., N.Y. & D.C. BAR)
**** (N.Y. BAR ONLY)

June 13, 2001

Kathleen Puorro
10 Donna Drive
Fairfield, NJ 07004

Re: Kearny Educ. Assoc., et al v. Kearny Bd. of Ed.
OAL Dkt No. EDU-11367-95
Our File No. 21326.127

Dear Ms. Puorro:

By letter dated May 4, 2001, I advised you that after the long and arduous discovery phase of this case, I had reached the conclusion that you do not have a viable claim to any position with the Kearny Board of Education following the Spring 1995 RIF and that it would be appropriate to effectuate your withdrawal from this action. I also requested that you contact me immediately if you had any information which was contrary to this conclusion.

To date, you have not indicated that you possess any contradictory information and I therefore assume that you are amenable, albeit somewhat reluctantly, to withdrawing from this case. Toward that end, I am respectfully requesting that you kindly acknowledge your agreement to withdraw from this case, based upon the information set forth in my May 4th letter, on the enclosed copy of this letter, and return same to me in the addressed stamped envelope which I have enclosed for your convenience.

Thank you for your continued cooperation. Should you have any questions, please feel free to call me.

Very truly yours,
ZAZZALI, FAGELLA & NOWAK

By: Kathleen A. Naprstek
Kathleen A. Naprstek

KAN:kn
enclosures
cc: Barbara Gray Kratt, NJEA
Fran Davis, KEA

I hereby request my withdrawal from the above-captioned matter currently pending before the Commissioner of Education/Office of Administrative Law.

Kathleen Puorro
Kathleen Puorro

3W

(G)

KENNETH J. LINDENFELSER
ATTORNEY AT LAW
570 Kearny Avenue
KEARNY, NEW JERSEY 07032
Tel. (201) 998-9500
Fax (201) 997-4557

July 23, 2002

Rec'd - 7/26/02 by fax

Hon. Thomas E. Clancy, A.L.J.
State of New Jersey
Office of Administrative Law
185 Washington Street
Newark, NJ 07102

Re: **KEA (Donnelly & Stopherd) v. KBOE**
OAL Docket No. EDU 11367-95;

Dear Judge Clancy:

Enclosed please find certified copies of the Board Minutes with raised seals approving the settlements on the above cases. Please contact my office if these items are not sufficient or in the event the Court requires anything additional.

Thank you for assistance in this matter.

Yours very truly

Kenneth J. Lindenfelser
Attorney for the KBOE

KJL:kat
Encs.
cc: Kathleen A. Naprstek, Esq.

CERTIFIED TO BE A TRUE COPY OF THE RESOLUTION AS IT APPEARS IN THE MINUTES OF THE MARCH 18, 2002 REGULAR MEETING OF THE KEARNY BOARD OF EDUCATION

BY: Leslie J. Lawton
Business Administrator/Board Secretary

MOTION RE: APPROVAL OF SETTLEMENT OFFER

It was moved by Mrs. Torres, seconded by Mr. Stevenson and unanimously carried that the Kearny Board of Education hereby approves the settlement offer of a one-time payment of $35,000 for former teaching staff member Nancy Donnelly.

CERTIFIED TO BE A TRUE COPY OF THE RESOLUTION AS IT APPEARS IN THE MINUTES OF THE MARCH 18, 2002 REGULAR MEETING OF THE KEARNY BOARD OF EDUCATION

BY: Leslie J. Gaueton
Business Administrator/Board Secretary

MOTION RE: APPROVAL OF SETTLEMENT OFFER

It was moved by Mrs. Torres, seconded by Mr. Stevenson and unanimously carried that the Kearny Board of Education hereby approves the following settlement offer to former teaching staff member Alan Stopherd:

- *One-time payment of $25,000*
- *Sick leave converted to one-year's salary, payable at 20% per year for a period of five (5) years*
- *Kearny Board of Education to provide pension contribution*
- *No attorney fees will be reimbursed by the Kearny Board of Education*

(H)

ZAZZALI, FAGELLA, NOWAK,
KLEINBAUM & FRIEDMAN
One Riverfront Plaza
Newark, New Jersey 07102-5410
(973) 623-1822
Attorneys for Petitioners

KEARNY EDUCATION ASSOCIATION, on behalf of itself and the members named herein, SANDRA SIINO, SALLY ANN ROESSLER, RUSSELL IUCULANO, MARY ANN PALO, NANCY DONNELLY, KATHLEEN PUORRO and ALLAN STOPHERD, Petitioners, v. BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON OF KEARNY, HUDSON COUNTY, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW Agency Ref. No. 273-7/95 OAL Dkt No. EDU 11367-95 ADDENDUM TO STIPULATION OF SETTLEMENT AS TO PETITIONER ALLAN STOPHERD DATED 3/22/02

The above-captioned matter having been brought before the Commissioner of Education upon a Petition of Appeal, petitioner Allan Stopherd and respondent Board of Education of the Town of Kearny hereby agree to amicably resolve this dispute between them, now pending before this court, subject to the additional terms and conditions set forth below:

1. As previously set forth in paragraph 5 of the Stipulation of Settlement in this matter, as of June 30, 1995, petitioner Stopherd had accumulated 172 ½ days of unused sick leave pursuant to his employment with respondent.

2. As previously set forth in paragraph 10 of the Stipulation of Settlement in this matter, petitioner Stopherd shall be credited with 15 days of paid sick leave time for

each of the past seven (7) school years (the 1995-96 through 2001-02 school years), consistent with N.J.S.A. 18A:30-7. Thus, as of June 30, 2002, Stopherd shall have accumulated 277 ½ days of unused sick leave pursuant to his employment with respondent.

3. Petitioner Stopherd has determined to terminate his employment with the Board as June 30, 2002. As per Article 10 of the collective bargaining agreement between the Board and the Kearny Education Association addressing Termination Leave, a copy of which is attached hereto, petitioner Stopherd is permitted, and has determined, to convert his accumulated sick leave to the payment of one year's salary, or $67,295.00, which shall be payable in five (5) annual payments of 20% each, beginning on July 1, 2003. In the event petitioner Stopherd not survive to collect the total funds of $67,295.00 due him over a five (5) year period, the balance of any monies due shall be paid to his estate as per this payment schedule.

ZAZZALI, FAGELLA, NOWAK,
KLEINBAUM & FRIEDMAN
Attorneys for Petitioner, Allan Stopherd

By: Kathleen A. Naprstek, Esq.

Dated: September 17, 2002

KENNETH J. LINDENFELSER, ESQ.
Attorney for Respondent, Board of
Education of the Town of Kearny

By: Kenneth J. Lindenfelser, Esq.

Dated: 12/5/02

ZAZZALI, FAGELLA, NOWAK, KLEINBAUM & FRIEDMAN
PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

(c) The Association and the Board agree that any teachers utilizing no sick days from September 1, 2001 to June 30, 2002 shall receive a $624.00 one time bonus. The Board and the Association further agree that any teacher utilizing one sick day from September 1, 2001 to June 30, 2002 shall receive a $572.00 one time bonus. Any teacher utilizing only two sick days from September 1, 2001 to June 30, 2002 shall receive a $520.00 one time bonus. Any teacher utilizing only three sick days from September 1, 2001 to June 30, 2002 shall receive a $468.00 one time bonus. Any of the aforesaid teachers who use more than three sick days shall not be entitled to any bonus under the above captioned sick leave incentive program.

Effective July 1, 1999 the per day incentive shall be $50. The bonus shall be $600.00 and the other payments shall be proportionately increased. All other terms and conditions of said paragraph B-8 shall remain in full force and effect.

Effective July 1, 2000 the per day incentive shall be increased from $50 to $52. The $600.00 bonus shall be increased to $624.00 and the other payments shall be proportionately increased. All other terms and conditions of said paragraph B-8 shall remain in full force and effect.

In no event in any year shall a teacher be eligible for any incentive bonus if more than three sick days are used. The above sick leave bonuses shall be payable in July 2000, July 2001 or July 2002 as the case may be.

9. The incentive bonus shall not be available to teachers, who are part time or do not work the entire year. Teachers who take a maternity or other kind of leave during the year do not qualify for the bonus.

10. Termination Leave

(a) An employee who elects to leave the District after a minimum of 20 years of service in the District will be granted payment for accumulated personal illness days based on the following schedule:

1. (1/200 of base salary* + longevity*) X (the number of accumulated sick leave days) up to a limit of one year's salary + longevity based on the first 200 days.

* Individual's salary and longevity at the time of termination.

2. Accumulated sick leave days beyond 200 days will receive additional payment based on the following schedule:

250-299 days	$ 5,000.00
300-349 days	$10,000.00
350-399 days	$15,000.00
400-449 days	$20,000.00

(b) All monies will be paid in 5 equal installments beginning July 1 of the termination year and in each of the four years that follow.

(c) Should the employee not survive to collect the total funds due him/her, said funds will be paid to his/her estate on the same schedule as provided for in part (b) of this Article.

(d) Notification of termination must he made to the District no later than February 1 in order to begin payment on July 1 of the same year as stipulated in part (b). If notification is made after February 1, the first payment will be made on July 1 of the following year and will then be paid in the four years that follow that year as stipulated in part (b).

(e) The annual sick day incentive monies will not be paid the last year of a teacher's employment in District only when termination leave monies are paid to that teacher.

C. — If a teacher comes to work in the morning and is sent home ill before noon in the elementary or 11:35 a.m. in the high school, he or she is charged only one-half day absence. If an elementary teacher is sent home after 12:00 noon or high school teacher after 11:35 a.m., he or she is not charged any time off.

OAL DKT. NO. EDU 11367-95
AGENCY DKT. NO. 273-7/95

KEARNY EDUCATION ASSOCIATION, on behalf of itself and the members named herein, SANDRA SIINO, SALLY ANN ROESSLER, RUSSELL IUCULANO, MARY ANN PALO, NANCY DONNELLY, KATHLEEN PUORRO, AND ALLAN STOPHERD,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY,	:	
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1|29|03

Date of Mailing: 1|29|03

GEORGE MILLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF ATLANTIC CITY, ATLANTIC COUNTY, AND JOHN O'KANE,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioning parent contested the Board's refusal to certify tenure charges against a teacher/coach.

The ALJ found and concluded that petitioner could not establish that the Board was arbitrary, capricious or unreasonable when it determined that petitioner had not shown probable cause to believe that respondent conducted himself in a manner requiring his termination from employment as a teacher or requiring a reduction of his teaching salary. Petition was dismissed.

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

January 31, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
ON MOTION TO DISMISS
OAL DKT. NO. EDU 6084-02
AGENCY DKT. NO. 158-5/02

GEORGE MILLER,
Appellant,

v.
BOARD OF EDUCATION OF ATLANTIC CITY, ATLANTIC COUNTY AND JOHN O'KANE,
Respondent.

Joseph A. Levin, Esq., appearing for petitioner (Jacobs and Barbone, P.A., attorneys)

Joseph R. Dougherty, Esq., appearing for respondent, Board of Education

Steven Cohen, Esq. and **Keith Waldman,** Esq., appearing for respondent, (Selikoff and Cohen, P.A., attorneys) John O'Kane respondent

Record Closed: December 18, 2002 Decided: December 18, 2002

BEFORE **EDGAR R. HOLMES**, ALJ

PROCEDURAL HISTORY AND STATEMENT OF THE CASE

The petitioner filed a "school law action complaint" with the Atlantic City Board of Education on January 24, 2002, seeking tenure charges against John O'Kane and other unknown persons. The Atlantic City Board of Education considered the charges on February 26, 2002, and by a vote of 6 to 3 with one abstention determined that there was "... no probable cause to credit the evidence in support of the charges and that if the charge were credited, it is not sufficient to warrant a dismissal or reduction in salary."

Petitioner appealed the rejection of the charges to the Commissioner of Education on May 28, 2002. On August 21, 2002, the matter was transmitted to the Office of Administrative Law (hereinafter) OAL to be heard as a contested case pursuant to *N.J.S.A.* 52: 14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

Respondents filed motions to dismiss in lieu of answers to the school law complaint and petitioner responded.

RELEVANT FACTS AND LAW

The legal standard to be applied in considering whether the BOE decision should be set-aside is whether that decision was arbitrary, capricious or unreasonable. *Kopera v. West Orange Board of Education,* 60 *N.J. Super.* 288, 296-297 (App. Div. 1960).

The employment of coaches is a managerial decision of the BOE and not subject to tenure law. *Mainland Teachers Association v. Mainland High School,* 176 *N.J. Super.* 476 (App. Div. 1980). *Certif denied* 87 *N.J.* 312 (1981). This complaint seeks to remove O'Kane from his teaching position for action taken by him as a coach of the softball team.

The petitioner is the father of two players on the Atlantic City girl's softball team. John O'Kane is the girl's softball team coach. It is evident from the petition and other filings in this matter that there is enmity between them.

The main thrust of petitioner's complaint is an incident that occurred over four years ago. Petitioner alleges that O'Kane would not take a pitcher out of a game even though she complained that her arm hurt. As a consequence the pitcher and her father now claim that this incident ruined her arm and she was never again an effective softball pitcher. They, however, did not bring this action. The petitioner and the pitcher are unrelated except that the petitioner's children and the pitcher were teammates.

The allegation does not indicate that any medical report or examination was done contemporaneously with the event complained of or subsequently, neither is there any indication

that petitioner actually suffers from an injury which is the direct result of this incident. After this much time, whether or not the events of that day harmed the girls arm is mere speculation.

The most that could be shown is that O'Kane left a pitcher in a game too long.

Based on other allegations; that O'Kane ignored or violated the school manual for coaches and has alienated parents of other players, one may surmise, if these allegations are credited, that O'Kane should not be a coach. This is a long way from saying he should be removed as a teacher after 29 years.

It would be unreasonable not to certify tenure days where the coach assaulted a player, a referee, an umpire or a fan. It would be unreasonable not to certify tenure charges where a coach played a student against medical advice such as immediately after a concussion or when the student had been diagnosed with epilepsy or congestive heart failure. But it is not reasonable to certify tenure charges against a coach when a player receives an injury and it is not apparent that an injury occurred until four years have elapsed. This is all the more apparent when there is no medical documentation that there was an injury.

The anonymous letter sent to the Board in support of O'Kane which petitioner claims O'Kane wrote did not influence the Athletic Director who is O'Kane's supervisor in his capacity as a coach. The Athletic Director said he does not credit anonymous letters. Neither did the Board. Even if it can be proven by a preponderance of the credible evidence that O'Kane did write the letter, that is not a sufficient basis upon which to remove him as a teacher or reduce his salary.

I **FIND** and **CONCLUDE** that the petitioner cannot establish that the BOE was arbitrary, capricious and unreasonable when it determined that the petitioner had not shown probable cause to believe that the respondent O'Kane conducted himself in a manner requiring his termination from employment as a teacher.

I also **FIND** and **CONCLUDE** that the petitioner cannot establish that the BOE was arbitrary, capricious and unreasonable when it determined that the petitioner had not shown

probable cause to believe that the respondent O'Kane conducted himself in a manner requiring a reduction of his teaching salary.

ORDER

I **ORDER** that the petition filed herein be **DISMISSED**.

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

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

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

December 18, 2002
DATE

Edgar R. Holmes by Designation, ACT
EDGAR R. HOLMES, ALJ

Receipt Acknowledged:

12-23-02
DATE

M. Kathleen Duncan /cp
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 24 2002
DATE

Jeff S. Masin
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

ERH/mamf

OAL DKT. NO. EDU. 6084-02
AGENCY DKT. NO. 158-5/02

GEORGE MILLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF ATLANTIC CITY, ATLANTIC COUNTY, AND JOHN O'KANE,	:	DECISION
RESPONDENTS.	:	

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

Upon his full and independent review, the Commissioner agrees with the Administrative Law Judge's conclusion that the within petitioner has failed to sustain his burden of demonstrating that the Board's action declining to certify tenure charges against Respondent O'Kane was arbitrary, capricious, unreasonable or an abuse of its discretion and, consequently, such action must be upheld.

Accordingly, the Initial Decision of the OAL is adopted for the reasons stated therein and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 1/31/03

Date of Mailing: 1/31/03

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

43-05

J.P. AND M.P., on behalf of their minor children, M.P. AND J.P.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTH BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning parents challenged the Board's redistricting plan to accommodate the building of a new elementary school as arbitrary, capricious, unreasonable and violative of school law. Under this plan petitioners' children and other children in the neighborhood, who currently walk to school, would be bussed to another school.

The ALJ noted that since a board of education's actions are entitled to a presumption of lawfulness and good faith, petitioner bears the burden of proving such actions unlawful. In this case, petitioners did not prove bad faith or wrongdoing as the motive for the Board's action. Moreover, the ALJ determined that there was no issue as to material fact and that the Board's action in adopting the redistricting plan was not arbitrary, capricious or unreasonable. The Board's motion for summary decision was granted and petitioner's motion for summary decision was denied.

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

February 3, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

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

OAL DKT. NO. EDU 4969-01

AGENCY DKT. NO. 302-7/01

J.P. AND M.P. ON BEHALF OF THEIR MINOR CHILDREN M.P. AND J.P.,

Petitioners,

v.

BOARD OF EDUCATION OF SOUTH BRUNSWICK, MIDDLESEX COUNTY,

Respondent.

George M. Holland, Esq., for petitioners (Lentz and Gengaro, attorneys)

James F. Schwerin, Esq., for respondent (Parker, McCay & Criscuolo, P.A., attorneys)

Record Closed: December 13, 2002 Decided: December 17, 2002

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners, Joan and Mark Puchalski, on behalf of their children, M.P and J.P., challenge the redistricting plan adopted by Respondent, South Brunswick Board of Education, to accommodate the building of a new elementary school. The original petition was filed on July 20, 2001, and Petitioners filed an amended petition on July 26, 2001, claiming that Respondent's adoption of the redistricting plan was (1) arbitrary, capricious or unreasonable; (2) in violation of the Rehabilitation Act of 1973, 29 *U.S.C.A.* § 794; (3) in violation of the New Jersey Law Against Discrimination ("LAD"), *N.J.S.A.* 10:5-1 et seq.; (4) in violation of Article I, ¶ 5 of the New Jersey Constitution; and (5) in violation of its authority under the school law. The crux of Petitioners' concerns center around the fact that Respondent, in accordance with the redistricting plan, made the decision to bus Petitioners' children and other children in their neighborhood, known as the "Reserve," who are currently walkers to their present school, to another school. Respondent filed its answer on August 3, 2001, and the case was transmitted to the Office of Administrative Law on August 28, 2001. The parties subsequently exchanged interrogatories. Respondent filed this motion for summary decision on June 12, 2002, claiming that the redistricting plan as adopted by Respondent could not be found arbitrary, capricious or unreasonable, even with all evidentiary materials viewed in the light most favorable to Petitioners and that there are no allegations which would support the other causes of action. Petitioners filed their opposition to Respondent's motion for summary decision and their "Cross-Motion for Summary Judgment" on July 24, 2002, arguing that there are genuine issues as to material fact, which show that the Respondent acted arbitrarily, capriciously or unreasonably in adopting the redistricting plan. However, Petitioners do not address Respondent's contention regarding the other causes of action. Respondent filed its reply on September 19, 2002, which

emphasizes that there are no genuine issues of material fact and that the Petitioners' proffers, if true, do no more than show that the redistricting plan may not be the best of all possible plans, which is not enough to avoid summary decision.

After receiving the motion papers, I directed a letter to counsel, dated October 30, 2002, in which I indicated the following:

> I am in receipt of your letter of October 25, 2002 concerning the issue of whether I'm going to assess petitioners' "standing" in arriving at a decision on the motion before me.
>
> It's an interesting question. It is my view that, similar to issues concerning subject matter jurisdiction, the judge has an affirmative obligation to determine whether there is jurisdiction or there is not, irrespective of whether the parties themselves raise that question. I believe that in respect to the issue of standing in this matter, that may also be the case. In addition, there seems to be some overlapping questions which relate both to standing and jurisdiction; by jurisdiction, I mean whether the assertions that are being made before the Commissioner of Education are those which should be made elsewhere in that the Commissioner may not have jurisdiction to address those questions. I need not obtain briefs from either you or Mr. Schwerin; however, if you wish to submit argument on those questions, that will be fine and please call me to advise me when those arguments are going to be submitted. If you do not submit, no inference of any kind will be drawn, and I will independently assess the questions before me. Thank you for your cooperation.

Following the submission of that letter, I received various written responses from counsel, and eventually a question was presented which resulted in a request by the parties or parties (it was unclear during the conference exactly who had requested the telephone conference call), and as a result the matter was conferenced on December 13, 2002. Following the conference, it appeared that all of the ancillary issues raised by me in my previous correspondence had been resolved informally by the parties, and as a consequence the record closed on the latter date, December 13, 2002.

THE FACTS

Based upon the motion papers and affidavits submitted by the parties, I have arrived at what I believe to be an uncontradicted narrative of the operative facts in these proceedings for purposes of addressing the respective motions.

Accordingly, I **FIND**:

During the 2000-2001 school year, the school district had eight lower elementary school, grades K through 4.[1] The Upper Elementary School included Grade 5. Due to overcrowding and population growth, Respondent decided to integrate a new elementary school into the system and return the fifth grade from the Upper elementary school to the lower elementary schools. These changes are due to occur during the 2002-2003 school year, which has made it necessary to redistrict the attendance structure within the school district. Respondent formed the Redistricting Committee ("Committee"), which consisted of some members of the respondent board, some administrative personnel and representatives of the community.

The Committee engaged in a process to investigate redistricting alternatives. The Committee developed the following guidelines for the lower elementary schools:

-All schools must be K-5
-School enrollments should be balanced
-Keep neighborhoods together where possible
-Maximize the number of walkers
-Comply with the State Office of Equal Education Opportunity ("OEEO") requirements
-Minimize time students spend on the bus
-Allow for "grandfathering" of 2001/2002fourth graders by open enrollment
-Keep special education students in the same school for a minimum of two years
-Cambridge Elementary and the new school should be designated schools for preschool handicap
-Continue the Board of Education's goals of high academic performance and achievement in a safe and caring environment

[1]The elementary schools within the school district are Brunswick Acres, Cambridge, Constable, Dayton, Deans, Greenbrook, Indian Fields and Monmouth Junction. The name of the new elementary school is Brooks Crossing.

The committee held three open public meetings on April 30, May 15 and May 16, 2001, in an effort to gather input from the public. Almost all of the South Brunswick residents who participated in these meetings expressed a desire to have their children remain in their current elementary schools. A list of comments from each meeting was attached to the Committee's report to Respondent, dated June 4, 2001. The committee was relying on transportation data, making it difficult for it to conduct redistricting. The Committee developed some "what if" scenarios to ensure that neighborhoods in changing districts would still be contiguous to the other neighborhoods in its new district and decided which neighborhoods would be changed to new districts. The Committee tried to make sure that neighborhoods being moved were not too big and that there were no natural barriers between sending districts. Over twenty possible plans were developed by the Committee, however, only two plans, 18A and 20A, were recommended to Respondent because the Committee felt that they were the only plans in compliance with the OEEO requirements. Respondent adopted plan 18A, intending to implement it for the 2002-2003 school year. In the spring of 2002, projections were made to assess the impact of recently updated data, which revealed that the new school would be overcrowded. The plan was modified, to avoid that problem, by having a number of students stay put at their current school.

Under the redistricting plan, both as originally adopted and as modified, Petitioners' children, as well as other children from "the Reserve" neighborhood will be moving from Monmouth Junction Elementary School to Indian Fields Elementary School.

Additionally, Petitioners allege the following, which are to be taken as true for the purposes of summary decision in favor of Respondent: Statements of Committee members were published in a state-wide newspaper which incorrectly alleged that the children in Petitioners' community were in danger of walking to school and that they hardly ever walk to school and are usually driven to school. A member of the Committee admitted that, in deciding how to redistrict neighborhoods, the Committee gave priority to established neighborhoods. This statement was printed in a local newspaper. The Committee Chair, Carole O'Brien, who is also a member of Respondent, sarcastically ridiculed the concerns of parents in an e-mail message sent to members of the respondent board and the Committee, which was published in the North/South Brunswick Sentinel newspaper. The findings of Petitioners' expert, Donald M. Scurry, Ph.D., assuming validity and qualification, reveal that adoption of plan 18A will cause the most

disruption when compared to Plans 20A, 15 and 14. Plan 18A would require a movement of 1,923 students or 52.9% of the student base, while Plan 20A would require a movement of 1,877 students or 51.6% of the student base, Plan 15 would require a movement of 1,539 students or 42.2% of the student base, and Plan 14 would require a movement of 1,729 students or 47.5% of the student base. Thus, Respondent's adoption of Plan 18A will cause the most disruption relative to three of the other plans considered. The findings of Dr. Scurry also reveal, using a "goodness of fit" statistical test, that Plan 14, with a measurement of .512 and Plan 15, with a measurement of .358, better represent the racial composition of Respondent's school district than Plan 18A, with a measurement of .521 or plan 20A, which has a grossly disproportionate amount of Asian children in some of the elementary schools. A representative of the OEEO advised respondent that it should not be concerned about minor deviations from the requirements of the OEEO guidelines so long as its numbers were in the "ballpark." A representative of the Middlesex County Department of Education advised the petitioner, Mrs. Puchalski, that South Brunswick did not have a racial problem and should not be concerned about exact compliance. Respondent and the Committee used pre-school age children attending the federally funded "Head-Start" program in its calculations. A representative of the Middlesex County Department of Education advised the petitioner, Mrs. Puchalski, that Respondent should have not used pre-school age children to obtain compliance with OEEO.

DISCUSSION

1. Arbitrary, Capricious and Unreasonable

Petitioners claim that Respondent's adoption of the redistricting plan was arbitrary, capricious and unreasonable, while Respondent denies this allegation. Respondent's action to adopt the redistricting plan, like that of any administrative agency, must be upheld unless it is deemed "arbitrary, capricious and unreasonable." *Non-Profit Affordable Housing v. COAH*, 265 *N.J. Super.* 475, 479 (App. Div. 1993); *Shuster v. Bd. of Ed. of Montgomery Twp.*, 96 *N.J.A.R.*2d (EDU) 670, 676, *adopted* Comm'r. 96 *N.J.A.R.*2d (EDU) 677. A board of education's actions "are entitled to a presumption of lawfulness and good faith." Accordingly, where board actions are challenged, the challenger bears the burden of proving that such actions were unlawful, or

arbitrary, capricious and unreasonable.[2] *Shuster*, 96 *N.J.A.R.*2d at 676 (citing *Schinck v. Westwood Bd. of Ed.*, 60 *N.J. Super.* 448 (App. Div. 1960), and *Quinlan v. North Bergen Bd. of Ed.*, 73 *N.J. Super.* 40, 46 (App. Div. 1962)).

Under this standard, three factors must be considered: (1) whether Respondent's actions violated the enabling act's express or implied legislative policies; (2) whether there is substantial evidence in the record to support the findings on which the action was based; and (3) whether, in applying the legislative policies to the facts, Respondent clearly erred by reaching a conclusion that could not reasonably have been made on a showing of the relevant facts. *Matter of Warren,* 117 *N.J.* 295, 296-7 (1989)(citing *Campbell v. Dep't. of Civil Service*, 39 *N.J.* 556, 562 (1963)); *Edison Twp. Bd. of Ed. v. Edison Twp. Princ. Ass'n.*, 304 *N.J. Super.* 459, 463 (App. Div. 1997)(citing *In re Musick*, 143 *N.J.* 206, 216-17 (1996)).

Notably, however, the "arbitrary, capricious and unreasonable" standard of review is narrow in its scope, and consequently imposes a heavy burden on the challengers of board actions. The New Jersey courts have defined this standard as follows:

> In the law, 'arbitrary' and 'capricious' means having no rational basis....Arbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration and in disregard of circumstances. *Where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached....* Moreover, the court should not substitute its judgment for that of an administrative or legislative body if there is substantial evidence to support the ruling.
>
> [*Bayshore Sewage Co. v. Dept. of Envt'l. Protection*, 122 *N.J. Super.* 184, 199-200 (Ch. Div. 1973), *aff'd.* 131 *N.J. Super.* 37 (App. Div. 1974) (internal citations omitted)(emphasis added).]

As such, "absent a *clear showing of abuse of discretion*," the Commissioner will not "substitute his judgment for that of the Board of Education." *Massaro v. Bd. of Ed. of the Borough of*

[2]In order to overcome the "presumption of correctness," a challenger of a board action must prove by a *preponderance of the credible evidence* that such action was arbitrary, capricious and unreasonable. *South Mountain Civic Ass'n. v. Bd. of Ed. of Millburn Twp.*, OAL DKT EDU 0589-83 (July 13, 1983) *adopted* Comm'r. (Aug. 29, 1983) (emphasis added).

Bergenfield, 1965 *S.L.D.* 84, 85. In *Kopera v. Bd. of Ed. of West Orange*, 60 *N.J. Super.* 288 (App. Div. 1960), the Appellate Division discussed the "well established rule that action of the local board [of education] which lies within the area of its discretionary powers may *not* be upset *unless patently arbitrary without rational basis or induced by improper motives.*" *Id.* at 94 (emphasis added). In this regard, in a similar challenge to board action, an ALJ has stated:

> It is the management prerogative of boards of education that will not be usurped or assumed by the Commissioner of Education *absent a definitive showing of bad faith or arbitrary actions taken in bad faith without a rational basis.*
>
> [*G.M. v. Roselle Park Borough Bd. of Ed.*, 95 *N.J.A.R.*2d (EDU) 107, 109, *adopted* Comm'r. 95 *N.J.A.R.*2d (EDU) 110 (citing *Paddock v. Bd. of Ed. of the Borough of Demarest*, 1974 *S.L.D.* 435) (emphasis added).]

Additionally, in *Brodie v. Bd. of Ed. of Saddle Brook Twp.*, 93 *N.J.A.R.*2d (EDU) 694, 700, *adopted* Comm'r. 93 *N.J.A.R.*2d 700, Chief ALJ LaVecchia quoted from the Commissioner's recitation of the law on this point as follows:

> [A]s long as...a board of education...acts within the authority conferred on...it by law the courts are without power to, or will not, interfere with, control, or review...its action and decisions in matters involving the exercise of discretion, in the absence of clear abuse thereof or error; nor is the wisdom or expediency of an act, or the motive with which it was done, open to judicial inquiry or consideration, where power to do it existed.
>
> [*Brodie*, 93 *N.J.A.R.*2d (EDU) at 700 (quoting *Barnes v. Bd. of Ed. of Jersey City*, 1961-62 *S.L.D.* 122, 125, *aff'd* State Bd., 1963 *S.L.D.* 240).]

Although the New Jersey courts have handled numerous challenges to actions by boards of education under this "arbitrary, capricious and unreasonable" standard, the challengers have been generally unsuccessful in their efforts to reverse such actions. In most cases, as long as the record reflected a rational basis for the action, as well as the absence of bad faith, the courts were likely to uphold the boards' actions. For example, in *Red Bank Teachers Ass'n. v. Bd. of Ed. of Red Bank*, OAL DKT EDU 5328-80 (Apr. 30, 1981), *adopted.* Comm'r. (June 15, 1981), the ALJ upheld the board's approval of a new "Mastery Learning" curriculum as a "valid exercise of its managerial prerogative" that was rationally arrived at. Likewise, in *G.M.*, *supra*, the ALJ found that the board's decision to change geographic boundaries for kindergarten pupil

placement, with a goal of evenly distributing the pupils at different schools within the district, was a reasonable exercise of its authority. Additionally, in *Shuster*, *supra*, the ALJ determined that it was within a board's discretion to make a change from a two-story plan for construction of a new school, to a one-story plan. There, the record reflected that notwithstanding the approval of the two-story plan in a referendum, the board had a reasonable basis to believe that a one-story plan, at a substantially similar cost, would be educationally superior to a two-story plan. Accordingly, its decision was not disturbed.

Even more relevant to the instant matter are cases concerning redistricting and/or reorganization of schools, in which such actions by boards of education have been upheld as valid exercises of their authority under *N.J.S.A.* 18A:11-1 and *N.J.S.A.* 18A:33-1. The fairly recent *Piccoli* case is on point. *See Piccoli v. Ramapo-Indian Hills Reg. H.S. Dist. Bd. of Ed.*, EDU 1839-98, Initial Decision, (January 22, 1999), *adopted* Comm'r. (March 10, 1999) <http://lawlibrary.Rutgers.edu/oal/search.html>. In *Piccoli*, three municipalities[3] sent students to the school district's two high schools. Because Ramapo High School became overcrowded and Indian Hills High School was underutilized, the board of education adopted a plan that allowed students to choose the high school of lesser enrollment. The plan, taking the overcrowding problem and the curriculum into account, was based upon population projections a study of the physical plants that was conducted by an architect. When the plan was challenged, the ALJ granted summary decision and dismissed the petition. Thereafter, the Commissioner adopted the ALJ's decision as his own, finding that he "could not substitute his judgment for that of the Ramapo-Indian Hills Board of Education, *even if he believed an erroneous conclusion had been reached* by respondent because the record establishe[d] that respondent did not take willful or unreasoning action, without consideration and in disregard to the circumstances" and that *the fact that some constituencies disagreed with the plan the respondent adopted did not make its actions arbitrary, capricious, unreasonable or discriminatory. Ibid.* (emphasis added).

In *Marcewicz v. Bd. of Ed. of Pascack Valley Regional High School Dist.*, 1972 *S.L.D.* 619, the regional high school district contained two high schools: the "Hills School" and the "Valley School." The board approved a high school redistricting plan after concluding, through various studies, that the Hills School had reached an "intolerable" level of "over capacity," which

was projected to worsen in the upcoming school years. When the board's passage of the plan was challenged, the Commissioner determined that the plan was not arbitrary, capricious and unreasonable, and upheld the board's action as a valid exercise of its authority. The Commissioner stated that "the Board acted in a reasonable, deliberate and thorough manner to examine the enrollment projections over a period of weeks prior to the time of its final action." *Marcewicz*, 1972 *S.L.D.* at 625. The Commissioner noted that the board, although not required to, invited public comment and discussion on the redistricting issue prior to taking its final action. In this regard, the Commissioner stated: "It is the Board alone which is empowered by *N.J.S.A.* 18A:11-1 to make rules for its own 'government' and the 'government' of the public schools entrusted to its supervision." *Ibid.*

A similar situation occurred in *Parents United for Better Learning in the Community v. Hamilton Twp. Bd. of Ed.*, OAL DKT EDU 3503-85 (July 12, 1985), *adopted* Comm'r. (Aug. 13, 1985), where the challenged board action consisted of a plan to change school attendance/boundary areas for the upcoming school year, in an effort to alleviate severe overcrowding at the middle school level. All parties conceded that overcrowding existed at the township's two middle schools. After a referendum to construct a new middle school was defeated, the board proposed boundary changes to address the overcrowding issue. Over the course of the following month, the board held various meetings and accepted public comments on the issue; thereafter, it passed the proposal. Finding that there was no affirmative showing that the action was arbitrary, capricious or unreasonable, the ALJ upheld the board's action, and the Commissioner affirmed. The ALJ noted that while emotions ran rampant when such board action was proposed, the challengers nonetheless had to meet the "arbitrary, capricious and unreasonable" standard in order to have the action overturned. In this regard, he stated: "[T]here are certain questions which arise in the life of a community which generate high feelings. No matter how emotional the question, however, as the petitioner correctly observes, it still must meet the [arbitrary, capricious and unreasonable] standard." *Ibid.*

Similarly, *Fullen v. Middletown Twp. Bd. of Ed.*, 1986 *S.L.D.* 582, *adopted* Comm'r. 1986 *S.L.D.* 603, and *Hussnatter v. Bd. of Ed. of Newton*, 1986 *S.L.D.* 2667, *adopted.* Comm'r. 1986 *S.L.D.* 2688, both dealt with the issues of school overcrowding and redistricting plans. The

[3]Oakland, Wyckoff and Franklin Lakes

boards' actions in approving the plans were upheld for substantially the same reasons as in the aforementioned cases. Additionally, the ALJ in *Fullen* stated the following:

> Lines for attendance at a particular school must always be drawn somewhere and whenever lines are drawn, there must always be those who fall immediately outside a desired attendance boundary line. But the existence of a difference of opinion as between petitioners and the Board does not equate with an unreasonable action of the Board in its adoption of the plan. A policy or rule of a board of education is reasonable if it is designed to achieve a legitimate goal.... While pupils have a constitutional right to receive a thorough and efficient program of education, there is no corollary right to receive such education in a specific schoolhouse in the district.
>
> [*Fullen*, 1985 *S.L.D.* at 598, 601.]

In the instant matter, as in *Piccoli*, the evidence and all inferences therein reflect that Respondent's adoption of the redistricting plan was not arbitrary, capricious or unreasonable. The determinations of school attendance areas and boundaries for pupil placement are well within the province of Respondent's authority as a board of education under *N.J.S.A.* 18A:11-1 and 18A:33-1. All the cases involving similar actions by other boards of education have been upheld as being within their delegated authority under these provisions. The only distinction between these cases and the case at bar is that there are allegations of bad faith and wrongdoing on the part of Respondent. However, Petitioners here fail to produce any affirmative evidence of any specific wrongdoing or deviation from lawful board of education activity.

Here, the record reflects that Respondent formed the Committee, which engaged in an analysis of various alternatives for redistricting. The Committee established guidelines, worked systematically at developing maps showing various configurations of neighborhoods and streets. Each map was sent to the Administration ... to get relative statistical information, such as school enrollments, ethnic and racial breakdowns and movement from current schools to redistricted schools. These statistics were compared to the optimum capacities, and the OEEO allowable range. More than 20 potential plans were developed. The Committee received letters and e-mails from parents and held three open meetings to receive input from the public. A list of

individuals' comments at these meetings was created and attached to the report of final recommendations, which is dated June 4, 2001.[4]

Petitioners have no knowledge of how the Respondents deviated from authorized Board activity and attempt to state their claim by asserting that statements allegedly made by members of the Committee were misleading and that the chairperson of the Committee, who is also a member of the respondent board, had sarcastically ridiculed the concerns of some parents in an e-mail. The statements by the members of the Committee that were printed in a newspaper, if true and admissible, at best lend support to the argument that Respondent reached an erroneous conclusion, which is not enough to show the action was arbitrary, capricious or unreasonable. The e-mail from Ms. O'Brien, even if accurate and admissible, shows inappropriate and unprofessional conduct, as well as poor judgment on the part of one member of the respondent board in her response to parents' concerns, and may even have been the indignity that led Petitioners' to file their petition. However, this does not equate to the whole respondent board acting in an arbitrary, capricious or unreasonable manner in adopting the redistricting plan, as there is a lack of any evidence that would permit the finding of such a connection.

The report of Dr. Scurry, putting aside the fact that he only conducted an analysis on 4 of the more than 20 plans considered by the committee and assuming that his analysis is valid and that he qualifies as an expert, concludes that Plan 15 is more reflective of the ethnic/racial characteristics of the district than Plan 18A (which Respondent adopted). His findings also indicate that there is little to distinguish the competing plans from each other in this respect. Even if there were more of a distinction and even if all the considered plans were evaluated, the fact that the redistricting plan adopted by Respondent was not the best plan does not amount to Respondent's decision being arbitrary capricious or unreasonable. Also, Dr. Scurry's analysis concludes that Plan 15 is better than Plan 18A because it moves 1539 students as opposed to moving 1923 students, but indicates that it is difficult to choose among the four plans on this basis. Again, because Respondent may not have adopted the best plan with regard to this statistic, does not mean that its decision was arbitrary capricious or unreasonable.

[4] *See South Brunswick Redistricting Committee Report to the South Brunswick Board of Education* (June 4, 2001).

Petitioners also make contradictory statements with respect to the OEEO guidelines. One the one hand they argue that the OEEO guidelines are not mandatory and can be flexible, therefore they should not have been a concern of the Committee and Respondent in adopting the redistricting plan, while on the other hand, they assert that Respondent's redistricting plan is not in strict compliance with the OEEO guidelines and should not have been adopted for this reason. Respondent agrees that compliance with the OEEO guidelines is not mandatory, but the evidence shows that Committee chose to follow them. Their conclusion that Plans 18A and 20A met the guidelines is based upon their comparison of permitted ranges to their projections. The record reflects that they relied on data, which determined that the percentages in each school for each racial group, except for one school, are strictly within guideline ranges. [5]

Additionally, Petitioners acknowledge that open public meetings were held and the evidence shows that notes were taken of the public's comments and sent to Respondent as part of the Committee's report. It is not enough to show that a plan is not the best of all plans. There must be some proof of some bad faith motive or irrational action. There is simply no evidence in the record that Respondent's actions were made in "bad faith" or were otherwise "arbitrary, capricious or unreasonable." Instead, a thorough reading of the record reflects that the basis of Petitioners' arguments is upon their emotion, as they have no factual or legal bases. Petitioners' arguments, while highly charged and emotionally laden, cannot stand absent a definitive showing that Respondent's action was arbitrary, capricious or unreasonable. Accordingly, summary decision on this point will be granted in favor of Respondent.

Claims that the Respondent's redistricting plan violates the Rehabilitation Act of 1973, the New Jersey Law Against Discrimination ("LAD"), Article 1, §5 of the New Jersey Constitution, and school laws.[6]

Petitioners also claim violations of the Rehabilitation Act of 1973, the New Jersey Law Against Discrimination ("LAD"), Article 1, §5 of the New Jersey Constitution, and school laws,

[5]The findings indicate that the only exception is the Black population at Cambridge, where the percentage is marginally below the permitted range. However, the Black population at that school is within the permitted range if the Head Start preschool program, which is located there, is used.

specifically *N.J.S.A.* 18A:11-1, 33-1 and 7F-1-14. Respondent argues in its motion for summary decision that these claims have no basis and should be dismissed. Petitioners do not respond nor set forth any evidence that would lead to a contrary finding on any of these claims.

First, to state a claim under § 504 of the Rehabilitation Act of 1973, 29 *U.S.C.* § 794(a), an individual must demonstrate that she is an individual with a disability who was denied benefits of a federally funded public entity because of her disability. *Calloway v. Boro of Glassboro Department of Police*, 89 *F.Supp.*2d 543, 551 (D.N.J. 2000). Here, there is no allegation of any disability by Petitioners. Therefore, Petitioners do not state a claim for relief under § 504 of the Rehabilitation Act of 1973.

Second, the New Jersey Law Against Discrimination, *N.J.S.A.* 10:5-1 through 10:5-49, which provides broad protections on the basis of race, creed, color, national origin, ancestry, age, sex, affectional or sexual orientation, marital status, liability for service in the Armed Forces of the United States, or nationality, as well as handicap. To state a claim under the LAD, Petitioners must claim discrimination on the basis of one of these protected classes. Petitioners fail to make such a claim by merely alleging discrimination in favor of older, wealthier, or more established neighborhoods and against families living in certain types of housing, which do not meet the standard of protected classes as contemplated by the LAD. Thus, Petitioners fail to state a claim upon which relief can be granted under the LAD.

Third, Article I, ¶ 5 of the New Jersey Constitution states that:

> No person shall be denied the enjoyment of any civil or military right, nor shall be discriminated against in the exercise of any civil military right, nor be segregated in the militia or in the public schools, *because of religious principals, race, color, ancestry or national origin.*
>
> [NJ Const. Article I, ¶ 5 (emphasis added).]

[6]During the phone conference conducted on December 13, 2002, both counsel acknowledged that all claims other than petitioner's "arbitrary and capricious" claims are not justiceable. I have, however, included the analysis for purposes of completeness.

Similar to the LAD, there are no allegations of discrimination on the basis of any of the enumerated categories, precluding such a claim. Even if such an allegation were present, "[m]ere inequality or difference in treatment does not suffice to support a charge of unconstitutional discrimination. *Kenny v. Byrne*, 144 *N.J. Super.* 243, 257 (App. Div. 1976), *affirmed* 75 *N.J.* 458 (1978). A "classification must be upheld under any reasonable set of facts unless there is a showing of invidious discrimination." *Ibid.* There is the presumption of constitutionality and Petitioners have "the burden of showing that it is arbitrary and without reasonable basis to support it." *Ibid.* Thus, even if Petitioners claimed discrimination on the basis of a protected classification, they have not met their burden. Nowhere is there evidence of such invidious discrimination and this claim is at most a restatement of Petitioners' arbitrary, capricious and unreasonable claim.

Moreover, the type of alleged "discrimination" raised by Petitioners (i.e., discrimination on the basis of geographic location or type of neighborhood) is not contemplated in any of the anti-discrimination statutes.

Finally, with regard to the school laws[7], the assignment of pupils and other attendance/boundary issues fall within the discretionary authority granted Respondent by the Legislature under *N.J.S.A.* 18A:11-1. Also, the provision of suitable facilities, access to same and courses of study are required under *N.J.S.A.* 18A:33-1. This claim challenging Respondent's exercises of its authority to redistrict and/or reorganize its schools under *N.J.S.A.* 18A:11-1 and *N.J.S.A.* 18A:33-1 is a restatement of Petitioners' arbitrary, capricious and unreasonable claim using different terms and can be dismissed or consolidated with the latter. Furthermore, there is no claim or affirmative evidence of any disparities in resource allocation or course offerings between the schools.

In the case at bar, Petitioners' do not even allege a prima facie case on any of these various claims. Therefore, these claims, which amount to allegations that Respondent's action in adopting the redistricting plan was discriminatory, must fail. Accordingly summary decision on these claims is **GRANTED** in favor of Respondent.

[7]Petitioners also claim that Respondent violated *N.J.S.A.* 18A:7F-1-14. There can be no finding that Respondent violated this statute, as there is no *N.J.S.A.* 18A:7F-1-14.

CONCLUSION

The standard of review for Respondent's adoption of the redistricting plan is extremely deferential to respondent. Petitioners have not met their burden to overcome the presumption of reasonableness on the part of Respondent in their attempts to prove that Respondent's action was arbitrary, capricious or unreasonable. It is not enough for Petitioners to show that Respondent erroneously chose a plan that was not the best plan when compared to a few other possible plans. There must be some evidence showing bad faith or wrongdoing as the motive for Respondent's action. Plaintiffs fail to make such a showing. Thus, there is no issue as to material fact and it can be determined that Respondent's action, in adopting the redistricting plan, was not arbitrary, capricious or unreasonable. Therefore, summary decision should be granted in favor of Respondent and Plaintiffs' amended complaint dismissed.

Additionally, Plaintiffs do not even state allegations that would create a prima facie case in support of their other claims. Therefore, summary decision should be granted and Plaintiffs' amended complaint dismissed.

Accordingly, and based upon the foregoing, I **CONCUDE** that the respondent has demonstrated by a preponderance of the relevant credible evidence that there are no genuine fact issues presented in these proceedings and that the respondents are entitled to prevail as a matter of law. Accordingly, respondent's motion for summary decision is **GRANTED**. Petitioner's motion for summary decision is **DENIED**. It is **ORDERED** that the matter be and is hereby **DISMISSED**.

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

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

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

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

12/17/02
DATE

STEVEN C. REBACK, ALJ

Receipt Acknowledged:

December 19, 2002
DATE

M. Kathleen Duncan Esq
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 20 2002
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/cmo

J.P. AND M.P., on behalf of their minor children, M.P. AND J.P.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTH BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Petitioners' exceptions were untimely filed pursuant to *N.J.A.C.* 1:1-18.4(a), in that the Initial Decision was mailed to the parties on December 20, 2002 and the exceptions were filed on January 6, 2003, outside the 13-day period prescribed by regulation. Accordingly, neither the exceptions nor the reply thereto is considered in the Commissioner's determination of this matter.

Upon careful and independent review of the record in this matter, the Commissioner initially notes that pursuant to a motion for summary decision, in order to prevail, the adverse party "must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." *N.J.A.C.* 1:1-12.5. Thus, "petitioners must raise factual issues which are sufficient to lead a rational factfinder to rule in their favor if a trial were held." *Piccoli, supra,* slip opinion at 6. Here, even accepting petitioners' allegations as true, they cannot, for the reasons set forth in the Initial Decision, meet their considerable burden of demonstrating that the Board's actions were arbitrary, capricious,

unreasonable, or otherwise contrary to law.[1] There being no disputed issues of *material* fact, therefore, the Commissioner finds that summary decision is properly granted in the Board's favor.

Accordingly, the Initial Decision is adopted and the Petition of Appeal is dismissed.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 2/3/03

Date of Mailing: 2/3/03

[1] The Initial Decision at page 15, footnote 7, indicates that, despite petitioners' claim, there can be no finding that the Board violated "*N.J.S.A.* 18A:7F-1-14" because the statute does not exist. Presumably, however, petitioners' argument at Count V in the Petition of Appeal refers to *N.J.S.A.* 18A:7F-1 *through* 18A:7F-14. In any event, petitioners' Brief in Support of Petitioners' Opposition to Respondent's Motion for Summary Judgment and In Support of Petitioners' Cross-Motion for Summary Judgment makes no argument with respect to this statute.

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

44-03

#44-03

ERNEST L. HARPER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

February 3, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 2321-95
AGENCY REF. NO. 6-1/95

ERNEST L. HARPER,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY,
Respondent.

James Swift, Esq., for Petitioner

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

Record Closed: November 15, 2002 Decided: December 18, 2002

BEFORE: **LILLARD E. LAW,** ALJ:

This matter was transmitted to the Office of Administrative Law on March 3, 1995 for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

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

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

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

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

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

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

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

12-18-02
DATE

Lillard E. Law BY RFW ALJ
LILLARD E. LAW, ALJ

Receipt Acknowledged:

12-20-02
DATE

M. Kathleen Dunn /CR
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 23 2002
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/jck

LIST OF WITNESSES

For Petitioner:

James Swift

Ernest Harper

For Respondent:

None

LIST OF EXHIBITS

Jointly filed:

J-1 Settlement Agreement and General Release

SETTLEMENT AGREEMENT AND GENERAL RELEASE

CONFIDENTIAL

This Release, dated September 9th, 2002, is given

BY: The releasor(s): ERNEST HARPER

TO: ATLANTIC CITY BOARD OF EDUCATION, ITS SUBSIDIARIES, AFFILIATES, PREDESESSORS, SUCCESSORS AND ASSIGNS OF ANY AND ALL OF THEM, THEIR PRESENT AND FORMER DIRECTOR, OFFICIALS, OFFICERS, REPRESENTATIVES, ASSOCIATES, PARTNERS, SERVANTS, EMPLOYEES, AGENTS, ATTORNEYS, SUCCESSORS, HEIRS, EXECUTORS AND ADMINISTRATORS WHETHER IN THEIR INDIVIDUAL OR OFFICIAL CAPACITIES AND ALL OTHER PERSONS, FIRMS, CORPORATIONS, ASSOCIATIONS, PARTNERSHIPS OR ANY OTHER ENTITIY CONNECTED THEREWITH.

If more more than one person signs this Release, "I" shall mean each person who signs this Release.

1. Release. All parties mentioned above release and give up any and all claims and rights which they may have against each other. This release applies to claims resulting from anything which has happened up to now. I specifically release all claims relating to or arising out of Mr. Harper's employment with the Board Of Education deriving from the incidents related to the matter known as Ernest Harper V. Atlantic City Board Of Education, Docket No: EDUOA-02321-95S. Harper and the Board expressly understand and agree that said payments include any and all amounts that may be claimed by Harper or on his behalf, or by his Attorney's, Heirs, Successors or Assigns, against the Board. The payment mentioned above is in complete and full settlement of any and all claims that Harper has or could be owed by the Board in connection with anything that happened in reference to the above referenced matter. Further, Harper and the Board agree that the Settlement Agreement and General Release is contingent on and subject to approval and ratification by the Board.

Within thirty (30) working days of the Board's receipt of this settlement agreement and general release, the Board shall pay to Harper the sum of $9,000.00 (Nine Thousand Dollars).

2. Payment. This Settlement is intended as a resolution for any and all possible claims, actual or implicit and Harper hereby waives any and all claims for lost wages, income or future earnings and any other benefits potentially available arising out of the matter known as Ernest Harper V. Atlantic City Board Of Education, Docket NO: EDUOA-02321-95S. Harper also understands and agrees that any adjustments to his withholding or any estimated tax payments are his responsibilities.

3. Who is Bound. This Settlement Agreement and General Release shall not be used as evidence or for any other purpose in any other action or proceeding, other than evidence of the compromise between Harper and the Board as set forth herein or to enforce the terms of the Settlement Agreement and General Release.

4. Signatures. Harper releases, acquits, gives up, forever discharges any and all claims and rights which he may have had against the Board for anything that happened arising from or in any way relating to the matter known as Ernest Harper V. Atlantic City Board Of Education EDUOA-02321-95S.

5. Harper and his Attorney agree and promise they will not disclose, either directly or indirectly, in any manner whatsoever, any information, regarding either: a). the substance or existence of his complaints, claims, charges and / or actions against the Board; or b). the existence, terms or contents of this Settlement Agreement and General Release, to any person or organization, including but not limited to any governmental agency, members of the press and media, present and former officers, employees and agents of the Board and other members of the Board and other members of the public, except the Office of the United States Attorney / Department of Justice for New Jersey or if applicable, the New Jersey State Attorney General. This paragraph shall not preclude Harper or his Attorney from disclosing the existence or terms of the settlement agreement and general release to: a). governmental authority which require such information; and b). Harper's Attorney who shall be also obligated to keep this information confidential Harper may only state, without elaboration, as follows: "the situation has been resolved to the mutual satisfaction of Harper and the Board." In the event Harper or his attorney violates this paragraph, Harper shall be obligated forthwith to the Board all monies paid to Harper by the Board pursuant to this agreement.

6. The Board and its attorneys agree and promise they will not disclose, either directly or indirectly, in any manner whatsoever, any information regarding either: a). the substance or existence of Harpers complaints, claims, charges and / or actions against the Board; or b). the existence, terms or contents of this settlement agreement and general release, to any person or organization, including but not limited to any governmental agency, members of the press and media, present or former officers, employees and agents of the board and other members of the public except the office of the United States Attorney, Department Of Justice for New Jersey or if applicable the New Jersey State Attorney General .This paragraph shall not preclude the Board or its attorneys from disclosing the existence or terms of this settlement agreement and general release to a) governmental authorities which require this information; b). the Boards attorneys who shall also be obligated to keep this information confidential. The board may only state, without elaboration, as follows, "the situation has been resolved to the mutual satisfaction of Harper and the Board." In the event the Board or its attorneys violate this paragraph, the board shall be obligated to pay forthwith to Harper all attorney's and costs incurred by Harper in obtaining this agreement attempting to recover the amount referred to above.

7. This settlement and general release contains the full agreement of Harper and the Board and may not be modified, altered, changed or terminated except upon the express prior written consent of Harper and the Board, which consent must be signed by Harper and the Board or their duly authorized agents;

8. Harper represents and warrants that no other person or entity have any interest in the claims, demands, obligations, or causative action referred to in this settlement agreement and general release; that Harper is not sold, assigned, transferred, conveyed or otherwise disposed of any of the claims, demands. Obligations or causative action referred to in the verbal complaint and / or in this settlement agreement and general release.

9. This settlement agreement and general release shall be construed and interpreted in accordance with the laws of the State of New Jersey.

10. Harper and the Board shall bear all costs and expenses arising from the actions of their own counsel in connection with the settlement agreement and general release. As further consideration for the settlement agreement and general release, Harper and his attorney agree that this sum represents all the money the Board has agreed to pay Mr. Harper and his attorney and any additional fees which may arise from the actions of Harper's attorney in connection with any matter arising from Harper's employment with the Board are to be born by Harper.

11. This settlement agreement and general release contains the entire agreement between Harper and the Board with regard to the matter set forth in Ernest Harper V. Atlantic City Board of Education, Docket No: EDUOA-02321-95S.
12. In entering into the settlement agreement and general release, Harper has relied upon the legal advise of his attorney who is the attorney of his own choice, as to the terms of the settlement agreement and general release which have been completely read and explained by his attorney and has been fully understood and voluntarily accepted.

IN WITNESS WHEREOF, Harper and the Board have hereunto set their hands

JAMES P. SWIFT, ESQUIRE

ERNEST HARPER

BUSINESS ADMINISTRATOR, BOARD SECRETARY

BOARD PRESIDENT

STATE OF NEW JERSEY)
) ss.
COUNTY OF Atlantic)

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

Given under my hand and official seal this 9th day of September, 2002.

Jennifer Swift
Notary Public

JENNIFER SWIFT
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires Feb. 2, 2006

4d

ERNEST L. HARPER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon such review, the Commissioner is compelled to reject the proposed settlement agreement as presently written in that Items #5 and #6 do not appear to contemplate that the settlement document will become a matter of public record. Although parties may agree between themselves to keep specific terms of a settlement agreement confidential, they must also be aware that, in the absence of a motion to seal the record for good cause shown, Commissioner's decisions and the underlying proceedings are a matter of public record. Moreover, it is unclear whether the following statement in Item #5 is a typographical error or whether this agreement seeks to impermissibly prohibit disclosure of the existence and terms of this settlement to the general Board membership:[1]

> Harper and his Attorney agree and promise *they will not disclose*, either directly or indirectly, in any manner whatsoever, any information, regarding either: a) the substance or existence of his complaints, claims, charges and/or actions against the Board; or b) *the existence, terms or contents of this Settlement Agreement and General Release, to any person or organization, including* but

[1]The proposed settlement is signed by the Board president, the District's Business Administrator/Board Secretary, petitioner and his attorney.

> not limited to any governmental agency, members of the press and media, present and former officers, employees and agents of the Board and *other members of the Board****. (emphasis added) (Settlement Agreement at 2)

The Commissioner also observes that Item #1 of the proposed settlement states that the Board shall pay petitioner the sum of $9000.00 within 30 working days of the Board's receipt of the settlement agreement. It therefore appears that the settlement may authorize payment prior to approval of the settlement terms by the Commissioner pursuant to *N.J.A.C.* 1:1-19.1. In that parties are precluded from effectuating terms of a settlement agreement in controverted matters that have been duly transmitted to the OAL prior to its submission to, and approval by, the Commissioner, the language in Item #1 requires clarification.

Finally, Item #1 of the Settlement Agreement and General Release also specifies that the proposed settlement is contingent on approval and ratification by the Atlantic City Board of Education. Since neither the file nor the settlement agreement contains a copy of the Board's resolution approving the proposed settlement, and the agreement is not signed by the Board attorney who is respondent's duly authorized representative in litigation, the parties were provided an opportunity to submit such ratification. In response, counsel for the Board submitted the following, signed by Interim Business Administrator/Board Secretary Lesley Motz:

> At the regular session of the Atlantic City Board of Education, held on Tuesday, June 23, 2002, the following resolution was approved:[2]
>
> > **Resolution No. 02 06B 31:** On a motion made by Mr. Gallagher and seconded by Ms. Nunez, the Atlantic City Board of Education unanimously agreed to authorize a settlement with Principal Ernest Harper in a sum not to exceed $9000.00. (Letter of January 23, 2002)

[2] The Commissioner notes that the Settlement Agreement and General Release is dated September 9, 2002.

Although the above resolution clearly authorizes settlement negotiations with petitioner within certain parameters, this resolution cannot be construed as approval and ratification of the 12 items comprising the within proposed settlement agreement.

Accordingly, this matter is remanded to the Office of Administrative Law for revision and clarification of the settlement terms to address the deficiencies set forth above or other appropriate action.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 2/03/03

Date of Mailing: 2/03/03

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

45-03

C.L., on behalf of minor child, C.L.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF BRICK, OCEAN COUNTY, MEMORIAL HIGH SCHOOL AND WILLIAM DUTTON, PRINCIPAL,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

February 5, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 8563-02
AGENCY DKT. NO. 398-12/02

C.L. ON BEHALF OF MINOR CHILD, C.L.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF BRICK, OCEAN COUNTY, MEMORIAL HIGH SCHOOL AND WILLIAM DUTTON, PRINCIPAL,
Respondent.

Philip D. Tobolsky, Esq., appearing for petitioner

Scott Thompson, Esq., appearing for respondent

Record Closed: December 19, 2002 Decided: December 20, 2002

BEFORE, **ISRAEL D. DUBIN**, ALJ:

This matter was transmitted to the Office of Administrative Law on December 18, 2002, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

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

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

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

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

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

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

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

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

December 20, 2002
DATE

ISRAEL D. DUBIN, ALJ

Receipt Acknowledged:

December 24, 2002
DATE

M. Kathleen Duncan (for)
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 27 2002
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

IDD/mamf

DOCUMENTS IN EVIDENCE

Jointly submitted

J-1 Settlement Agreement

C.L. Sr. on behalf of C.L. Jr. vs Bruck BOE EDU 8563-02

Stipulation of Settlement:

1. Petitioner shall withdraw the above captioned petition, without prejudice

2. Respondent, Bruck BOE, shall conduct a manifest determination hearing for C.L. Jr. on December 20th 2002, and provide petitioner with a determination ~~within 48 hours of hearing~~ by 5 P.M. Monday Dec. 23, 2002

3. If C.L. Jr's absences + tardiness are a result of his handicapping condition, Respondent shall restore the 2½ credits lost during the school year 2001/2002, thereby restoring C.L. Jr. to the wrestling team.

SCOTT D. THOMPSON, ESQ
ATTY FOR RESPONDENT
BRUCK BOE

PHILIP B. TOBOLSKY, ESQ
ATTY FOR PETITIONER
CHARLES LOBELLO

OAL DKT. NO. EDU 8563-02
AGENCY DKT. NO. 398-12/02

C.L., on behalf of minor child, C.L.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BRICK, OCEAN COUNTY, MEMORIAL HIGH SCHOOL AND WILLIAM DUTTON, PRINCIPAL,	:	DECISION
RESPONDENTS.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 2/5/03

Date of Mailing: 2/5/03

46-03

DOUGLAS WICKS, :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE TOWNSHIP OF BERNARDS, SOMERSET COUNTY, :

RESPONDENT. :

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning taxpayer alleged the Board failed to comply with state law and regulations in carrying out its roofing projects.

The ALJ concluded that the allegations raised by petitioner were already addressed by forums of competent jurisdiction and must be dismissed on the basis of *res judicata* and under the doctrine of *collateral estoppel*. The ALJ concluded that under the facts of this case, petitioner failed to have the proofs necessary to proceed to plenary hearing. The Petition was dismissed.

The Commissioner dismissed the matter as moot since it was undisputed that the roof replacement project at Ridge High School was completed and approved by the necessary authorities and there was "simply no *meaningful* relief to be obtained in this forum."

February 5, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6161-01

AGENCY DKT. NO. 260-7/01

DOUGLAS E. WICKS,

Petitioner,

v.

BERNARDS TOWNSHIP BOARD OF EDUCATION,

Respondent.

Douglas E. Wicks, petitioner *pro se*

Philip E. Stern, Esq., for respondent (Sills Cummis Radin Tischman Epstein & Gross, attorneys)

Record Closed: September 25, 2002 Decided: December 23, 2002

BEFORE **DANIEL B. MC KEOWN,** ALJ (t/a)

HISTORY

Douglas E. Wicks, (petitioner), is a resident of Bernards Township who alleges in a Petition of Appeal filed before the Commissioner of Education that the Board violated various provisions of Title 18A, Education Law, regarding the roof replacement on its high school facility and that it failed to provide him certain documents regarding the matter. Petitioner also alleges the Board improperly made payments to its roofing contractor on its earlier Cedar Hill school roof replacement, and that its conduct was sufficient for the Bernards Township Code

Officer to issue notices of code violations. (Petition of Appeal, sub para. (e)) The Board denies that its actions regarding roof replacements on any one of its school buildings is, or was, in any way improper. The Board also asserts petitioner's present complaint related to the Cedar Hill School and Annin School is barred by the statute of limitations, res judicata, and collateral estoppel based on earlier litigation between the parties on those very same allegations. See, *Wicks v. Board of Education of Bernards Township, Somerset County*, Initial Decision, October 3, 2000, aff'd. Commissioner of Education, Nov. 20, 2000, aff'd. St. Bd. of Ed, April 4, 2001

After the Commissioner of Education transferred the matter September 18, 2001 to the Office of Administrative Law as a contested case under the provisions of *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to-13, a hearing was scheduled for November 29 and 30, 2001. The hearing was adjourned at petitioner's request for the asserted failure of the Board to provide him requested discovery. A telephone conference call was conducted November 29, 2001 during which the Board agreed to provide petitioner the discovery he requested related to the Ridge High School project. In addition, an in-person prehearing was scheduled for January 8, 2002 to refine the issues to be adjudicated including the Board's position that prior roofing projects in which it engaged, the Cedar Hill and Annin School projects, that were the subject matter of prior litigation between the parties should not be considered in this case.

During December 2001, the Board did submit to petitioner discovery related to the Ridge High School roof project and petitioner reviewed the material during the same month. On December 17, 2001 petitioner served the Board with another discovery demand relating solely to the Ridge High School project. The Board was directed to file a letter motion by January 25, 2002 setting out its arguments why certain discovery requests made by petitioner need not be honored. Petitioner was to respond by February 14, 2002. During the conference, the issue was discussed of whether the Cedar Hill and Annin School roofing projects, or any part thereof, should be barred from this case. The parties were advised that this issue would be addressed at the commencement of the hearing then scheduled to be conducted March 8 and 9, 2002. But, these dates had to be adjourned because of the hospitalization of this judge.

On or about January 10. 2002 petitioner filed a "complaint in lieu of prerogative writ" in New Jersey Superior Court, Law Division, before the Honorable Rosemarie Ruggerio Williams, J.S.C., seeking the same documents he sought through discovery regarding the Chapel Hill and Annin school roofing projects under *N.J.S.A.* 47:1-1, *et seq.,* the New Jersey Right to Know Law. Judge Williams, in view of the fact petitioner had the matter pending as a contested case, declined jurisdiction and transferred that issue to this proceeding.

In the earlier litigation between the parties before the Commissioner and already referenced in this decision, petitioner alleged the Board acted contrary to the Public School Contracts Law, *N.J.S.A.* 18A: 18A-1, *et seq.*, with respect to roofing projects at the Cedar Hill and Annin Schools. After a plenary hearing, the conclusion was reached petitioner failed to carry his burden of proof to prove the truth of the allegations he made against the Board regarding either the Cedar Hill or Annin school roof projects. The petition was dismissed. (See *Wicks v. Board of Education of Bernards Township, Somerset County*, Initial Decision, October 3, 2000, aff'd. Commissioner of Education, Nov. 20, 2000, aff'd. St. Bd. of Ed, April 4, 2001)

On or about July 24, 2001 petitioner filed this petition with the Commissioner of Education in which he alleges the Board "[a]dvertised, bid and awarded the 2001 contract for the replacement of the Ridge High School roof before obtaining construction code approval as mandated by *N.J.A.C.* 6:22-1.7." (Para. 5(a) of petition) This is the essence of the petition; that the Board violated *N.J.A.C.* 6:22-1.7 regarding the Ridge High School. However, the remaining allegations raised by petitioner in subparagraphs (b) through (j) provide the framework for the present dispute between the parties regarding the issues to be adjudicated in the matter and petitioner's discovery requests. Petitioner's remaining allegations are paraphrased here, except as otherwise noted through the use of direct quotation marks:

> (b) that the Board failed to provide him copies of "ledger payments for legal services as required by 18A:19-15;"
> (c) that the Board paid its architect in October 2000 for work not completed "under his contract dated November 23, 1999 for professional services encompassing the year 2000 Ridge High roofing project thus violating 18A:19-2 . . ."

(d) that the Board failed to adopt until July 2000 a resolution approving the architect's November 1999 contract, a time after the projects under the contract were advertised, bid and awarded in violation of 18A:18A-3(a);
(e) that the Board "failed to conduct required construction code inspections during and upon completion of the roofing projects for Cedar Hill and Annin School reproofing projects resulting in code violation notices by the Bernards Township Code Officer."
(f) that the Board "[p]aid in full for . . . Cedar Hill roofing project which failed to comply with the specifications and building code . . ."
(g) "Commenced work on the Ridge High School roof project without a building permit as required by 18A:18A-49 . . . "
(h) that the Board "[i]ssued plans and specifications for all the roofing projects {Cedar Hill, Annin, and Ridge High] which contain false and misleading information . . . "
(i) that the Board paid its architect $100 an hour, not the $90 an hour set out in the 1999 contract;
(j) that the Board "[r]atified two separate professional contracts, in the same fiscal year, both to [its architect] for the same exact Ridge High School reproofing project . . . "

A fair reading of subparagraphs (b) through (j) shows petitioner seeks to either continue the litigation of, or to relitigate, issues he raised in the earlier petition that was dismissed following a plenary hearing surrounding the Cedar Hill and Annin Schools roof projects.

In an Order issued May 16, 2002 this administrative law judge entered a recommended Order granting the Board's motion to dismiss any and all allegations surrounding the Cedar Hill and Anin school projects; that the sole issue in this case is the Board's conduct relating to the Ridge High School roof project; and, that petitioner was barred by the doctrines of res judicata and the entire controversy of relitigating the Cedar Hill and Annin School roof project anew. See, *Wicks v BOE of Bernards Twp., Somerset Co.*, OAL DKT, NO, EDU 6161-01, Order, May 16, 2002.

At the hearing finally conducted in the matter of the Ridge High School roof project on September 24, 2002, and while presenting his opening statement, petitioner asserted there was fraud involved in obtaining permits for the Ridge project because the Board represented certain material was to be used in the project upon which construction permits were issued. Petitioner did not contact the County Prosecutor in his allegations of fraud in the inducement of the issuance of the permit. Petitioner asserts the manufacturer and the architect of the project are behind such fraudulent conduct. Petitioner did complain of the manufacturer to the State

Commission of Investigation which, petitioner says, conducted an exhaustive investigation of the matter. Petitioner says that in order to really understand his complaint, one has to "be in the business" of roof construction. Petitioner acknowledges that all the allegations raised in this petition have been fully investigated by the State Commission of Investigation.

Petitioner then says he is not certain whether the architect knowingly engaged in fraudulent conduct or was duped by the manufacturer. But, at the same time, petitioner complains the architect specified the manufacturer in the specifications and in addenda to specifications made before the bids being opened April 11, 2001. Petitioner complains the addenda was issued April 7, 2001 and changed the slope of the roof which, he says, increased costs. All potential bidders were notified and no bidder complained. Petitioner says *N.J.S.A.* 18A:18A-21 prohibits (c) the issuance of addenda without at least seven days notice, but petitioner has no evidence the subsequent bids were tainted. Petitioner has no evidence the architect engaged in any fraudulent conduct.

Petitioner says the Ridge high school has a roof that does not meet the building code as the result of manufacturer fraud and he, petitioner, is not happy about it. The architect should have known that the roofing materials were not compliant with the code, and as a result, duped the building code officials into issuing certificates of occupancy.

The Board points out that the Somerset County Construction Board of Appeals issued it a Certificate of Approval on April 22, 2002 and that the New Jersey Economic Development Authority that provided full-funding for the project determined that all conditions precedent to the execution of the grant agreement for the roof project had been met. The Authority authorized the disbursement of full funding for the project. The Board also notes that all appropriate agencies at the local, county and state have been involved in this project and each level of government has given its final approval for the project.

Petitioner was advised no testimony would be taken from his witnesses regarding faulty roofing materials or of his witness's review of the Board's compliance with the building code.

Each of those matters has already been exhaustively studied and investigated by bodies with far greater expertise than resides in this forum. Furthermore, if despite the complaints of petitioner, the State Commission of Investigation, the local building officials, the county construction board, and the Economic Development Authority are satisfied with the materials used on the Ridge High School roof and the absence of fraud by anyone for whom the Board is responsible, the conclusion must be reached petitioner seeks to use this forum to continue litigation against the Board in bad faith. Petitioner knows his evidence does not prove his allegations, because he essentially has been told that by the State Commission of Investigation, the local and county construction officials, and the Economic Development Authority. There is nothing new being raised in this petition of appeal that has not already been litigated before.

Petitioner left the hearing room upon being advised that the foregoing testimony would not be allowed. In essence, he abandoned his petition of appeal much in the same manner he abandoned his first petition after he verbalized his allegations against the Board without any proof in support thereof.

CONCLUSION

I **CONCLUDE** that the facts establish the allegations raised by petitioner have already been addressed by forums of competent jurisdiction and must be dismissed on the basis of *res judicata.* I **CONCLUDE** the facts establish the allegations raised by petitioner have already been addressed by forums of competent jurisdiction and must be dismissed under the doctrine of *collateral estoppel.* I **CONCLUDE** that under the facts of this case, petitioner fails to have the proofs necessary to proceed to plenary hearing and the petition must be dismissed.

The Petition of Appeal is **DISMISSED**.

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

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

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

December 23, 2002
DATE

Daniel B. McKeown, ALJ
by: Anthony Bruno, ALJ
DANIEL B. MC KEOWN, ALJ, t/a

Receipt Acknowledged:

December 24, 2002
DATE

M. Kathleen Duncan (CA)
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 27 2002
DATE

Jeff S. Masin
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/lam

DOUGLAS WICKS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BERNARDS, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and the Board's reply were submitted in accordance with *N.J.A.C.* 1:1-18.4.

Petitioner emphatically objects to the Initial Decision issued by the Administrative Law Judge (ALJ) arguing, *inter alia*, that he was improperly denied a hearing and this matter should, therefore, be remanded to the OAL for an "open and full hearing***." (Petitioner's Exceptions at 1) Petitioner argues that the ALJ failed to make any findings of fact or conclusions of law, that he lacked the expertise necessary to hear a case such as this one, and that his statements in the Initial Decision at pages 6 and 7 regarding previous review of this matter by other investigative bodies and agencies are simply unsupported on this record. (*Id.* at 3-5) The Initial Decision, petitioner asserts, failed to properly consider the issues raised in the course of this litigation. (*Id.* at 7-8)

In reply, the Board "objects to Petitioners [sic] use of evidence not presented at the hearing, in violation of the N.J.A.C. 1:1-18.4(c)." (Board's Reply at 1) The Board argues that there is no merit to petitioner's contentions and, therefore, the Initial Decision should be affirmed.

Upon careful and independent review of the record in this matter, including an audio cassette tape of the proceedings that took place on September 24, 2002 at the OAL, the Commissioner determines to grant the Board's Motion for Summary Decision, for the reasons set forth below.[1]

Initially, the Commissioner agrees with the ALJ's view that the essence of petitioner's "complaint" is that the Board violated *N.J.A.C.* 6:22-1.7 by advertising, bidding and awarding the 2001 contract for the replacement of the Ridge High School roof before obtaining construction code approval. (Request for Declaratory Judgment/Petition of Appeal at 2, paragraph 5a; Initial Decision at 4)[2] Thereafter, as enumerated in the Initial Decision at pages 4 and 5, petitioner alleges other violations of administrative code, State school law and specifically, the Public School Contracts Law, *N.J.S.A.* 18A:18-1 *et seq.*, in connection with the Board's roof replacement projects at the Cedar Hill School, the Annin School and Ridge High School. The Board denies each allegation. (Board's Answer)

By Order dated May 16, 2002, and based on earlier litigation brought by petitioner in this matter (*see Wicks v. Board of Education of the Township of Bernards, Somerset*

[1] Although the Board filed a Motion for Summary Decision before the OAL on September 4, 2002, the ALJ did not issue a ruling on the motion.

[2] It is noted that *N.J.A.C.* 6:22-1 *et seq.*, the School Facility Planning Service regulations, were repealed and recodified as *N.J.A.C.* 6A:26-1 *et seq.*, effective October 1, 2001. *See* 33 *N.J.R.* 1809(a), 33 *N.J.R.* 3482(a).

County, Commissioner Decision No. 383-00, November 20, 2000, *aff'd* State Board of Education April 4, 2001), the ALJ determined that the "Petitioner is barred by the doctrine of res judicata and by the entire controversy doctrine [from] relitigating the Cedar Hill and Annin School roof project anew." (ALJ's Order, May 16, 2002 at 8) Thus, the within matter was confined to only those issues relating to the roof replacement project at Ridge High School. The Commissioner herein affirms this interlocutory order, which petitioner did not appeal in accordance with *N.J.A.C.* 1:1-14.10.[3]

With respect to the allegations concerning the roof replacement project at Ridge High School, the Board argues in its Motion for Summary Decision, *inter alia*, that such issues are now moot. Specifically, the Board contends:

> Since initiating this second action, the parties appeared before the Somerset County Construction Board of Appeals. On April 22, 2002, a Certificate of Approval was issued for the Ridge High School.*** On July 29, 2002, the New Jersey Economic Development Authority determined that all conditions precedent to the execution of the grant agreement for the Ridge High School roofing project had been met. *** [4]
>
> ***
>
> Simply stated, inasmuch as the roofing project for the Ridge High School has been completed, the debate concerning the construction of the project [is] academic and moot.*** Further, the previous

[3] Petitioner did, however, submit to the ALJ, by letter dated May 25, 2002, numerous objections to his Order. Petitioner therein argues, *inter alia*, that the issues raised in the within matter regarding the alleged Cedar Hill School violations should *not* be dismissed, since these violations did not arise until after the prior case record was closed. Petitioner argues, "with respect to the claim of *res judicata*, I would advise that the claims in the instant case are all new and based upon subsequent events unknown at the time of the earlier case." (Petitioner's Letter of May 25, 2002 at 3) Petitioner acknowledges, however, that the Cedar Hill School reroofing project has been completed. Therefore, even assuming petitioner accurately states that the issues in the within matter regarding the Cedar Hill School *could not have been* raised in his prior litigation, the Commissioner finds, for the reasons set forth *infra*, that such issues are moot.

[4] The Board attaches a copy of the Economic Development Authority's letter of July 29, 2002 at Exhibit D of its Motion for Summary Decision.

> Petition raising similar claims was forwarded to the Office of Compliance for review and the Board was vindicated.*** (Board's Brief in Support of Motion for Summary Decision at 3, 9)

Thus, even if the requested remand were to be granted *and* petitioner were to prevail on the merits of his claims that the Board acted as he alleged in his petition in carrying out the Ridge High School project, the Commissioner finds that, at this stage, where it is undisputed that the roof replacement project at Ridge High School has been completed and approved by the necessary authorities, there is simply no *meaningful* relief to be obtained in this forum.[5] In this regard, the Commissioner recognizes that:

> An issue is "moot" when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy. In other words, the conflict between the parties has become merely hypothetical. *See Black's Law Dictionary* 409 (5th ed. 1979), and *In re Conroy*, 190 *N.J. Super.* 453 458 (App. Div. 1983). Our courts, and the Commissioner as well, ordinarily will refuse to review questions which become academic prior to the issuance of a decision out of reluctance to render a legal decision in the abstract and a desire to conserve judicial or administrative resources.*** (*Barshatky v. Freehold Regional High School District Bd. of Educ.*, 95 *N.J.A.R.*2d (EDU) 71, 73)

[5] Notably, by way of relief, petitioner requested that the Commissioner: (1) direct the Board to provide all requested public documents to him; (2) declare the professional design contract of 2001 between the Board and Thomas Rienzi to be null and void; (3) require that plans and specifications for the reroofing project at Ridge High School be declared null and void as they contain false and misleading material factors, and that the project be redesigned with code compliant specifications, readvertised and rebid in accordance with the law; (4) declare that the Board has violated *N.J.S.A.* 18A:12-22 and *N.J.S.A.* 18A:11-1(d); and (5) direct that the Office of Compliance investigate these matters and confirm these violations. (Request for Declaratory Ruling/Petition of Appeal at 3-4)

Accordingly, summary decision is properly granted in the Board's favor and this matter is dismissed.[6]

IT IS SO ORDERED.[7]

COMMISSIONER OF EDUCATION

Date of Decision: 2|5|03

Date of Mailing: 2|5|03

[6] Notwithstanding this outcome or that there is no relief to be granted herein, the Commissioner notes that it is simply not clear on this record whether, in executing its roof replacement project at the Ridge High School, the Board acted in compliance with *N.J.S.A.* 18A:7G-1 *et seq.*, the Educational Facilities and Construction Act, which became effective July 18, 2000. Indeed, although the Board specifically contends that "the Ridge High School roof was a normal building maintenance requiring review *only* by the local code officials pursuant to *N.J.A.C.* 6:22-1.1(b)***" (Board's Answer at 2, paragraph "a", emphasis added), it also indicates that it received "full approval from the State of New Jersey Department of Education Facilities Review and a full permit from the local code officials" for this project. (*Id.* at paragraph "h") The Commissioner, therefore, herein cautions this and all other boards that failure to act in accordance with the standards established in *N.J.S.A.* 18A:7G-1 *et seq.*, and, now, its implementing regulations, *N.J.A.C.* 6A:26-1 *et seq.*, may result in action to withhold State funds. *N.J.A.C.* 6A:26-14.1.

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

41-03

IN THE MATTER OF THE TENURE	:	
HEARING OF TROY JENKINS,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP OF	:	DECISION
PEMBERTON, BURLINGTON COUNTY.	:	

February 6, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6094-00S

AGENCY REF. NO. 237-7/00

IN THE MATTER OF THE TENURE HEARING OF TROY JENKINS, SCHOOL DISTRICT OF THE TOWNSHIP OF PEMBERTON, BURLINGTON COUNTY

Jason Sokolowski, Esq., appearing for Petitioner (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys)

Dennis M. DeSantis, Esq., appearing for Respondent (Destribats, Campbell, DeSantis, Magee & O'Donnell, attorneys)

Record Closed: November 15, 2002 Decided: December 18, 2002

BEFORE **ISRAEL D. DUBIN**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On June 29, 2000, the School District of the Township of Pemberton, Burlington County, certified tenure charges against Troy Jenkins, a tenured vocational education teacher, to the Commissioner of the State Department of Education. The charges alleged that respondent Jenkins wrongfully negotiated into his own bank account a check payable to the Pemberton Township School District and, on numerous occasions, submitted vouchers for and received funds from the District to which he was not entitled. Respondent filed an answer to the tenure charges on July 17, 2000 and the Department of Education, Bureau of Controversies and

Disputes, transmitted this matter to the Office of Administrative Law on July 24, 2000, as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

A prehearing conference was held by Administrative Law Judge Bruce R. Campbell on August 23, 2000. Following a status conference on September 6, 2000, Respondent filed a motion to stay the proceedings pending the resolution of criminal charges that had been against him. Oral argument was held on October 4, 2000 and, by Order dated October 13, 2000, ALJ Campbell denied the motion. However, respondent filed an interlocutory appeal and, on November 13, 2000, the Commissioner of Education set aside the judge's order, stayed the proceedings and directed that the District's 120-day statutorily authorized suspension of respondent be tolled as of September 6, 2000.

On May 9, 2002, this matter was transferred from the soon-to-be-retired ALJ Campbell to ALAJ Beatrice Tylutki. Thereafter, a series of status conferences were held on June 13, July 26, and September 24, 2002. On September 26, 2002, the matter was transferred from the retiring Judge Tylutki to newly appointed Assignment Judge John R. Tassini who, in turn, assigned the matter to this Administrative Law Judge on October 31, 2002.

A status conference was held on November 15, 2002, at which time I learned that respondent had resigned his tenured teaching position with the District as part of a plea agreement whereby he was admitted to and ultimately completed a Pre-Trial Intervention program. Respondent formally submitted his resignation on November 26, 2001 and the District accepted the same on November 29, 2001.

During the telephone conference on November 15, 2002, counsel agreed that the tenure charges had been rendered moot by respondent's resignation and requested that the matter be dismissed. Therefore, the issue is whether the pending tenure charges should be dismissed in light of respondent's resignation.

FACTUAL DISCUSSION

The material facts are essentially undisputed. Therefore, the factual statements contained herein are the **FINDINGS OF FACT** made with respect to this matter.

On June 9, 2000, a criminal complaint was issued by the Pemberton Township Police Department charging respondent with Theft by Deception, *N.J.S.A.* 2C:20-4. The charge alleged that respondent wrongfully negotiated into his own bank account a check made payable to the Pemberton Township School District in the amount of $1,125.00 and, on numerous occasions, submitted vouchers for and received $2,966.76 in funds from the District to which he was not entitled. On June 29, 2000, the District certified tenure charges against respondent based upon the same underlying facts.

In or about November 2001, respondent entered into a plea agreement whereby he was admitted into and ultimately completed a Pre-Trial Intervention program. As part of this plea agreement, on November 26, 2001, respondent formally submitted his resignation as a tenured teacher and the District accepted the same on November 29, 2001.

DISCUSSION OF THE LAW

The determination of controversies and disputes arising under the local school laws is within the exclusive jurisdiction of the Commissioner of the Department of Education. *N.J.S.A.* 18A:6-9. A tenured school teacher cannot be dismissed or have his or her compensation reduced except for inefficiency, incapacity, unbecoming conduct, "or other just cause," and then only after a hearing when written charges of the cause or causes of the complaint, signed by the person or persons making the same, have been preferred against the teacher. *N.J.S.A.* 18A:6-10. The pertinent statutory provisions addressing the filing of tenure charges with the local school district, certification of the charges to the Commissioner, filing of responses by the teacher, a determination of the sufficiency of the charges by the Commissioner, and deadlines applicable to the hearings in such cases are set forth at *N.J.S.A.* 18A:6-11, 6-13, 6-14 & 6-16, as well as *N.J.S.A.* 52:14B-10.1.

Regulations promulgated by the DOE address the "withdrawal, settlement or mooting of tenure charges." *N.J.A.C.* 6A:3-5.6(a). Paragraph (a) provides that "once tenure charges are certified to the Commissioner, such charges may be withdrawn or settled only with the Commissioner's approval." It then discusses the requirements that must be satisfied in order to secure that approval. *See also In re Cardonick*, State Board decision of April 6, 1983 (1990 *S.L.D.* 842, 846) ("it is proper, therefore, for the Commissioner to review and evaluate, and to approve and disapprove, tenure **settlements**.") (emphasis supplied).

The regulatory scheme also addresses the effect of a resignation or retirement by the teacher in question during the pendency of tenure charges. In those situations "where tenure proceedings are concluded prior to adjudication because the charged party has unilaterally resigned or retired, the Commissioner may refer the matter to the State Board of Examiners for action against the charged party's certificate as it deems appropriate, when such referral is warranted... ." *N.J.A.C.* 6A:3-5.6(d). In fact,

> In cases in which teaching staff members accused of misdemeanors, crimes or conduct unbecoming which might warrant revocation or suspension, resign or retire from their positions, either before tenure proceedings have been brought or prior to the conclusion of such proceedings, it shall be the responsibility of the chief school administrator of that district to notify the State Board of Examiners of the alleged conduct pursuant to *N.J.A.C.* 6:11-3.6(a)2.

[*N.J.A.C.* 6:11-3.5].

In construing regulatory provisions, the plain language must first be considered. *Merin v. Maglaki*, 126 *N.J.* 430 (1992). Pertinent provisions must also be read in *pari materia*. *Alling Street Urban Renewal Co. v. City of Newark*, 204 *N.J. Super.* 185 (App. Div. 1985), *cert. den.* 103 *N.J.* 472 (1986). The fact that *N.J.A.C.* 6A:3-5.6(a) specifically requires that tenure charges may be withdrawn or settled only with the Commissioner's approval, and then only upon consideration of certain factors, but *N.J.A.C.* 6A:3-5.6(d) does not expressly require the Commissioner's review of resignations or retirements during the pendency of tenure proceedings, supports a conclusion that pending tenure charges can and should be dismissed when there is a unilateral resignation or retirement. *Stillwater Board of Education v. Clothier*, OAL Docket No.

EDU 9526-00 (2001). This conclusion is further supported by the requirement in *N.J.A.C.* 6:11-3.5 that the local district must, in some cases, notify the Board of Examiners of the teacher's misconduct. That requirement, on its face, furthers the broader public interest so important in tenure proceedings. *Stillwater Board of Education v. Clothier, supra.*

DECISION AND ORDER

Based upon the foregoing, I **CONCLUDE** that given his unilateral resignation as a tenured vocational education teacher, thereby rendering the charges against him moot, the tenure charges certified by petitioner Pemberton Township School District against respondent Troy Jenkins should be dismissed

Accordingly, it is **ORDERED** that the tenure charges certified by petitioner Pemberton Township School District against respondent Troy Jenkins be and are hereby dismissed. It is further **ORDERED** that if it has not already done so, petitioner should report the misconduct alleged in the tenure charges to the State Board of Examiners pursuant to *N.J.A.C.* 6:11-3.5.

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

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

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

December 20, 2002
DATE

ISRAEL D. DUBIN, ALJ

Receipt Acknowledged:

December 24, 2002
DATE

M. Kathleen Duncan (Ea)
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 27 2002
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

IDD/mamf

EXHIBITS

For Petitioner:

None.

For Respondent:

None.

WITNESSES

For Petitioner:

None.

For Respondent:

None.

OAL DKT. NO. EDU 6094-00
AGENCY DKT. NO. 237-7/00

IN THE MATTER OF THE TENURE	:	
HEARING OF TROY JENKINS,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP OF	:	DECISION
PEMBERTON, BURLINGTON COUNTY.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed.[1] The parties filed no exceptions.

Upon his full and independent review of the record, the Commissioner agrees that in light of Mr. Jenkins' unilateral resignation from the District, there is no basis upon which he can order this matter to proceed and it must, therefore, be dismissed as moot. In so concluding, the Commissioner does not find it necessary to reach to the Administrative Law Judge's discussion, on pages 4-5 of the Initial Decision, with respect to the obligation of either the Commissioner or the Board to refer this matter to the State Board of Examiners. Inasmuch as the record indicates that Mr. Jenkins is noncertificated, such referral would serve no purpose.[2]

Accordingly, the recommendation of the OAL that this matter be dismissed as moot is adopted.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 2/6/03

Date of Mailing: 2/6/03

[1] The Initial Decision identifies Jason Sokolowski, Esq. as petitioner's counsel and Dennis M. DeSantis, Esq. as counsel for respondent. By way of clarification, in this tenure matter, Mr. DeSantis represented the petitioning Board and Mr. Sokolowski represented Respondent Jenkins.

[2] It is specifically noted that Mr. Jenkins' tenure status was uncontroverted by the parties and, thus, was not an issue for review before the Commissioner.

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

48-03

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

February 6, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 9652-01

AGENCY DKT. NO. 382-9/01

HELEN MEANS,

Petitioner,

v.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK,

Respondent.

Marvin L. Comick, Esq., for petitioner
(Love and Randall, attorneys)

Lisa M. Yennella-Granese, Esq. for respondent
(McCarter & English, attorneys)

Record Closed: December 20, 2002 Decided: December 20, 2002

BEFORE **KEN R. SPRINGER**, ALJ:

This matter was transmitted to the Office of Administrative Law on December 14, 2001 for a hearing pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13.

The parties have agreed to settle this matter and have prepared the attached stipulation indicating the terms of settlement.

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

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

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

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

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

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

Dec. 20, 2002
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

January 1, 2003
DATE

M. Kathleen Duncan (ta)
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 6 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

al

SETTLEMENT AGREEMENT AND GENERAL RELEASE

This Settlement Agreement and General Release ("Agreement") is between Helen Means ("Petitioner") and the State-operated School District of the City of Newark ("School District").

WHEREAS, Petitioner filed a Petition against the School District and the Commissioner of Education of the State of New Jersey entitled Helen Means v. Newark Public Schools, Case No. 382-9/01, asserting certain claims arising out of Petitioner's employment with the School District ("the Action");

WHEREAS, the School District filed an Answer to the Petition, noting that the School District was improperly pleaded as "Newark Public Schools;"

WHEREAS said Action was then transferred to the Office of Administrative Law and was assigned Docket No. EDUOR 09652-01N;

WHEREAS, the parties desire to reach a settlement of Petitioner's claims, subject to the approval of the Commissioner of Education as required by law; and

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

1. Settlement Compensation. The School District agrees to pay the amounts in subsections (a), (b), and (c) (collectively "Settlement Compensation") by check within thirty (30) business days after the School District receives approval by the Commissioner of Education of the Agreement:

(a) the sum of $6,944.25 (less applicable withholdings and deductions) payable to "Helen Means," which sum shall be reflected on an IRS Form W-2 representing lost wages, representing a pro-rated amount (from July 1, 2001 through April 1, 2002) of the employment and adjustment increments withheld for the 2001-2002 school year;

(b) the sum of $3,128.20 (less applicable withholdings and deductions) payable to "Helen Means," which sum shall be reflected on an IRS Form W-2 representing retroactive pay from July 1, 2001 through April 1, 2002 minus an overpayment in the amount of $132.20; and

(c) the sum of $5,325.00 (less applicable withholdings and deductions) payable to "Helen Means," which sum shall be reflected on an IRS Form W-2 representing sick pay.

Petitioner agrees that she will not seek anything further from the School District, including any other payment.

Petitioner agrees that she shall be solely responsible for the payment of all federal, state, and local taxes on the Settlement Compensation. Petitioner agrees to defend, indemnify, and hold the School District harmless against any claim or assessment by a government agency (including but not limited to claims or assessments of employment taxes, interest, or penalties) arising from the School District's payment of the Settlement Compensation to Petitioner.

2. Restoration of Employment and Adjustment Increments. The School District agrees to administratively "restore" Petitioner's employment and adjustment increments for the 2001-2002 school year, which had been withheld. The School District agrees to notify, on the date this Agreement becomes effective, the School District's Office of Human Resources and the New Jersey Division of Pensions and Benefits of the restoration of the employment and adjustment increments.

3. June 13, 2001 Annual Evaluation Report. The School District agrees to remove the June 13, 2001 Annual Evaluation Report attached hereto as "Exhibit A" from Petitioner's personnel file.

4. Retirement. Petitioner agrees that she will tender her retirement from her employment with the School District. The retirement will be retroactive to April 1, 2002 (the "Retirement Date") on the date this Agreement becomes effective, provided that Petitioner has complied with all terms and conditions of this Agreement.

5. Explanation of Salary Differentials Appearing in her July 20, 2001 and August 3, 2001 Paycheck Stubs. Petitioner acknowledges that she has been provided with a sufficient explanation for the difference in salary appearing on her July 20, 2001 and August 3, 2001 paycheck stubs.

6. Petitioner's Release and Waiver of Claims. Petitioner acknowledges that the Settlement Compensation set forth in this Agreement contains consideration to which she would not otherwise be entitled. In consideration of such compensation, Petitioner hereby agrees:

(a) "Released Parties" means the School District, its predecessor the Newark Board of Education, the Newark Public Schools, and the School District's current and former officers, employees, agents, contractors, employee pension or welfare benefit plans, and current and former trustees and administrators of these plans.

(b) Petitioner hereby releases the Released Parties from all claims and rights that Petitioner has against any and all Released Parties. This releases all claims, including those of which Petitioner is not aware, those not mentioned in this Agreement, and any claims for attorney's fees, costs, and interest. This release applies to claims and rights resulting from anything that has happened up to now. This release does not apply to claims arising under or after the date of this Agreement.

(c) Petitioner specifically releases all claims asserted in the Action. Petitioner releases the Released Parties from all claims, rights, charges, demands, debts, actions, causes of

action, defenses, rights, grievances, and any other interests, whether known or unknown, which Petitioner ever had, may now have or hereafter shall or may have by reason of any matter, cause or thing which has happened up to the date of this Agreement, including but not limited to any and all claims and rights arising from or related in any way to Petitioner's employment with the School District or other relationship with the Released Parties, any and all claims or rights Petitioner may have under Title VII of the Civil Rights Act of 1964, as amended, and the Civil Rights Act of 1991, the Age Discrimination in Employment Act, the Older Workers Benefit Protection Act, the Americans with Disabilities Act, the federal Family and Medical Leave Act, Section 1981 of the Civil Rights Act of 1866, the Employee Retirement Income Security Act, the New Jersey Law Against Discrimination, the New Jersey Conscientious Employee Protection Act, the New Jersey Family Leave Act, any state laws against discrimination, or any other federal, state, or local law relating to employment, wages, hours, or any other terms and conditions of employment. Petitioner releases all claims for wrongful discharge, wrongful suspension, breach of contract or rights under any collective bargaining agreement, breach of fiduciary duty, breach of implied covenant of good faith and fair dealing, promissory or equitable estoppel, whistle-blowing, fraud, misrepresentation, defamation, negligent and/or intentional infliction of emotional distress, other intentional torts, negligence, any and all claims for wages or other compensation, including salary, benefits, payment of accumulated sick leave, stipends, and longevity payments, workers compensation benefits, any and all claims of discrimination on the basis of race, creed, color, national origin, sex, marital status, sexual orientation, age or disability, or any other claims in any way related to Petitioner's employment with or resignation from the School District.

(d) Petitioner represents and warrants that all liens, if any, for attorneys', insurers', workers' compensation, hospital or any other liens have been satisfied or will be satisfied out of the Settlement Compensation and that Petitioner will indemnify and hold the Released Parties harmless from any claims asserting or relating to such liens.

(e) Petitioner represents and warrants that, other than the Action, there are no pending or outstanding administrative or judicial proceedings, charges, complaints, claims or actions, against the School District or any of the Released Parties, to which Petitioner is a party or which are maintained on behalf of Petitioner. Petitioner acknowledges that the School District relies upon this representation and warranty in agreeing to enter into this Agreement.

7. Binding Effect. This Agreement is binding upon and shall inure to the benefit of anyone who succeeds to the rights, interests or responsibilities of the parties. Petitioner makes the releases contained in this Agreement for the benefit of the Released Parties and all who succeed to their rights, interests, or responsibilities.

8. Stipulation of Dismissal With Prejudice. Petitioner agrees that her attorney shall provide to the School District's attorney a signed Stipulation of Dismissal With Prejudice of the Action, in the form attached as "Exhibit B," at the time that Petitioner signs the Agreement. The School District's attorney shall file the Stipulation of Dismissal With Prejudice only after the School District has paid the Settlement Compensation.

9. No Future Employment. Petitioner agrees that she shall not apply for, or otherwise seek employment from, the School District or any of the Released Parties.

10. Confidentiality of Agreement. Petitioner shall not directly or indirectly disseminate the terms of this Agreement to any person or entity not a party to this Agreement, except (a) by written agreement of the parties, (b) pursuant to a valid court order or subpoena, (c)

as required by law, or (d) as otherwise provided in this paragraph. Petitioner may disclose the terms of this Agreement to her attorneys, financial advisors and/or spouse, provided she first advises them that the terms must not be further disclosed. Petitioner agrees that it shall be a violation of this Agreement by Petitioner in the event her attorneys, financial advisors and/or spouse disclose the terms of this Agreement.

The School District may disclose the fact that the Action has been settled. The School District may disclose the terms of this Agreement to its attorneys, accountants, and auditors, and to any officer or employee of the School District or the New Jersey Department of Education with a legitimate need for such information. The School District may disclose the terms of this Agreement to any person to whom disclosure is required to comply with this Agreement, to any person to whom disclosure is required by law, or pursuant to a valid subpoena or court order, and as may be required in the ordinary course of business. It shall not be a violation of this Agreement for any party to this Agreement to state that Petitioner "resigned" or "retired" from the School District.

11. Return of Property. Petitioner acknowledges that all products, materials, and information received or generated by her in connection with her employment with the School District (collectively, "School District Property"), are the sole property of the School District. Petitioner shall return all School District Property (including any copies) in Petitioner's possession or control immediately upon signing this Agreement.

12. Request or Subpoena. If Petitioner receives a request or subpoena seeking production or disclosure of the terms of this Agreement, she shall promptly send a letter to that effect, together with a copy of the request or subpoena, to: Perry L. Lattiboudere, General

Counsel, State-operated School District of the City of Newark, 2 Cedar Street, Newark, New Jersey 07102; Phone: (973) 733-7139; Fax: (973) 733-7054.

13. Enforceability. If a court rules that any provision of this Agreement is not enforceable in the manner set forth in this Agreement, that provision should be enforceable to the maximum extent possible under applicable law and should be reformed accordingly. If a court rules that any provision of this Agreement is invalid or unenforceable, that ruling shall not affect the validity or enforceability of the other portions of this Agreement.

14. Non-waiver. In the event any party violates any provision of this Agreement, the failure of the other party to enforce any of its rights at that time shall not constitute a waiver by the other party to enforce any provision of this Agreement at any time.

15. Compromise. This Agreement is the result of a compromise and is made solely to avoid the expenses of litigation. The School District and the Released Parties expressly deny any liability to or wrongdoing against Petitioner. This Agreement shall not be construed as an admission of liability or wrongdoing on the part of the School District or any of the Released Parties.

16. Entire Agreement. This Agreement is the entire agreement between Petitioner and the School District. It supersedes any existing oral or written agreements with respect to Petitioner's employment with the School District. No representations regarding the Released Parties' relationship with Petitioner, or any obligations to Petitioner, have been made, or survive, except as set forth in this Agreement. This Agreement has been jointly drafted and no provision shall be construed against a party because that party or its attorneys drafted that provision.

17. Amendment. This Agreement cannot be amended, except by a written document signed by the party against whom enforcement of any such amendment is sought.

18. Legal Counsel. Petitioner acknowledges that she has consulted with an attorney before signing this Agreement.

19. Full Understanding. Petitioner acknowledges that she has read this Agreement carefully and has been given a reasonable period of time within which to consider it, that she fully understands the meaning of its terms, and is signing this Agreement knowingly and voluntarily.

20. No Assignment. Petitioner may not assign this Agreement or any rights under this Agreement, except by will or by operation of the laws of intestate succession.

21. Breach. In the event that any party breaches any of its/her duties or promises under this Agreement, the aggrieved party shall have the right to all remedies permissible under law, including, but not limited to, damages, legal and equitable relief, and any other relief which a court may order.

22. Governing Law. This Agreement shall be interpreted in accordance with the laws of the State of New Jersey, without regard to its principles of conflicts of law. This Agreement has been jointly drafted and no provision shall be construed against a party because that party or its attorneys drafted that provision. Any action relating to this Agreement shall be filed in New Jersey.

23. Counterparts. The parties may sign this Agreement in separate counterparts.

24. Approval by Commissioner of Education. The parties understand that this Agreement is contingent upon the approval of the Commissioner of Education.

THIS SPACE INTENTIONALLY LEFT BLANK

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The parties signify their entry into this Agreement by signing below.

Dated: 12/12/02, 2002

Helen Means
HELEN MEANS

Subscribed and sworn to before me this
12th day of December, 2002.

Notary Public
MARVIN L. COMICK
Attorney at Law
State of New Jersey

STATE-OPERATED SCHOOL DISTRICT
OF THE CITY OF NEWARK

Dated: 12/10/02, 2002

By:
Marion A. Bolden
State District Superintendent

NWK3: 686712.04

Newark Public School
Annual Evaluation Report
Certified Administrative Staff

ANNUAL EVALUATION REPORT

Name Helen Means Position Principal Date 6/13/01

School/Dept. Speedway Ave. School Tenured X Nontenured ____

I. PERFORMANCE REVIEW: Review of performance requirements identified in job description.

The following assessment criteria have been established by the district. Within these skill areas, the listed school components have been reviewed and assessed for overall effectiveness.

ASSESSMENT CRITERIA

A. Ability to manage – Needs Improvement
B. Ability to lead curriculum program – Unsatisfactory
C. Ability to supervise instruction – Unsatisfactory
D. Ability to communicate – Unsatisfactory
E. Ability to make decisions – Unsatisfactory
F. Responsiveness to others – Needs Improvement
G. Parent/Community initiatives – Satisfactory
H. Ability to maintain an effective climate – Needs Improvement
I. Implementation of staff development - Unsatisfactory
J. Ability to manage financial resources – Unsatisfactory

SCHOOL COMPONENTS

1. Literacy
2. Mathematics
3. Science
4. Technology
5. Primary Program (if applicable)
6. Middle School Program (if applicable)
7. Special Education
8. PRC
9. Whole School Reform

II. SUMMARY EVALUATION:

Based upon your performance during the 2000-2001 academic year through December 12, 2000, your last date of attendance, the following has been determined.

A. Areas of Strength:

You began the school year with the intention of formulating highly structured parameters within which your Whole School Reform facilitator, a key position, would function. You designed a record-keeping device and announced a schedule of conferences, which would ensure her accountability to you as she performed her duties.

In addition, you initially expressed a keen desire to remain abreast of students' progress through Success for All eight-week assessments.

In the area of Parent/Community Initiatives, you established courses for parents which would help them to better assist their children and become viable forces within the school community. This is an essential component of the operation of an effective school; and you have done this well.

B. Areas Needing Attention or Improvement:

Despite your communicated intentions to improve the achievement of students at Speedway Avenue School, you have been found unsatisfactory in six criteria and minimally satisfactory ("Needs Improvement") in three.

Supervision of Instruction/Curriculum/Program - There remains, throughout the school, an inconsistent quality of program implementation. Your negligence regarding the supervision of instruction is largely responsible for this phenomenon. The district requires a minimum of four formal observations submitted each month. The most important element of the observation process is the post-observation conference, at which time the lessons' contents and, in particular, the teachers' deliveries, are critiqued. It is at this time that you and the teacher are able to review the teachers' behaviors for reinforcement and modification; this is where YOUR skill as an educational leader is essential. And, as you are well aware, considering your vast administrative experience in the district, signatures attesting to the conference are required in a timely fashion. In fact, as in any instructional setting, the more immediate the feedback, the more meaningful it is. Your failure to obtain signatures on the few formal observations you conducted through December 12th has rendered them invalid. As stated in my December observation, my staff was then responsible to conduct evaluations in order to bring the school into compliance.

Recommendations: Design your schedule of observations to include a timeline for conferences – and stick to it. Use conference time as a vehicle for cultivating teachers' skills as well as support and respect. Adhere to conferencing within ten days of

observing. Conduct frequent informal observations and follow up with a brief positive note as appropriate – or with a brief conference as appropriate.

Obtain literature relative to collaborative supervision, which is premised on participation by equals in making instructional decisions. Its outcome is a mutual plan of action and comes as a result of clarifying, listening, reflecting, presenting, problem solving, negotiating, and standardizing. (See Pajak, E. 1993-*Approaches to clinical supervision*; Gordon, T. 1977. *Leader Effectiveness Training, L.E.T.: The no-lose way to release the productive potential of people).*

Staff Development - The absence of a comprehensive, ongoing staff development effort has contributed to the failure of your staff to become proficient in instruction in all areas. They have participated in SFA training, but have not been exposed to professional development in other areas, such as the district writing program, technology, the PRC or science. At the time of your unfortunate accident, there was no staff development plan in place. In fact, as discussed, you had not implemented mentorship activities for any of your new staff. Besides safety, there is little more critical to effective schooling than the quality of the teaching. YOU must have control of that; it is your responsibility to supervise, coach, provide assistance, guide and, if necessary, take appropriate action with teaching staff.

Recommendations: Create a "buddy" system for new teachers. Assign an experienced teacher to a new teacher who will be the new teacher's "lifeline." This can be in addition to the formal mentoring process.

Create a staff development plan and adhere to it. Conduct professional development at EVERY staff meeting; prepare agendas with curricular matters as well as management issues. Ensure that grade level meetings are devoted primarily to academic topics, and that you or your facilitator are present.

Share educational research articles and information with staff on an ongoing basis. Of ten SLT V schools with fourth grades, students at Speedway scored lowest in Language Arts (ESPA) for the past two years, third lowest in math for the past two years, and third and fourth lowest, respectively, in science ('99 and '00, respectively). With such dismal performance, it is expected that quality of instruction would be THE priority of Speedway Avenue School; and that, concomitantly, supervision and professional development would be essential.

Management/Decisions/Finances - School administration requires diligent prioritization; the myriad activities in which principals are engaged demands such for effective school operation. You appear to attend to the smaller details rather than the more important factors of school success. For example, as cited in the December observation, your school experienced a serious shortage of instructional materials due to poor management and fiscal supervision. Failures in the areas of supervision and staff development raise serious questions as to your ability to recognize and address the really important matters of school.

The Developer of SFA expressed serious concerns relative to program implementation; the Implementation Check revealed many areas where strategies were not in place. Certainly, this should be a priority of the entire school; however, it appears that you have not spent the appropriate time observing and assessing the status of program implementation. Remember, SFA has very specific expectations; it is your responsibility to facilitate and ensure their operationalization.

Recommendations – Immediately establish SFA/Whole School Reform as a priority. Be certain that you are intimately familiar with the model's tenets and can articulate them to staff, students and school community.
Obtain the latest Implementation Check and address areas in need. Contact the Developer for assistance; and employ the services of your facilitator for corrective action as needed.

Look at your school in its entirety; then, list issues which are critical to its effectiveness (e.g. – quality of teaching, discipline, management, communications, etc.) Determine priority areas and allocate your time appropriately.

Consider surveying your staff, perhaps anonymously, for areas which they feel are essential for your attention.

Communication - Additionally, as the school administrator, it is your challenge to recognize and capitalize upon the strengths of staff. You have chosen, instead, to focus on the perceived personal conflict between you and your facilitator. You must remember that, in the organization known as school, it is incumbent upon you to value the professional characteristics of individuals and cultivate them so that they maximally impact upon learning. You have to be "bigger than" – and attempt to get beyond your personal feelings.

Recommendations - I strongly suggest that you make a conscious decision to meet frequently with your facilitator; establish a collegial, rather than adversarial, position. Cite her strengths; discuss those areas in which you would like to see improvement. Remember, she is an extension of you; she is knowledgeable of the model. In addition, she is perceived as a colleague by teachers; you may be able to accomplish a lot through her. Utilize her skills for one purpose – that of improving the knowledge base and aptitudes of staff relative to Success for All.

Conduct a self-audit; appraise your professional skills as objectively as possible. Contact a respected colleague whom you trust and request honest feedback relative to your strengths and areas in need of attention.

Schedule a meeting with me so that we may discuss these matters at length.

C. Review of multiple indicators of pupil progress and growth (NJAC6:8-3.4)

Criterion Referenced Tests
ESPA (2000)
Direct Assessment
Attendance

III. PROFESSIONAL IMPROVEMENT PLAN (See attached sheet)

IV. OVERALL RATING: Satisfactory _____ Unsatisfactory X

V. RECOMMENDATIONS FOR NEXT SCHOOL YEAR:

1. Grant Tenure (if applicable) _____
2. Continue Employment _____
3. Other Recommendations Withhold salary increment

VI. EVALUATEE'S COMMENTS:

Signatures: _____ _____ _____
Evaluator/Position Evaluatee/Position Witness/Position

(Use Additional Sheets if Necessary)

Office of Education Services
95/96

McCARTER & ENGLISH, LLP
Four Gateway Center
100 Mulberry Street
P.O. Box 652
Newark, New Jersey 07101-0652
973-622-4444
Attorneys for Respondent
State-operated School District
of the City of Newark, improperly pleaded
as the "Newark Public Schools"

HELEN MEANS, Petitioner, vs. NEWARK PUBLIC SCHOOLS, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION – STATE OF NEW JERSEY AGENCY DOCKET NO. 382-9/01 AND OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO. EDUOR 09652-01N **STIPULATION OF DISMISSAL WITH PREJUDICE**

It is hereby stipulated and agreed by the undersigned attorneys for petitioner Helen Means and respondent State-operated School District of the City of Newark, improperly pleaded as the "Newark Public Schools," that the above action be and hereby is dismissed with prejudice

in its entirety and without any costs to either party.

LOVE & RANDALL
Attorneys for Petitioner
Helen Means

By:_____
Marvin L. Comick

Dated: December___, 2002

McCARTER & ENGLISH, LLP
Attorneys for Respondent State-operated School District of the City of Newark, improperly pleaded as "Newark Public Schools"

By:_____
Steven B. Hoskins

Dated: December ___, 2002

SO ORDERED on this _____ day of _____ 2002

_____
, A.L.J.

3 R

OAL DKT. NO. EDU 9652-01
AGENCY DKT. NO. 382-9/01

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

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 2/6/03

Date of Mailing: 2/6/03

* The Commissioner is, however, compelled to comment on Term #10. of this agreement. Although the parties may agree between themselves to keep the specific terms of a settlement agreement confidential, they cannot seek to bind the Commissioner or any other individual to such confidentiality. Furthermore, in the absence of a motion to seal the record for good cause shown, Commissioner's decisions and the underlying proceedings are a matter of public record.

E.R., on behalf of minor child, D.A., :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE NORTHERN HIGHLANDS REGIONAL SCHOOL DISTRICT, BERGEN COUNTY; BOARD OF EDUCATION OF THE BOROUGH OF HO-HO-KUS, BERGEN COUNTY; BOARD OF EDUCATION OF THE TOWNSHIP OF MAHWAH, BERGEN COUNTY; AND BOARD OF EDUCATION OF LAKELAND REGIONAL HIGH SCHOOL DISTRICT, PASSAIC COUNTY, : DECISION

RESPONDENTS.

February 7, 2003

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 9559-02

Agency Dkt. No. 282-9/02

E.R. o/b/o D.A.,

Petitioner,

v.

BOARD OF EDUCATION OF THE
NORTHERN HIGHLANDS REGIONAL
SCHOOL DISTRICT, BERGEN COUNTY,
BOARD OF EDUCATION OF THE BORO
OF HO-HO-KUS, BERGEN COUNTY,
BOARD OF EDUCATION OF THE TOWNSHIP
OF MAHWAH, BERGEN COUNTY, AND
BOARD OF EDUCATION OF LAKELAND REGIONAL
HIGH SCHOOL DISTRICT, PASSAIC COUNTY,

Respondents.

William P. Higgins, Esq., for petitioner
(Higgins & Walker, attorneys)

Linda Ganz Ott, Esq., for Northern Highland Regional School BOE, respondent
(Bucceri and Pincus, attorneys)
John Geppert, Esq., for Ho-Ho-Kus BOE, respondent
(Wiley, Malehorn and Sirota, attorneys)
Nathanya G. Simon, Esq., for Mahwah Township BOE, respondent
(Schwartz, Simon, Edelstein, Celso, & Kessler, attorneys)
Philip Stern, for Lakeland Regional High School District BOE, respondent

Record Closed: December 16, 2002 Decided: December 26, 2002

BEFORE **THOMAS E. CLANCY**, ALAJ:

The matter was transmitted to the Office of Administrative Law (OAL) on November 20, 2002, for resolution as a contested case pursuant to *N.J.S.A.* 52:14B-1 *et seq.* and *N.J.S.A.* 52:14F-1 *et seq.*

During the pendency of the case at the Office of Administrative Law, the parties settled their differences as provided in the attached Stipulation of Settlement, page 2 of which has been signed in counterparts by the parties and their authorized representatives.

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

Accordingly, I **CONCLUDE** that the attached Stipulation of Settlement meets the requirements of *N.J.A.C.* 1:1-19.1.1, and I hereby **APPROVE** same. In conjunction therewith, I **ORDER** that the parties comply with its contents and that these proceedings be (and are hereby) **TERMINATED**.

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

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

12/26/02
DATE

Thomas E. Clancy
THOMAS E. CLANCY, ALAJ

Receipt Acknowledged

January 7, 2003
DATE

M. Kathleen Duncan (by)
DEPARTMENT OF EDUCATION

Mailed to Parties

JAN 9 2003
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

William P. Higgins, Esq.
Higgins & Walker, P.C.
130 Skyline Drive
Ringwood, New Jersey 07456
(973) 962-7004
Attorney for Petitioner

E.R. on behalf of her minor child D.A., Petitioner	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY
v.	DOCKET NO. 282-9/02
NORTHERN HIGHLANDS REGIONAL HIGH SCHOOL BOARD OF EDUCATION, HOHOKUS BOARD OF EDUCATION, LAKELAND REGIONAL HIGH SCHOOL BOARD OF EDUCATION, MAHWAH BOARD OF EDUCATION, Respondents	**STIPULATION OF SETTLEMENT**

EDU 9559-02
addition by Tec ALAJ
12/19/02

In the matter of E.R. on behalf of minor child D.A. v. Northern Highlands Regional High School Board of Education, et al., Agency Docket No. 282-9/02, it has hereby been agreed by and between the parties to settle this matter on the following bases:

1) D.A. will remain a student at the Northern Highlands Regional High School for his senior year.

2) D.A.'s present IEP will remain in place.

3) The Petitioner and her former husband, Frank Altomare, have agreed to pay $4,868.50 tuition directly to the Northern Highlands Regional High School on or by November 1, 2002, the tuition to be divided evenly between Petitioner and her former husband, Frank Altomare, in the amount

of $2,434.25 each.

4) On or by February 1, 2003, the Petitioner and her former husband, Frank Altomare, have agreed to pay the $4,868.50 tuition directly to the Northern Highlands Regional High School, each party to pay $2,434.25 towards the tuition.

5) Based upon the above, the Petitioner agrees with the Respondents as to the following actions: a. Petitioner's claim against Northern Highlands Regional High School Board of Education, HoHoKus Board of Education, Lakeland Regional High School Board of Education, and the Mahwah Board of Education will be withdrawn from both the Commissioner of Education and the Office of Special Education Programs; b. The Respondent HoHoKus Board of Education agrees to withdraw their Counterclaim, Cross-claim and Third-Party Complaint against Petitioner Ellen Ravese, the other named Respondents and Frank Altomare, respectively.

Dated:

By_____
WILLIAM P. HIGGINS
Attorney for Petitioner

By_____
NATHANYA SIMON
Attorney for Respondent Mahwah Board of Education

By_____
PHILIP STERN
Attorney for Lakeland Regional High School Board of Education

By_____
ELLEN RAVESE

By_____
JOHN G. GEPPERT, JR.
Attorney for Respondent HoHoKus Board of Education

By_____
LINDA GANZ OTT
Attorney for Respondent Northern Highlands Regional High School Board of Education

By_____
FRANK ALTOMARE

LAW OFFICES OF

Higgins and Walker

A PROFESSIONAL CORPORATION

WILLIAM P. HIGGINS *
MICHAEL WALKER

MICHAEL J. ANDALAFT

*MEMBER N.J. & N.Y. BARS
MEMBER U.S. TAX COURT

FIELDSTONE PARK CENTER
130 SKYLINE DRIVE
RINGWOOD, NEW JERSEY 07456

(973) 962-7004
FAX: (973) 962-6704
www.higginswalker.com
wphiggins@aol.com
mikewalk@aol.com

December 16, 2002

via facsimile 973-648-6124 and regular mail

Office of Administrative Law
33 Washington Street
15th Floor
Newark, NJ 07102-3011
Attn.: The Honorable Thomas Clancy

RE: E.R. on behalf of D.A. v. Northern Highlands Regional Board of Education, et al.
Docket No.: 282-9/02
Agency Ref. No.: 2003-6931

Dear Judge Clancy:

Pursuant to our telephone conference, please find enclosed the Stipulation of Settlement and Notice of Withdrawal that has been signed by all parties. Please be advised that the enclosed document was forwarded to the Office of Administrative Law on October 31, 2002 as per the enclosed fax receipt.

As you can see, the Stipulation of Settlement contains a conformed signature of Ellen Ravese and Frank Altomare. I have enclosed herewith copies of their original signatures which were made under separate cover.

Kindly provide my office with a filed copy of the Stipulation of Settlement in the enclosed envelope. If you should have any questions, please feel free to contact me at my office.

Very truly yours,

WILLIAM P. HIGGINS

WPH/jmp
enc.
cc: Office of Special Education Programs
Attn.: John Worthington, Coordinator

of $2,434.25 each.

4) On or by February 1, 2003, the Petitioner and her former husband, Frank Altomare, have agreed to pay the $4,868.50 tuition directly to the Northern Highlands Regional High School, each party to pay $2,434.25 towards the tuition.

5) Based upon the above, the Petitioner agrees with the Respondents as to the following actions: a. Petitioner's claim against Northern Highlands Regional High School Board of Education, HoHoKus Board of Education, Lakeland Regional High School Board of Education, and the Mahwah Board of Education will be withdrawn from both the Commissioner of Education and the Office of Special Education Programs; b. The Respondent HoHoKus Board of Education agrees to withdraw their Counterclaim, Cross-claim and Third-Party Complaint against Petitioner Ellen Ravese, the other named Respondents and Frank Altomare, respectively.

Dated: 10/24/2002

By _____
WILLIAM P. HIGGINS
Attorney for Petitioner

By _____
JOHN G. GEPPERT, JR.
Attorney for Respondent HoHoKus Board of Education

By _____
NATHANYA SIMON
Attorney for Respondent Mahwah Board of Education

By _____
LINDA GANZ OTT
Attorney for Respondent Northern Highlands Regional High School Board of Education

By _____
PHILIP STERN
Attorney for Lakeland Regional High School Board of Education

By _____
FRANK ALTOMARE

By _____
ELLEN RAVESE

of $2432.75 each. — conformance effected by fax ALAJ 12/17/02

4) On or around February 1, 2003, the Petitioner and her former husband, Frank Altomare, have agreed to pay the $4,865.50 tuition directly to the Northern Highlands Regional High School, each party to pay $2,432.75 towards the tuition.

5) Based upon the above, the Petitioner agrees with the Respondents as to the following actions:

a. Petitioner's claim against Northern Highlands Regional High School Board of Education, HoHoKus Board of Education, Lakeland Regional High School Board of Education, and the Mahwah Board of Education will be withdrawn from both the Commissioner of Education and the Office of Special Education Programs; b. The Respondent HoHoKus Board of Education agrees to withdraw their Counterclaim, Cross-claim and Third-Party Complaint against Petitioner Ellen Ravese, the other named Respondents and Frank Altomare, respectively.

Dated:

By_____
WILLIAM P. HIGGINS
Attorney for Petitioner

By_____
JOHN G. GEPPERT, JR.
Attorney for Respondent HoHoKus Board of Education

By_____
NATHANYA SIMON
Attorney for Respondent Mahwah Board of Education

By_____
JAMES PLOSIA, JR.
Attorney for Respondent Northern Highlands Regional High School Board of Education

By_____
PHILIP STERN
Attorney for Lakeland Regional High School Board of Education

By_____
FRANK ALTOMARE

By Ellen Ravese
ELLEN RAVESE

of $2,432.75 each.

4) On or by February 1, 2003, the Petitioner and her former husband, Frank Altomare, have agreed to pay the $4,865.50 tuition directly to the Northern Highlands Regional High School, each party to pay ~~$2,432.75~~ OR 2434.25 towards the tuition.

5) Based upon the above, the Petitioner agrees with the Respondents as to the following actions: a. Petitioner's claim against Northern Highlands Regional High School Board of Education, HoHoKus Board of Education, Lakeland Regional High School Board of Education, and the Mahwah Board of Education will be withdrawn from both the Commissioner of Education and the Office of Special Education Programs; b. The Respondent HoHoKus Board of Education agrees to withdraw their Counterclaim, Cross-claim and Third-Party Complaint against Petitioner Ellen Ravese, the other named Respondents and Frank Altomare, respectively.

Dated:

By_____
WILLIAM P. HIGGINS
Attorney for Petitioner

By_____
JOHN G. GEPPERT, JR.
Attorney for Respondent HoHoKus Board of Education

By_____
NATHANYA SIMON
Attorney for Respondent Mahwah Board of Education

By_____
LINDA GANZ OTT
Attorney for Respondent Northern Highlands Regional High School Board of Education

By_____
PHILIP STERN
Attorney for Lakeland Regional High School Board of Education

By_____
FRANK ALTOMARE

By_____
ELLEN RAVESE

OAL DKT. NO. EDU 9559-02
AGENCY DKT. NO. 282-9/02

E.R., on behalf of minor child, D.A.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE NORTHERN HIGHLANDS REGIONAL SCHOOL DISTRICT, BERGEN COUNTY; BOARD OF EDUCATION OF THE BOROUGH OF HO-HO-KUS, BERGEN COUNTY; BOARD OF EDUCATION OF THE TOWNSHIP OF MAHWAH, BERGEN COUNTY; AND BOARD OF EDUCATION OF LAKELAND REGIONAL HIGH SCHOOL DISTRICT, PASSAIC COUNTY,	:	DECISION
RESPONDENTS.	:	

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

Upon review, the Commissioner approves the settlement terms, with respect to those issues within his jurisdictional purview,* and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 2/7/03

Date of Mailing: 2/7/03

* The Commissioner specifically does not reach to provision #2. of the parties' agreement as this is a Special Education issue.

S.R.R., on his own behalf and on behalf of minor child, S.R.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF ROSELLE, UNION COUNTY, WILLIAM L. LIBRERA, COMMISSIONER OF EDUCATION AND NEW JERSEY STATE BOARD OF EDUCATION,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner challenged Board's decision to permanently expel his 14-year-old son, S.R., when S.R. made threats against students and brought to school an inoperable BB gun to frighten another student. Petitioner's claims against the State were bifurcated from earlier proceedings. Petitioner asserts that State respondents violated S.R.'s constitutional rights.

In "Part II" of these bifurcated proceedings, the ALJ found that this matter was ripe for summary decision in that no genuine issues of material fact remain to be determined. The ALJ further found that petitioner had not proven that the State respondents violated S.R.'s constitutional rights and, therefore, dismissed Counts Five, Six and Seven.

The Commissioner adopted the Initial Decision, with modification. The Commissioner concurred with the ALJ's findings as to Counts Five, Six and Seven, specifically noting that there was no relief petitioner sought from the State respondents which could be granted. The Commissioner also ordered that the decision in this matter be unsealed, while the record remain sealed.

February 18, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION AND RECORD SEALED

INITIAL DECISION
SUMMARY DECISION
PART II
OAL DKT. NOS. EDU 1914-02
and EDU 5616-02
AGENCY DKT. NO. 35-2/02

S.R.R. ON HIS OWN BEHALF AND ON BEHALF OF MINOR CHILD, S.R.,

Petitioner,

v.

ROSELLE BOROUGH BOARD OF EDUCATION, WILLIAM L. LIBRERA, COMMISSIONER OF EDUCATION OF NEW JERSEY, AND NEW JERSEY STATE BOARD OF EDUCATION,

Respondents.

David R. Giles, Esq., and **Anna Maria Tejada**, Esq., for petitioner

Allan C. Roth, Esq., and **Joel G. Scharff**, Esq., for Roselle Borough Board of Education (Ruderman & Glickman, attorneys)

Michael C. Walters, Deputy Attorney General, and **Cynthia A. Phillips**, Deputy Attorney General, for William L. Librera, Commissioner of Education, and the New Jersey State Board of Education

Record Closed: November 12, 2002 Decided: December 23, 2002

BEFORE **RICHARD McGILL**, ALJ:

This is the second part of a bifurcated proceeding concerning a petition by S.R.R. (petitioner) in regard to the expulsion of his fourteen-year-old son, S.R., by the Roselle Borough Board of Education. The expulsion stemmed from events over several days during which S.R. allegedly threatened to kill three students and brought a non-functional BB gun to school.

The petition is set forth in eight counts. Counts One, Two, Three, Four and Eight contain allegations related to the Roselle Borough Board of Education. Counts Five, Six and Seven contain allegations against William L. Librera, Commissioner of Education of New Jersey, and the New Jersey State Board of Education (State respondents). A Partial Initial Decision dated September 12, 2002, addressed the counts against the Roselle Borough Board of Education. The State respondents now move for summary decision dismissing Counts Five, Six and Seven.

Count Five alleges that the State respondents violated S.R.'s right to due process of law under the Fourteenth Amendment to the United States Constitution by failing to take steps, such as issuing regulations, to ensure that no student is expelled in a manner that is fundamentally unfair, arbitrary, capricious and unreasonable, and without demonstrating that expulsion is the narrowest means available. Count Six alleges that the State respondents violated S.R.'s right to a thorough and efficient education under Article VIII, § 4, ¶ 1 of the New Jersey Constitution by failing to take essentially the same steps as set forth in Count Five. Count Seven alleges that the State respondents violated S.R.'s right to a thorough and efficient education under Article VIII, § 4, ¶ 1 of the New Jersey Constitution by failing to ensure that S.R. was provided with an appropriate alternative education program after he was expelled from school.

As relief related to the State respondents, the petition demands the following: (1) a finding that the State respondents violated S.R.'s right to a thorough and efficient education under Article VIII, § 4, ¶ 1 of the New Jersey Constitution, (2) placement of S.R. in an appropriate alternative educational program, (3) an Order directing the State respondents to promulgate regulations to guide school districts on how to administer long-term suspensions and expulsions without violating the substantive and procedural due process rights of pupils protected by the United States and New Jersey constitutions and in a manner that is not fundamentally unfair or that is arbitrary, capricious or unreasonable, and (4) such other relief that

is equitable and just. Petitioner would include in this last category guidance, monitoring and supervision of schools and school districts.

PROCEDURAL HISTORY

This procedural history is supplemental to the Partial Initial Decision dated September 12, 2002, and focuses on procedures in regard to counts related to the State respondents. Petitioner filed his petition of appeal with the Commissioner of Education on February 14, 2002, and on February 19, 2002, petitioner filed a motion for emergent relief. The matter was transmitted to the Office of Administrative Law on February 28, 2002, for determination as a contested case.

An oral argument in regard to the motion for emergent relief was conducted on March 7, 2002, and an Order granting emergent relief in the form of placement of S.R. in an appropriate educational program pending final disposition of this matter was issued on March 13, 2002. On March 22, 2002, the Commissioner issued a Decision on Motion affirming the Order granting emergent relief.

On May 15, 2002, the State respondents filed a motion for summary decision and requested dismissal of Counts Five, Six and Seven. Petitioner submitted a response on May 28, 2002, and a reply by the State respondents was received on June 6, 2002.

By letter dated May 31, 2002, the State respondents filed a motion to bifurcate the proceeding such that all claims against the State respondents would be considered after a determination was made in regard to the claims against the Roselle Borough Board of Education. The motion was unopposed and was granted by Order dated June 7, 2002. A six-day hearing in regard to the claims against the Roselle Borough Board of Education began on June 24, 2002, and a Partial Initial Decision was issued on September 12, 2002. The Commissioner of Education issued a Decision in regard to the first part of this case on November 1, 2002.

By letter dated October 11, 2002, the undersigned requested supplemental briefs in regard to the State respondents' motion for summary decision. The State respondents filed a

supplemental brief on October 29, 2002, and petitioner's response was received on November 12, 2002.

STATE RESPONDENTS' MOTION

a. Positions of the Parties

In support of the motion for summary decision, the State respondents maintain that there are no genuine issues of material fact and that they are entitled to prevail as a matter of law. The pertinent statutes, *N.J.S.A.* 18A:37-1 *et seq.*, reflect a determination by the Legislature that local boards of education are best suited to determine whether good cause exists for expulsion of a student. The statutes enumerate specific examples and provide general standards as to the conduct which will constitute grounds for expulsion. According to the State respondents, the statutory framework provides ample guidance to school boards in determining whether good cause exists for an expulsion. The State respondents maintain that petitioner is attempting to force them to micro-manage disciplinary policies of each school district throughout the State. This task would be not only inefficient but also an egregious waste of resources. More importantly, it would conflict with the statutes that vest the authority to expel students in the local board of education. Because of the statutory guidelines, there is no need for regulations in regard to expulsions.

The State respondents advance two specific legal arguments. First, the State respondents contend that the Office of Administrative Law lacks the authority to invalidate the current statutory and regulatory framework governing pupil discipline. Second, in regard to the merits of petitioner's claims, the State respondents maintain that they have not violated S.R.'s constitutional rights by failing to promulgate regulations governing pupil discipline. In their supplemental brief, the State respondents also argue that Counts Five, Six and Seven should be dismissed for failure to state a cause of action upon which relief may be granted.

Petitioner maintains that the State respondents fundamentally misconstrue the claims set forth in Counts Five, Six and Seven. More specifically, petitioner denies that this case is a general or facial attack on a statute or regulation which might appropriately be brought in the Appellate Division. Rather, this is the type of individual dispute which must be brought first to

the administrative agency charged with enforcing the law in this area and before the appropriate fact finder to hear and weigh the relevant evidence. Further, it is the responsibility of an administrative agency to address such claims not only to ensure that there is an adequate record on appeal but also to provide the agency's insights on a subject that is within its purview. An evidentiary hearing is mandated where the proposed administrative action is based on disputed adjudicative facts.

According to petitioner, the State Board of Education has the "general supervision and control of public education in this state ... and of the state department of education ... which shall formulate plans and make recommendations for the unified, continuous and efficient development of public education ... of people of all ages within the state." *N.J.S.A.* 18A:4-10. Further, the state board must "make and enforce, and may alter and repeal, rules for its own government and for implementing and carrying out the school laws of this state under which it has jurisdiction." *N.J.S.A.* 18A:4-15. The Commissioner of Education has jurisdiction to hear and determine all controversies and disputes arising under the school laws. *N.J.S.A.* 18A:6-9.

Petitioner would group the material facts in this matter into four categories. The first category of facts relates to the actual expulsion of S.R. and the procedures related thereto. Findings of fact in regard to this category were made in the Partial Initial Decision. The second category concerns facts related to the services provided to S.R. during the thirteen-month period during which S.R. was excluded from his regular school program and any educational, social or emotional harm to him. Evidence was presented in regard to these facts during the hearing, and findings were made in the Partial Initial Decision. However, no evidence was admitted concerning S.R.'s educational program during the summer or fall. The adequacy of this program is in dispute.

The third category concerns facts related to the question whether the State respondents failed to take necessary steps to protect S.R. from an unwarranted expulsion. The fourth category relates to the question whether the State respondents failed to ensure that S.R. had an appropriate alternative education subsequent to the expulsion by the Roselle Borough Board of Education. According to petitioner, the factual issues with respect to the third and fourth categories relate to

the State's activities in guiding, monitoring and supervising its public schools and school districts.

b. Legal Standard

A motion for summary decision should be granted where there is no genuine issue as to any material fact and the moving party is entitled to prevail as a matter of law. *N.J.A.C.* 1:1-12.5(b). The same standard is applied in the courts of this State pursuant to *R.* 4:46-2. Summary judgment "is designed to provide a prompt, businesslike and inexpensive method" to dispose of actions which do not present any genuine issue of material fact. *Judson v. Peoples Bank & Trust Co. of Westfield,* 17 *N.J.* 67, 74 (1954). The movant must show that there is no genuine issue of material fact, and all inferences of doubt are drawn against the movant. *Id.*, at 74-75. However, excessive caution which would undercut the purposes of a motion for summary judgment should be avoided. *Pierce v. Ortho Pharmaceutical Corp.*, 84 *N.J.* 58, 65 (1980). Thus, if the opposing party offers only facts which are immaterial or insubstantial in nature, these circumstances should not defeat a motion for summary judgment. *Judson v. Peoples Bank & Trust Co. of Westfield*, 17 *N.J.* at 75. Although the pleadings may raise a factual issue, summary judgment procedure pierces the allegations in the pleadings, where the other papers show the absence of any genuine issue of material fact. *Ibid.*

In determining whether there exists a genuine issue as to a material fact, the judge must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." *Brill v. Guardian Life Ins. Co. of America*, 142 *N.J.* 520, 523 (1995).

c. Facts

This case is in an unusual posture in that a motion for summary decision is pending at a point in time when extensive findings of fact have already been made in the Partial Initial Decision. Rather than attempt to address this motion on the basis of the record at the time of

filing in May 2002, the findings as set forth in the Partial Initial Decision dated September 12, 2002, will be treated as the facts in this matter.

In addition, the procedural history and the disposition of the five counts against the Roselle Borough Board of Education are part of the fact pattern with respect to the three counts against the State respondents. In a Decision dated November 1, 2002, the Commissioner of Education overturned the expulsion of S.R. and ordered that S.R. be reinstated to his regular education program, that his school records reflect the substance of the Commissioner's decision and that S.R. be provided with compensatory services in order to help him reach competencies consistent with his appropriate grade level.

Petitioner maintains that findings need to be made as to those facts which he includes his second, third and fourth categories. The State respondents have not asserted that these facts are not in dispute. Rather, the State respondents argue in effect that these facts are immaterial. This issue will be discussed below as a question of law.

d. Law and Analysis

Counts Five, Six and Seven of the petition allege that the State respondents have violated S.R.'s constitutional rights in various respects. Petitioner's filing of these allegations in this forum and the State respondent's arguments in support of the motion for summary decision raise the question of the extent of the authority of an administrative agency to decide constitutional issues.

In *Paterson Redevelopment Agency v. Schulman*, 78 *N.J.* 378 (1979), the role of an agency with respect to a constitutional claim was described as follows:

> We therefore conclude that relocation claims must first be presented to the local agency. Because that agency lacks proper jurisdiction to decide constitutional claims, such issues should merely be noted, as is generally done in the municipal court. Factual presentations relevant to the constitutional issues may be made, however, to ensure an adequate record for determination on appeal. In this way both the integrity of the administrative system and the

> defendant's right to a judicial determination of constitutional issues will be preserved. [*Id.*, at 388.]

More recent cases, however, allow a broader role for administrative agencies in dealing with constitutional issues. In *Hunterdon Central High School Board of Education v. Hunterdon Central High School Teachers' Association,* 174 *N.J. Super.* 468 (App. Div. 1980), aff'd o.b. 86 *N.J.* 43 (1981), the court considered whether the Public Employment Relations Commission (PERC) could dispose of the question stated as "whether public employers and public employees (may) agree to allow certain members of the bargaining unit to take days off from work for the purpose of religious observation without deduction of either a personal day, a vacation day or a day's wage" on the constitutional basis that the agreement violated the constitutional prohibition against the establishment of religion. PERC had concluded that the provision would violate the constitution. In deciding that PERC could make this determination, the court noted that the subject of leaves of absences was certainly within the scope of PERC's jurisdiction. Further, the terms and conditions of employment may be impacted by laws other than those within the New Jersey Employer-Employee Relations Act, *N.J.S.A.* 34:13A-1 *et seq.*, which is administered by PERC. The court determined that PERC may apply other rules of law including provisions of the constitution to decide a question within its jurisdiction.

A more authoritative statement may be found in *Abbott v. Burke*, 100 *N.J.* 269 (1985), where the court noted that although an agency may base its decision on constitutional considerations, such legal determinations do not receive a presumption of correctness on appellate review. *Id.*, at 298-299. More recently in *Board of Education of the Township of Neptune v. Neptune Township Education Association*, 293 *N.J. Super.* 1 (App. Div. 1996), the court stated as follows:

> Where the broader subject matter of a case is within the purview of an administrative agency's authority, it is valuable to have the insights and policy reflections of that agency, even if the only issue to be decided is one of constitutional dimension, in respect of which the agency is seen to have no particular expertise or authoritative decisional role. In such matters, it is appropriate that a case proceed as an agency adjudication, whether pursuant to *N.J.S.A.* 52:14B-8 or another procedural source, subject, of course, to appellate review without the presumption of correctness that would attend the resolution of less weighty questions. *Id.*, at 9].

A distinction is normally drawn between a facial attack on the constitutionality of a statute and an as-applied challenge. The general rule is that an administrative agency is barred from passing on the constitutionality of a statute. *Hunterdon Central High School Board of Education v. Hunterdon Central High School Teachers' Association*, 174 *N.J. Super.* at 474. The case of *Brunetti v. Borough of New Milford*, 68 *N.J.* 576 (1975) is instructive with respect to an as-applied challenge. There, the determination was that it was proper for a court to rule on the facial constitutionality of an ordinance and then require exhaustion of administrative remedies for other challenges. A challenge that an ordinance is unconstitutional as applied requires detailed findings of fact and therefore exhaustion of administrative remedies. *Id.,* at 590-591; *Roadway Express Inc. v. Kingsley,* 37 *N.J.* 136, 140 (1962).

Counts Five, Six and Seven all involve allegations of violations of S.R.'s constitutional rights. Petitioner maintains that the State respondents' motion for summary decision fundamentally misconstrues the nature of the allegations in Counts Five, Six and Seven. From a review of Counts Five, Six and Seven, it becomes evident that their nature is not readily apparent and that they are susceptible to varying interpretations. Under the circumstances, the allegations will be discussed first as a facial attack on the constitutionality of the pertinent statutes and then as an as-applied challenge.

In their brief in support of the motion for summary decision, the State respondents argue that the Office of Administrative Law lacks the authority to invalidate the current statutory and regulatory framework governing pupil discipline. The State respondents cite the general principle that administrative agencies lack the authority to invalidate statutes or regulations on constitutional grounds. In response, petitioner denies that this case involves a general or facial attack on any statute or regulation. Rather, petitioner maintains that this is the type of individual dispute which must first be brought before the agency as the appropriate fact finder to hear and weigh the relevant evidence.

It is well established that administrative agencies are barred from invalidating a statute on constitutional grounds. *Hunterdon Central High School Board of Education v. Hunterdon Central High School Teachers' Association*, 174 *N.J. Super.* at 474. Petitioner does not oppose

the argument of the State respondents in this regard. Therefore, the facial constitutionality of the statutes related to student discipline will not be considered in this proceeding.

With respect to petitioner's as-applied challenge, the essence of the claims contained in Counts Five and Six is that the State respondents did not take steps to ensure that the local board of education would not expel S.R. in a manner contrary to law. In effect, petitioner maintains that the State respondents should have acted preemptively to control the local board of education by means such as regulations, training, guidance and monitoring to prevent the expulsion from occurring in the first place. According to petitioner, the failure of the State respondents to do so violated S.R.'s right to due process of law under the Fourteenth Amendment to the United States Constitution and the thorough and efficient clause in Article VIII, § 4, ¶ 1 of the New Jersey Constitution.

S.R.'s right to due process of law was discussed at length in the Partial Initial Decision, and those principles will not be repeated here. The thorough and efficient clause of the New Jersey Constitution provides as follows:

> The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in this State between the ages of five and eighteen years. [*N.J. Const.* (1947) Art. VIII, § 4, para.1.]

This provision has been interpreted to require "equal opportunity for all children ... which must be understood to embrace that educational opportunity which is needed in the contemporary setting to equip a child for his [or her] role as a citizen and as a competitor in the labor market." *Id.*, at 280-281. Further, "a constitutionally adequate education has been defined as an education that will prepare public school children for a meaningful role in society, one which will enable them to compete effectively in the economy and to contribute and to participate as citizens and members of their communities." *Abbott v. Burke*, 149 *N.J.* 145, 166 (1997).

In regard to the pertinent statute, *N.J.S.A.* 18A:37-2, the Legislature has granted the authority to suspend or expel students to the local board of education. This provision recognizes that the local board of education is in the best position to determine whether a particular situation

warrants a suspension or expulsion. Further, the local boards of education do not act without guidance. The statute establishes a standard of good cause for suspensions and expulsions and provides a list of ten types of conduct that would be included therein.

Any action by a local board of education is subject to an appeal process to the Commissioner of Education and then to the State Board of Education. *N.J.S.A.* 18A:6-9; *N.J.A.C.* 6A:3-1.1 *et seq.*, and *N.J.S.A.* 18A:6-27. Over the years, the State respondents have provided guidance to local boards of education through decisions in contested cases. For example, the Commissioner has stated that "termination of a pupil's right to attend the public schools of a district is a drastic and desperate remedy which should be employed only when no other course is possible." *Scher v. Board of Educ. of West Orange*, 1968 *S.L.D.* 92, 96. Local boards of education have been urged to recognized expulsion as a negative and defeatist kind of last-ditch expedient resorted to only after and based upon competent evaluation and recommendation. *Id.,* at 97. Where the circumstances do not meet these standards, the Commissioner has found an expulsion to be unreasonable. *E.g., C.S. v. Board of Educ. of Township of Piscataway*, 97 *N.J.A.R.*2d (EDU) 573. Finally, the courts have provided guidance as to the procedures required to provide students with due process of law. *E.g., R.R. v. Bd. of Ed., Shore Reg. H.S.*, 109 *N.J. Super.* 337 (Ch. Div. 1970); *Tibbs v. Bd. of Ed. of Tp. of Franklin*, 114 *N.J. Super.* 287 (App. Div. 1971); *aff'd,* 59 *N.J.* 506 (1971). Under the circumstances, local boards of education have received substantial guidance in applying the standards set forth in *N.J.S.A.* 18A:37-2.

One function of an administrative agency in dealing with a constitutional issue is to make findings of fact with respect to an underlying subject matter within its purview. Here, extensive findings were made in the Partial Initial Decision concerning the facts in this matter. Of significance with respect to Counts Five and Six, S.R. engaged in serious misconduct which warranted substantial disciplinary action. S.R. threatened to kill two or three other students and brought a non-functional BB gun to school to lend credence to his threat. While the other students were not in actual danger, they should not have to go to school fearing for their lives. This is not a case in which S.R. was vindicated of the alleged misconduct. There can be no doubt that S.R. was properly removed from the regular education program for some period of time.

In regard to the facts which petitioner includes in his third and fourth categories, the allegations that the State respondents failed to take certain actions are premised on the assumption that they had an obligation to do so. The cases cited by petitioner offer no direct support for this assumption. Moreover, the facts of this case do not point to a need for preemptive action. While the initial expulsion by the local board of education was an overreaction, the decision by the Commissioner corrected the situation. It follows that there is no basis in law or fact for petitioner's assumption. Under the circumstances, the conclusion is warranted that the facts related to any steps, whether taken or not, to control preemptively the local board of education are not material with respect to the outcome of this case. In the absence of any obligation to take preemptive action, the State respondents are entitled to prevail as a matter of law with respect to Counts Five and Six.

Count Seven alleges that the State respondents violated S.R.'s right to a thorough and efficient education by failing to provide or otherwise ensure that S.R. was provided an appropriate alternative education after he was expelled by the local board of education. This count could be viewed as an attack on the alternative education actually received by S.R. or as an allegation that the State respondents should have acted preemptively to cause S.R. to have a program take effect immediately upon his expulsion.

At the factual level, one striking aspect of this case is that S.R. had no educational program whatsoever for a five-month period from approximately mid-November 2001 to mid-April 2002. However, after the expulsion took effect in mid-November 2001, petitioner took three full months until mid-February 2002 to file an appeal. Thus, petitioner's inaction accounted for a large portion of the time when S.R. had no educational program.

Additionally, once made, petitioner's request for emergent relief was promptly considered and granted. The fact that S.R. was placed on home instruction for an extended period of time reflects the view of the court-appointed psychologist who expressed the opinion that placement in an alternative school would not be appropriate for S.R. Thus, the Commissioner of Education ordered that the local board of education provide S.R. with an alternative education program which was appropriate under the circumstances.

Petitioner filed a motion to enforce the Commissioner's order to provide an alternative education program for S.R. This motion was treated as an application for emergent relief and was resolved through a settlement. Thus, petitioner agreed to changes in S.R.'s alternative educational program. Finally, in his Decision dated November 1, 2002, the Commissioner ordered that S.R. receive compensatory services in order to help him reach competencies consistent with his appropriate grade level. In view of these circumstances, the additional facts in petitioner's second category as to which findings were not made in the Partial Initial Decision would not be indicative of a violation of S.R.'s constitutional rights by the State respondents and therefore are not material.

In terms of the standards applicable to a motion for summary decision, petitioner has not demonstrated that there are any genuine issues of material fact with respect to Count Seven. Further, petitioner has cited no case which would require the State respondents to act preemptively to cause S.R. to have a program in effect immediately upon his expulsion. In the absence of any support for petitioner's position, the State respondents are entitled to prevail as a matter of law. Therefore, I **CONCLUDE** that the motion for summary decision should be granted.

Accordingly, it is **ORDERED** that:

1. The State respondents' motion for summary decision is granted.

2. Counts Five, Six and Seven of the petition in this matter are dismissed.

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

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

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

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

Dec. 23, 2002
DATE

Richard McGill
RICHARD McGILL, ALJ

Receipt Acknowledged:

January 1, 2003
DATE

M. Kathleen Duncan (for)
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 6 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

cml

S.R.R., on his own behalf and on behalf of minor child, S.R.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF ROSELLE, UNION COUNTY, WILLIAM L. LIBRERA, COMMISSIONER OF EDUCATION AND NEW JERSEY STATE BOARD OF EDUCATION,	:	
RESPONDENTS.	:	

The record of this bifurcated matter and the Initial Decision of the Office of Administrative Law (OAL), identified as "Part II," have been reviewed.[1] Petitioner's exceptions and the State's reply thereto were filed in accordance with *N.J.A.C.* 1:1-18.4 and considered by the Commissioner in reaching his decision.

UNSEALING THE DECISION

Pursuant to motion filed by counsel for petitioner, on January 8, 2003, the Commissioner of Education issued an Order **unsealing** the decision issued by the Commissioner on November 1, 2002 (No. 384A-02) in the matter entitled *S.R.R., on his own behalf and on behalf of minor child, S.R. v. Board of Education of the Borough of Roselle, Union County, William L. Librera, Commissioner of Education and New Jersey State Board of Education*, OAL

[1] As noted in the Initial Decision at page three, the issues relating to the State respondents were bifurcated from those relating to the Roselle Borough Board of Education.

DKT. NOS. EDU 1914-02 and 5616-02, or "Part I." The record of that matter, however, remains sealed.

By letter dated January 22, 2003, the parties were invited to submit reasons why the Initial and Final Decisions herein, *i.e,* "Part II" of the above-captioned matter, should not be unsealed, as well. Objections, if any, were to be filed by January 30, 2003. No objections were filed. Consequently, the Commissioner determines that this decision is unsealed, while the record remains sealed.[2]

COMMISSIONER'S DETERMINATION, PART II

Upon careful and independent review of the record in this matter, the Commissioner determines that the remaining counts with respect to the State respondents are properly dismissed. As the Administrative Law Judge (ALJ) notes, at this stage of these proceedings, there is a motion for summary decision pending *after* extensive findings of fact have been rendered by the ALJ, then adopted and supplemented by the Commissioner in his November 1, 2002 decision. Moreover, nothing in the exceptions submitted by petitioner suggests that there remains a genuine issue which can be determined only in an evidentiary proceeding. *N.J.A.C.* 1:1-12.5(b). Rather, at this point in time, the parties dispute the *significance of the facts* relative to petitioner's allegations in Counts Five, Six and Seven. In this regard, the Commissioner recognizes that "It is well-stablished that where no disputed issues of material fact exist, an administrative agency need not hold an evidential hearing in a contested case." *Frank v. Ivy Club*, 120 *N.J.* 73, 98 (1990), *citing Cunningham v. Dept. of Civil Service*, 69 *N.J.* 13, 24-25 (1975). "Moreover, disputes as to the conclusions to be drawn from the facts, as opposed to the facts themselves, will not defeat a motion for summary judgment." *Contini v.*

[2] A copy of this decision, however, will be forwarded to the OAL for appropriate action.

Board of Education of Newark, 96 *N.J.A.R.* 2d (EDU) 196, 215, *citing Lima & Sons, Inc. v. Borough of Ramsey*, 269 *N.J. Super.* 469, 478 (App. Div. 1994). *In the Matter of the Tenure Hearing of Andrew Phillips, School District of the Borough of Roselle, Union County*, Commissioner's Decision No. 129-97, decided March 20, 1997; *In the Matter of the Tenure Hearing of Neal A. Ercolano, Board of Education of Branchburg Township, Somerset County*, Commissioner's Decision No. 140-00, decided May 1, 2000. Therefore, the Commissioner finds that this matter is ripe for summary decision.

Having so determined, the Commissioner concurs, for the reasons set forth in the Initial Decision, that Counts Five, Six and Seven are properly dismissed.[3] Furthermore, and significantly in this bifurcated matter, the Commissioner notes that the *only* relief sought by petitioner which remains to be granted *relative to the State respondents* is:

- A finding that the Commissioner and the State Board violated S.R.'s right to a thorough and efficient education under Article VIII, Section IV, paragraph 1 of the New Jersey Constitution; and

- An Order directing the Commissioner and State Board to promulgate regulations to guide school districts on how to administer long-term suspensions and expulsions without

[3] These counts allege as follows: **Count Five:** The Commissioner and State Board violated S.R.'s constitutional right to due process guaranteed by the Fourteenth Amendment to the United States Constitution by failing to take steps necessary and readily available, such as issuing regulations governing pupil expulsions, to ensure that no pupil enrolled in a public school in the State of New Jersey is expelled from such school without due process and in a manner that is fundamentally unfair or arbitrary, capricious and unreasonable, and that pupils are not expelled from school without it first being demonstrated that expulsion is the most narrow means available to achieve the local education agency's interest in maintaining safe and orderly schools.

Count Six: The Commissioner and State Board violated S.R.'s right to a thorough and efficient education established under New Jersey Constitution Article VIII, Section IV, paragraph 1 by failing to take steps necessary and readily available, such as issuing regulations governing pupil expulsions, to ensure that no pupil enrolled in a public school in the State of New Jersey is expelled from such school without due process and in a manner that is fundamentally unfair or arbitrary, capricious and unreasonable, and that pupils are not expelled from school without it first being demonstrated that expulsion is the most narrow means available to achieve the local education agency's interest in maintaining safe and orderly schools.

Count Seven: The Commissioner and State Board violated S.R.'s right to a thorough and efficient education established under New Jersey Constitution Article VIII, Section IV, paragraph 1 by failing to provide S.R. or otherwise failing to ensure that S.R. was provided an appropriate alternative education program after he was expelled from the public schools operated by the Board. (Petition of Appeal at 8, 9)

violating substantive and procedural due process rights of pupils protected by the United States and New Jersey Constitutions and in a manner that is not fundamentally unfair, arbitrary, capricious and unreasonable. (Petition of Appeal at 9, 11)

Consistent with the ALJ's discussion and the decision herein, however, the Commissioner is compelled to deny the remaining relief requested.[4]

Accordingly, there being no cause of action for which relief can be granted, the Commissioner adopts the Initial Decision, with modification as set forth above, and finds that summary decision is properly granted in the Board's favor.

IT IS SO ORDERED.[5]

COMMISSIONER OF EDUCATION

Date of Decision: 2/18/03

Date of Mailing: 2/19/03

[4] Indeed, the Commissioner notes that the State Board of Education's decision issued on July 2, 2002 in the matter entitled *P.H. and PH.,. on behalf of minor child, M.C. v. Board of Education of the Borough of Bergenfield et al.* specifically instructs that "the proper course for seeking the adoption of regulations by an administrative agency is to petition the agency to adopt a new rule according to the procedures prescribed by such agency. *N.J.S.A.* 52:14B-4(f).***" *Bergenfield* at 13.

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

66-03

M.H., on behalf of minor children, M.H. and M.M.,

PETITIONER,

V.

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

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

2/24/03

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 7102-02
AGENCY DKT. NO. 165-5/02

M.H., on behalf of minor children
M.H. and M.H.,
Petitioner,

v.

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

M.H., petitioner, *pro se*

Joanne Butler, Esq., for respondent
(Schenck, Price, Smith & King, attorneys)

Record Closed: January 2, 2003 Decided: January 6, 2003

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

On or about June 5, 2002, petitioner, M.H., filed a petition of appeal with the Commissioner of Education, challenging respondent's residency determination in regard to her children, M.H. and M.H. On July 18, 2002, respondent filed its answer seeking dismissal of the petition and counterclaiming for tuition for the period of ineligible attendance. On August 2, 2002, the Department of Education, Bureau of Controversies and Disputes, transmitted this matter to the Office of Administrative Law

as a contested case for a hearing pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13.

The matter was assigned to the undersigned judge on September 4, 2002 and a telephone prehearing conference scheduled for October 1, 2002. Due to the undersigned's inability to contact petitioner at the listed telephone number and address, the prehearing conference was adjourned. Thereafter, the matter was scheduled for hearing on January 2, 2003 at the Office of Administrative Law. As the result of settlement conferences held between the parties on that date, a settlement was reached and the hearing was not held.

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

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

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

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

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

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

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

January 6, 2003
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

January 10, 2003
DATE

M. Kathleen Duncan (EJ)
DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JAN 14 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

al

M.H. o/b/o M.H. and M.H. : State of New Jersey
: Office of Admin. Law
v. :
: OAL DKT NO. EDU 7103-03
Union Board of Education :

This matter having come before the Court upon the Petition filed by Myrtle Horace, and the parties having agreed to amicably ~~[illegible]~~ resolve the matter, as follows:

1. Petitioner will pay to the Board payments of $100 per month, for fifteen months, as tuition reimbursement, starting February 15, 2003.

2. Petitioner's payments will be made by cash, money order or certified check/bank check, and are due by the 15th day of each month.

3. The total amount to be paid by Petitioner is $1500, except that payment of the entire amount of tuition due, $2500, will be due to the Board if Petitioner defaults on any payment due hereunder.

4. This is the settlement of disputed claims and does not constitute an admission of liability by either party.

2a

5. In consideration of the foregoing, Petitioner shall withdraw her Petition and the Board will withdraw its Counterclaim.

6. The parties agree to waive any and all claims which have been or could have been raised against the other party, except that the Board does not waive its right to seek payment of the entire amount due, $2500, in the event of Petitioner's default.

Myrtle Horace
Petitioner Myrtle Horace

Joanne L. Butler
For the Board
Joanne Butler, Esq

Elinor R. Reiner
HON. ELINOR R. REINER

1/3/05
Date

OAL DKT. NO. EDU 7102-02
AGENCY DKT. NO. 165-5/02

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

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 2/24/03

Date of Mailing: 2/24/03

65-03

JOAN BREVARD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

February 20, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 7468-99
AGENCY DKT. NO. 108-5/99

JOAN BREVARD,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON,

Respondent.

Nancy I. Oxfeld, Esq., for petitioner
(Oxfeld Cohen, PC, attorneys

Ma´Lee L. Wing, Esq., for respondent
(Hunt, Hamlin & Ridley, attorneys)

Record Closed: December 27, 2002 Decided: January 3, 2003

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

Petitioner, a tenured teaching staff member employed by respondent, filed a petition with the State Department of Education (DOE), on or about May 10, 1998, disputing the treatment of certain days pertinent to her leave time. The DOE transmitted the matter to the Office of Administrative Law on July 13, 1999 for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to 13.

Hearing dates were adjourned at the requests of the parties for various reasons, and the matter was placed on the inactive list. A hearing was subsequently scheduled for November 25, 2002. The parties appeared on that date, conferred, and reached a resolution of the matter. An executed Stipulation of Settlement was filed on December

27, 2002, on which date the record was closed. Enclosed herewith is a copy of the Stipulation.

Having reviewed the terms Stipulation of Settlement Agreement, I **FIND** the parties voluntarily have agreed to the terms and conditions of the settlement as evidenced by the signatures contained thereon and that the settlement fully disposes of all issues in controversy and is consistent with the law.

Therefore, I **ORDER** that the parties comply with the terms of the settlement and that these proceedings be and are hereby **CONCLUDED**.

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

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

January 3, 2003
DATE

Diana C. Sukovich
DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

January 7, 2003
DATE

M. Kathleen Jennaro
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 9 2003
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

\mvh

OXFELD COHEN, PC
50 Commerce Street
Newark, New Jersey 07102
(973) 642-0161
Attorneys for Petitioner

BEFORE THE COMMISSION OF EDUCATION
OF THE STATE OF NEW JERSEY
OAL DKT. NO. EDUOR 07468-99N
AGENCY REF. NO. 108-5/99

JOAN BREVARD,	:	
Petitioner,	:	
-vs-	:	STIPULATION OF SETTLEMENT
BOARD OF EDUCATION OF THE CITY OF IRVINGTON,	:	
Respondent.	:	

The within matter having been amicably resolved between the parties, it is hereby agreed as follows:

1. The Respondent will pay to the Petitioner her full pay for the dates March 11, 1999 through June 30, 1999, her last date of employment prior to retirement;

2. The Petitioner and Respondent agree that the terms of this agreement may be raised before the Division on Workers' Compensation in the matter of Joan Brevard v. Irvington Board of Education, CP No. 99-010242;

3. This settlement fully disposes of all issues and defenses raised by either party in this matter;

4. In return for the action of Respondent in paying to Petitioner the money set forth in Paragraph 1 of this agreement, Petitioner hereby withdraws her petition in this matter before the Commissioner of Education.

OXFELD COHEN, PC
Attorneys for Petitioner
By:

NANCY I. OXFELD, ESQ.

Dated: 12/23/02

HUNT, HAMLIN & RIDLEY
Attorneys for Respondent
By:

MA'LEE L. WING, ESQ.

Dated: 12/13/02

OAL DKT. NO. EDU 7468-99
AGENCY DKT. NO. 108-5/99

JOAN BREVARD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 2/20/03

Date of Mailing: 2/21/03

70-03

IN THE MATTER OF THE TENURE	:	
HEARING OF GLORIA LEE,	:	
MOUNTAINVIEW YOUTH CORRECTIONS	:	COMMISSIONER OF EDUCATION
FACILITY, DEPARTMENT OF	:	DECISION
CORRECTIONS.	:	
	:	

February 25, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 6904-02
AGENCY DKT. NO. 318-10/02

IN THE MATTER OF THE TENURE HEARING OF GLORIA LEE, MOUNTAINVIEW YOUTH CORRECTIONS FACILITY, DEPARTMENT OF CORRECTION

Christopher C. Josephson, Deputy Attorney General, appearing for petitioner

Marvin T. Braker, Esq., appearing for respondent

Record Closed: January 22, 2003 Decided: January 22, 2003

BEFORE **ISRAEL D. DUBIN**, ALJ:

This matter was transmitted to the Office of Administrative Law on October 23, 2002 for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

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

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

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

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

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

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

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

January 23, 2003
DATE

ISRAEL D. DUBIN, ALJ

Receipt Acknowledged:

January 28, 2003
DATE

M. Kathleen Duncan (Ex)
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 29 2003

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

IDD/mamf

DOCUMENTS IN EVIDENCE

Jointly submitted

J-1 Settlement Agreement

Gloria Lee

vs

NJ Department of Corrections

SETTLEMENT AGREEMENT

The parties hereto agree to settle this matter in accordance with the following terms:

1. The appellant admits that she is guilty of having violated the State of New Jersey's policies on violence in the workplace, and as such behaved in a manner unbecoming a public employee. She agrees to accept a suspension without pay for 5 working days for that infraction.

   The Department agrees to withdraw its request to the New Jersey Department of Education that tenure charges be implemented.

2. The parties hereto stipulate that this agreement shall fully dispose of all issues in controversy between them with regard to this matter.

3. The appellant will not receive any back pay, counsel fees, costs or any other monetary relief as a result of this settlement.

4. The personnel file for the Department of Corrections will indicate that Ms. Lee served her 5-day suspension on October 21, 22, 23, 24 and 25, 2002. The record will also show that the appellant was placed on a leave of absence without pay for personal reasons effective October 26, 2002. She will be returned to active duty on December 5, 2002, or the day after she signs this settlement agreement, whichever is later. She will contact Assistant Director Patty Friend of the Office of Educational Services (609/633-6648) *prior* to returning to duty in order to receive reporting instructions. The appellant will be assigned to a new duty station at the Edna Mahan Correctional Facility for Women.

5. The appellant agrees to apply for a Service Retirement with a requested effective date of no later than February 1, 2003.

   A. In the event the Division of Pensions grants the appellant's retirement request she will retire from her position on the effective date of her approved retirement.
   B. If the Division of Pensions denies her request for retirement, *or* if she fails to apply for a service retirement by February 1, 2003, she will be considered to have resigned in good standing from her position effective February 1, 2003 or the date of her requested retirement, whichever is first.
   C. If the Division of Pensions has not yet determined, by her requested date of retirement, whether it will approve her application for service retirement, the employee will be considered to have resigned in good standing effective on that date. This will not affect her retirement eligibility. If the application for service retirement is approved sometime after her resignation, she will receive her pension in accordance with the laws governing the Public Employees Retirement System.

6. This stipulation of settlement shall not constitute a precedent in any other matter involving another employee.

7. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Corrections, their employees, agents or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information and disputes giving rise to this action up to the date of this agreement, including but not limited to all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Conscientious Employee Protection Act, and any contract expressed or implied.

8. Appellant will not reapply in the future to the New Jersey Department of Corrections for any position.

9. In accordance with the *Holland Consent Decree* all internal records of the Department of Corrections with regard to this matter will be kept intact. The Department shall exercise a good faith effort to answer all employer inquiries concerning the appellant with the response she retired or resigned in good standing, whichever is applicable. However, nothing herein shall preclude the Department from releasing information on this matter to any public employer who has a properly executed release.

Authorization has been given by the Department of Corrections to agree to this settlement. The parties have read the settlement agreement and freely and voluntarily agree to its provisions.

Appellant 12-12-02 (Date)

Appellant's Representative 12-12-02 (Date)

Appointing Authority's Representative (Date)

DAVID SAMSON
ATTORNEY GENERAL OF NEW JERSEY

By: Christopher Josephson 12/16/02
Christopher Josephson, D.A.G. (Date)

For the Appointing Authority

4b

CERTIFICATION

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

It is also my understanding that this Settlement Agreement will terminate all claims and further appeal against the State of New Jersey, Department of Corrections.

Gloria Lee 12-16-02

Signature (date)

4

State of New Jersey

DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW
RICHARD J. HUGHES JUSTICE COMPLEX
25 MARKET STREET
PO BOX 112
TRENTON, NJ 08625-0112
E-Mail: josepchr@law.dol.lps.state.nj.us

(609) 633-7786

JAMES E. MCGREEVEY
Governor

DAVID SAMSON
Attorney General

DOUGLAS K. WOLFSON
Assistant Attorney General
Director

January 17, 2003

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW
2003 JAN 22 A 11: 11

The Honorable Israel D. Dubin, A.L.J.
9 Quakerbridge Plaza
P.O. Box 049
Trenton, N.J. 08625-0049

Re: Gloria Lee v. N.J. Department of Corrections
Docket No. EDU6904-02

Dear Judge Dubin:

Enclosed is a copy of the executed Settlement Agreement that was reached in the above-listed matter. Please feel free to contact me if you have any questions or concerns about this matter.

Sincerely yours,

DAVID SAMSON
ATTORNEY GENERAL OF NEW JERSEY

By: Christopher C. Josephson
Christopher C. Josephson
Deputy Attorney General

c: Marvin Braker, Esq.

OAL DKT. NO. EDU 6904-02
AGENCY DKT. NO. 318-10/02

IN THE MATTER OF THE TENURE	:	
HEARING OF GLORIA LEE,	:	
MOUNTAINVIEW YOUTH CORRECTIONS	:	COMMISSIONER OF EDUCATION
FACILITY, DEPARTMENT OF	:	DECISION
CORRECTIONS.	:	
	:	

The record, Stipulation of Settlement and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon review, the Commissioner approves the settlement terms since they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846; *N.J.A.C.* 6A:3-5.6(a). The matter is hereby dismissed, subject to compliance with the terms of the settlement. A copy of this decision shall be forwarded to the State Board of Examiners for action as deemed appropriate.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 2/25/03

Date of Mailing: 2/26/03

91-03

IN THE MATTER OF SARA DAVIS	:	
AND ROSEMARY JACKSON,	:	COMMISSIONER OF EDUCATION
CAMDEN CITY BOARD OF	:	DECISION
EDUCATION, CAMDEN COUNTY.	:	

SYNOPSIS

The School Ethics Commission determined that respondent Board members violated *N.J.S.A.* 18A:12-24(b) and (c) of the School Ethics Act for the actions they took to bring about the appointment of their attorney, Mr. Johnson, as Board solicitor. After considering the nature of the charge and the fact that respondents received erroneous attorney advice, the Commission recommended that respondents be censured.

Upon review of the record, the Commissioner, whose decision was restricted solely to a review of the Commission's recommended penalty, concurred with the Commission's recommendation that censure was the appropriate penalty for Ms. Davis. The Commissioner, however, found that, in light of Ms. Jackson's prior School Ethics infraction for which she received a reprimand, her recent violation warranted a more severe sanction than that imposed on Ms. Davis. Thus, the Commissioner imposed a penalty of a two-month suspension on Ms. Jackson.

IN THE MATTER	:	**Before the**
	:	**School Ethics Commission**
OF	:	
	:	**Docket No. C08-02**
ROSEMARY JACKSON and	:	
SARA DAVIS,	:	
CAMDEN CITY BD. OF EDUCATION	:	**DECISION**
CAMDEN COUNTY	:	
	:	

PROCEDURAL HISTORY

This matter arises from a complaint filed with the School Ethics Commission by Philip Freeman alleging that Camden City Board of Education (Board) members Rosemary Jackson and Sara Davis violated the School Ethics Act, N.J.S.A. 18A:12-21 et seq., in connection with the appointment of Harvey Johnson, Esq. as Solicitor for the Camden City Board of Education. Mr. Freeman is a former member of the Board.

Ms. Davis and Ms. Jackson filed answers to the complaint denying that their participation in discussions and votes regarding the appointment of Mr. Johnson violated the Act.

The Commission advised the parties that the complaint would be discussed at the Commission's meeting of August 27, 2002 and asked the parties to appear. All parties appeared, respondents with counsel. At the public session of the meeting, the Commission found probable cause to credit the allegation that Rosemary Jackson and Sara Davis violated the School Ethics Act, N.J.S.A. 18A:12-21 et seq., specifically N.J.S.A. 18A:12-24(b) and (c), when they took various actions to bring about the appointment of Harvey Johnson, Esq. as Solicitor for the Board and voted in favor of his appointment. The Commission found that the material facts were not in dispute. Therefore, it invited the respondents to file written submissions within 30 days of the date of the probable cause decision setting forth the reasons that the Commission should not find them in violation of N.J.S.A. 18A:12-24(b) and (c) of the School Ethics Act.

Respondents hand-delivered a timely written submission, which the Commission fully considered at its November 26, 2002 meeting. At its public meeting on that date, the Commission concluded that the respondents violated N.J.S.A. 18A:12-24(b) and (c) of the Act and recommended a penalty of censure for both Sara Davis and Rosemary Jackson.

FINDINGS OF FACT

The Commission discerned the following facts from the pleadings, the documents submitted, testimony and its investigation of this matter.

Ms. Davis was elected to the Camden City Board of Education in April 1999. She was re-elected to the Board in April 2002. Ms. Jackson was at all times relevant to this complaint, a member of the Board, having served for approximately nine years. Mr. Freeman ran for re-election to the Board in April 2002, but lost.

On April 17, 2002, Harvey Johnson, Esq. sent his firm's resume to the Board's business administrator. In his cover letter, Mr. Johnson set forth that Rosemary Jackson asked him to submit the resume to be considered as board solicitor at the upcoming reorganization meeting. His resume sets forth that the only school board that he represents is the Lawnside Board of Education, which is a district consisting of one school.

On April 24, 2002, the Board held its annual reorganization meeting. Ms. Davis was sworn in for a second term and was elected board president at that meeting. Ms. Jackson was elected vice-president. A motion was made to table resolutions selecting the auditor, solicitor, labor attorney and professional negotiator. That motion was defeated for lack of a second. A resolution had been prepared by the business administrator appointing the law firm of Sumners George, P.C. as board solicitor. Sumners George, P.C. was currently serving as the board solicitor. The motion was moved and seconded, but it was defeated by a vote of three in favor, four against and one abstention. Ms. Davis and Ms. Jackson voted against the appointment. A motion was then made by Ms. Jackson to appoint Harvey Johnson as board solicitor. The minutes show that the vote was four in favor, one against and three abstaining. The motion was noted as defeated. After a similar motion to appoint the labor attorney failed, the Board then adjourned to executive session. When it returned to public session, the Board voted unanimously to return the resolutions appointing the solicitor and labor attorney until the Board received responses to a request for proposals (RFP).

After the vote at the reorganization meeting, Ms. Jackson read a letter dated April 22, 2002 from Harvey Johnson, Esq. to Ms. Jackson. Therein, Mr. Johnson advised Ms. Jackson that she would not have a conflict of interest in voting to appoint him as board solicitor. The letter set forth his opinion that, although his firm represented her in an ethics matter before the Department of Education and a personal injury matter, there would be no conflict because the firm no longer represents her in any actions. He further noted that she should disclose that the firm previously represented her. After the letter was read, Ms. Davis also stated that Mr. Johnson had also done legal work for her prior to the date of the meeting.

Ms. Jackson testified that, after the reorganization meeting, Ms. Jackson spoke to a member of the New Jersey School Boards Association (NJSBA) who advised that the

initial vote to appoint Harvey Johnson as Solicitor on April 24, 2002 had succeeded by a vote of four in favor, one against and three abstentions, although the motion was noted to have failed.

Ms. Davis called a special meeting of the Board on May 2, 2002 and placed on the agenda an item, "Appointment of the Solicitor." Ms. Jackson stated at that time that Mr. Johnson was in effect the solicitor because the Board had erred at the reorganization meeting when it believed that her motion to appoint Mr. Johnson needed five votes. A motion was made to rescind the action taken at the reorganization meeting to send out an RFP for professional services for the Board Solicitor. The motion was seconded by Ms. Jackson. The motion was defeated by a vote of three to three. Ms. Jackson and Ms. Davis voted for the motion.

Another special meeting was held on May 7, 2002 at the request of Ms. Davis. According to the minutes, at this meeting, the first action was a motion by Ms. Jackson to rescind action taken on all professional services at the annual reorganization meeting. In the minutes, this motion was noted as defeated by a vote of four in favor and three against.

Philip Freeman filed this complaint against Ms. Davis and Ms. Jackson with the School Ethics Commission on May 7, 2002, alleging that the respondents had violated various provisions of the School Ethics Act.

On June 4, 2002, a special meeting of the Board was held to review the RFPs that were submitted by law firms for consideration to the appointment of Board Solicitor. The business administrator distributed the responses to the RFPs to the Board members for consideration. Initially, a motion to appoint the firm of Sumners George was defeated by a vote of four in favor and two against, with two Board members abstaining. A subsequent motion to appoint Mr. Johnson prevailed by a vote of six in favor and two against. Ms. Davis and Ms. Jackson voted in favor of Mr. Johnson.

On June 5, 2002, Mr. Freeman amended his complaint to add the respondents' participation in the discussion and votes at the June 4, 2002 meeting.

Attorney Harvey Johnson represented Ms. Davis and Ms. Jackson in separate cases before the School Ethics Commission. Those cases concluded in October 2001 for Ms. Davis and July 2001 for Ms. Jackson, when the Commissioner of Education issued his decision accepting the Commission's settlement finding her in violation of the Act and imposing a penalty of reprimand. Mr. Johnson also represented Ms. Jackson in a personal injury matter in 1995. Mr. Johnson did not charge Ms. Jackson for representing her in the School Ethics Commission case. He charged a fee to Ms. Davis, which she testified that she is still paying. Mr. Johnson represented Ms. Jackson on a contingent fee basis (for one-third of the recovery) in the personal injury matter.

ANALYSIS

The Commission found probable cause to credit the allegation that the respondents' conduct in participating in lobbying for Mr. Johnson to be the solicitor was in violation of N.J.S.A. 18A:12-24(b) and (c).

N.J.S.A. 18A:12-24(b) provides:

> No school official shall use or attempt to use his official position to secure unwarranted privileges, advantages or employment for himself, members of his immediate family, or others.

The Commission found probable cause to credit the allegation that respondents used their position to secure unwarranted privileges and advantages for Mr. Johnson in violation of N.J.S.A. 18A:12-24(b). In the present case, the business administrator recommended the law firm of Sumners George, P.C. to be board solicitor. According to the respondents' testimony, the business administrator recommended the reappointment of the firm without application or firm resume. Although it strains credulity to believe that the business administrator did not have some indication from Sumners George, which had been serving as board solicitor for approximately four years, that it wished to continue as board solicitor and that he would not have shared that information with the Board, Ms. Jackson testified that the firm's failure to indicate in writing that they wished to remain counsel was one of her reasons for not supporting the firm. It is undisputed that firm resumes had not previously been sought for the position of the board solicitor and no request for proposals had been initiated at the time of the reorganization meeting, when the respondents cast their vote against the appointment of Sumners George and for Mr. Johnson. Since the Board had not issued an RFP prior to the reorganization meeting, Mr. Johnson would not have known to apply if Ms. Jackson had not asked him to do so as shown by his April 17, 2002 letter to the Board's business administrator stating that he was asked to send his resume by Ms. Jackson in an effort to be considered as board solicitor at the upcoming reorganization meeting. Ms. Jackson's solicitation of Mr. Johnson to seek the position and her letter from him advising that she would be able to vote for him despite his prior representation of her both preceded the April 24, 2002 reorganization meeting when she cast her vote against Sumners George and in favor of Harvey Johnson. Therefore, she cannot say that anything that occurred subsequent to that meeting influenced her to vote for Mr. Johnson.

Further, at the reorganization meeting, Ms. Davis and Ms. Jackson voted against the business administrator's recommendation to appoint Sumners George as board solicitor without any discussion. Neither said at that time that they lacked knowledge that the firm wanted to continue. Mr. Johnson's letter of April 17th showed that Ms. Jackson had already encouraged Mr. Johnson to apply for the position in conversations prior to the meeting. Ms. Jackson then made the motion to appoint Harvey Johnson as Solicitor. She did so with no proposal from Mr. Johnson as to what he would charge the Board for his

services. Three other Board members went along without any information. When that motion was declared to have failed, the Board sought requests for proposals. Ms. Davis then called special meetings of the Board on May 2, 2002 and May 7, 2002 to try to rescind the action of the Board requesting proposals. Ms. Davis called a third special meeting on June 4, 2002. At that meeting, although the business administrator distributed the proposals to the Board, the Board held no discussion about them. The first motion to appoint Sumners George was declared defeated by a vote of four in favor, two against and two abstentions. Interestingly, although Ms. Jackson had received advice that only a simple majority vote was needed to appoint the solicitor, she did not inform the Board of that advice, which would have meant that the motion to appoint the firm of Sumners George actually passed. Mr. Johnson was then finally appointed on June 4th, with six board members voting in favor, including Ms. Davis and Ms. Jackson.

The respondents' objections notwithstanding, the Commission still finds that Ms. Davis and Ms. Jackson went to great lengths as noted above to have Harvey Johnson appointed as board solicitor. All of the special meetings were only to get Mr. Johnson appointed. Even if the meetings were to correct an error made at the initial reorganization meeting, as the respondents assert, the goal was never to discuss the merits of appointing any firm. If it were, then the respondents who were President and Vice-President of the Board would have opened discussion on the merits of the proposals at the June 4, 2001 meeting. The goal of the special meetings was only to see Mr. Johnson appointed, so much so that Ms. Jackson ignored prior legal advice that she had received that a simple majority was enough to appoint a solicitor. The Commission finds that the respondents so acted due to their prior relationship with Mr. Johnson. Mr. Johnson had represented Ms. Jackson at no cost and Ms. Davis had been vindicated from ethics charges with Mr. Johnson's representation.

The Commission does not have to find that Mr. Johnson represented Ms. Davis for free in order to conclude that she used her position to secure unwarranted privileges for him. Ms. Davis testified that she was still paying Mr. Johnson for his representation of her before the Commission, which had concluded October 23, 2001, when the present case was heard before the Commission. This adds to the finding that the representation was close in time to the April 24, 2002 reorganization meeting and indeed played a part in the events that took place at that meeting. The Commission also notes that it dismissed the prior complaint against her. The Commission therefore finds that Ms. Davis used her position to secure unwarranted privileges and advantages for Mr. Johnson in violation N.J.S.A. 18A:12-24(b), when she admittedly solicited from Mr. Johnson an opinion as to whether a conflict of interest would exist if she were to vote on his appointment as board solicitor, when she called special meetings to try to have the Board reconsider or rescind its vote to send out an RFP after the motion to appoint Mr. Johnson was declared failed and when she voted to appoint Mr. Johnson to be board solicitor.

Regarding Ms. Jackson, the Commission again notes that Mr. Johnson previously represented her before the Commission without charge. The Commission concludes that she used her position to secure unwarranted privileges or advantages for Mr. Johnson in violation N.J.S.A. 18A:12-24(b) when she asked Mr. Johnson to submit his firm resume to

seek the appointment as board solicitor, when she sought an opinion from Mr. Johnson as to whether her voting for him would be a conflict of interest, when she made the motion and voted to appoint Mr. Johnson at the reorganization meeting, when she seconded and voted in favor of a motion to rescind the vote to send out an RFP at the May 2nd meeting, when she made the motion and voted in favor of rescinding action taken on all professional services at the May 7th meeting, and when she voted in favor of the motion to appoint Mr. Johnson at the special meeting on June 4th.

The Commission also found probable cause to credit the allegation that Ms. Davis and Ms. Jackson violated N.J.S.A. 18A:12-24(c), which provides:

> No school official shall act in his official capacity in any matter in which he, a member of his immediate family, or a business organization in which he holds an interest, has a direct or indirect financial involvement that might reasonably be expected to impair his objectivity or independence of judgment. No school official shall act in his official capacity in any matter where he or a member of his immediate family has a personal involvement that is or creates some benefit to the school official or member of his immediate family.

In *Public Advisory Opinion A03-01* (April 24, 2001), the Commission advised that a board member would violate the Act if she were to participate in discussions and vote on the reappointment of the board attorney when the attorney had prepared simple wills and powers of attorney for her and her spouse. The Commission reasoned that the attorney's representation of her in her personal capacity created a personal involvement that constitutes a benefit to her because it creates a perception that her desire for the attorney's continued appointment as solicitor is based on the attorney being her personal counselor and therefore the board attorney's opinions may be more favorable to her viewpoint. The Commission reiterated that the benefit does not have to be financial.

However, as Mr. Johnson noted in his letter to the Board business administrator, and Mr. Peterson noted in his brief on respondent's behalf, the Commission concluded in the case, *In the Matter of Huber*, C19-96 (May 27, 1997), that a board member did not violate the Act by voting on the appointment of an attorney as board solicitor who had prepared closing papers for the board member eleven years earlier. The Commission finds that the present case much more closely resembles the situation set forth in *Advisory Opinion A03-01*, rather than the *Huber* case. In the former, the personal representation was occurring at the same time as the vote in question to reappoint the attorney as counsel to the Board. In the latter, the representation had occurred eleven years earlier, thus dissipating the conflict. Although Mr. Johnson's representation of the respondents in their respective ethics cases and his representation of Ms. Jackson in a personal injury matter had concluded, his letter to her of April 21, 2002 demonstrates that he was still providing personal legal advice to the respondents just before the reorganization meeting. Ms. Davis and Ms. Jackson both indicated that they had solicited the letter from him. When one couples Mr. Johnson's letter with the additional fact that Ms. Davis is still paying for his

representation of her, it becomes clear that the representation is not so far in the past, as in *Huber* that the conflict has dissipated.

The letter demonstrates the reason that the personal involvement creates a "benefit" for the respondents, if Mr. Johnson becomes board solicitor. The benefit of having him serve as the board attorney is that they will perceive that when the law is not clear, they will be more likely to receive legal advice that is favorable to their position. The Commission therefore concludes that Ms. Davis and Ms. Jackson acted in their official capacity in a matter in which they had a personal involvement that constituted a benefit to them when they participated in discussions, made the motions and voted on the appointment of Mr. Johnson to become the new board solicitor in violation of N.J.S.A. 18A:12-24(c).

DECISION

For the foregoing reasons, the Commission concludes that Ms. Davis and Ms. Jackson violated N.J.S.A. 18A:12-24(b) and (c) of the School Ethics Act.

PENALTY

The respondents argue in their submission that the respondents are being punished for relying on the opinion of Mr. Johnson that the School Ethics Act did not prohibit them for voting for him. They further argue that they were without assistance from the former solicitor and the lack of formal legal advice lead to confusion among the Board members.

The Commission would normally find reliance on legal advice to be a mitigating factor. However, in the present case, the respondents asked for an opinion from an attorney who they knew was seeking a contract with the Board as to whether they could vote on his contract. If they had received advice from a disinterested attorney, the fact that they sought advice would have more weight. Nevertheless, the Commission allows some mitigation of the penalty as a result of their reliance on the opinion on the justification that attorneys are obligated to provide correct legal advice, even when they have an interest in the advice that they are rendering. The Commission however, rejects the argument that the former solicitor forced the respondents to proceed without proper legal representation and that the lack of legal advice from the former solicitor contributed to their conduct. Morris Smith, Esq., who the respondents testified was from another firm, was present at the meeting of June 4, 2002 as he was quoted as thanking the board and regretting that the firm was unable to continue in a Philadelphia Inquirer article dated Wednesday, June 5, 2002 attached to Mr. Freeman's amendment to his complaint. Mr. Smith's statement in the article is not relevant for the truth of it, but to show only that he was present.

In considering the nature of the offense and the somewhat mitigating circumstances, the Commission recommends that the Commissioner of Education impose a penalty of censure for both Sara Davis and Rosemary Jackson.

This decision shall now be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction only, pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the Commission and all other parties.

Paul C. Garbarini, Chairperson

Resolution Adopting Decision – C08-02

Whereas, the School Ethics Commission has considered the pleadings filed by the parties, the documents submitted in support thereof and the findings from its investigation; and

Whereas, the Commission found probable cause to credit the allegation that respondents violated N.J.S.A. 18A:12-24(b) and (c) of the School Ethics Act in connection with their votes to appoint an attorney who had represented them on personal matters prior to the appointment; and

Whereas, the Commission reviewed the written submission of the respondents and the complainant and now concludes that their conduct violated N.J.S.A. 18A:12-24(b) and (c) of the School Ethics Act and warrants a penalty of censure; and

Whereas, the Commission has reviewed the proposed decision of its staff setting forth the reasons for its decision; and

Whereas, the Commission agrees with the proposed decision;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter and directs its staff to notify all parties to this action of the Commission's decision herein.

Paul C. Garbarini, Chairperson

I hereby certify that the Resolution
was duly authorized by the School
Ethics Commission at its public meeting
on November 26, 2002.

Lisa James-Beavers
Executive Director

LJB/e:lisa/decisions/c0802

IN THE MATTER OF SARA DAVIS	:	
AND ROSEMARY JACKSON,	:	COMMISSIONER OF EDUCATION
CAMDEN CITY BOARD OF	:	DECISION
EDUCATION, CAMDEN COUNTY.	:	

The record of this matter and the decision of the School Ethics Commission ("Commission"), finding that Camden City Board of Education Members Sara Davis and Rosemary Jackson violated *N.J.S.A.* 18A:12-24(b) and (c) of the School Ethics Act, and recommending a penalty of censure have been reviewed. Upon issuance of the decision of the Commission, respondents were provided 13 days from the mailing date of the decision to file written comments on the recommended penalty for the Commissioner's consideration.

Respondents' comments disagree with the findings and conclusion of the School Ethics Commission that they violated *N.J.S.A.* 18A:12-24(b) and (c), claiming that the Opinion of the Commission is replete with factual inaccuracies. Respondents, therefore, argue that the imposition of any penalty is inappropriate.

Initially, it must be emphasized that, pursuant to *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6A:3-9.1, the determination of the Commission as to violation of the School Ethics Act is **not reviewable by the Commissioner** herein. Only the Commission may determine whether a violation of the School Ethics Act occurred. The Commissioner's jurisdiction is limited to reviewing the sanction to be imposed based upon a finding of a violation by the Commission.

Therefore, this decision is restricted solely to a review of the Commission's recommended penalty.

Upon a thorough review of the record, the Commissioner determines to accept the Commission's recommendation, for the reasons expressed in the Commission's decision, that censure is the appropriate penalty for Ms. Davis in this matter. The Commissioner is not persuaded, however, in light of the particular factual circumstances existing here, that censure is the appropriate penalty for Ms. Jackson. In this regard, the Commissioner notes that in May 2001 the Commission found probable cause to credit the allegation that Ms. Jackson violated *N.J.S.A.* 18A:12-24(c) by voting on a bill list containing the bill of her employer, for which she agreed to accept a settlement penalty of a reprimand. Although, with respect to this particular violation, the parties agreed that Ms. Jackson did not *intentionally* violate the Act, it cannot be overlooked that an admitted violation occurred. It is without question that board members are expected to have knowledge and understanding of their responsibilities under the School Ethics Act. It is, therefore, Ms. Jackson's duty as a board member to familiarize herself with the requirements of the Act and to conform her conduct to its dictates. Given that the instant violation is Ms. Jackson's second infraction of the School Ethics Act in a short period of time, the Commissioner finds that it evidences a serious lack of attention to and concern for adherence to the law which governs her conduct, which cannot be condoned. It is crucial that board members recognize the importance of maintaining public confidence in them. Central to this effort is a clear recognition that they *must* conform their conduct to the standards set forth in the School Ethics Act. Because he finds it imperative to deter behavior that creates an impression of a violation of the public trust, the Commissioner wants it clearly understood by this and all board members that repetitive violations of the Act cannot and will not be tolerated.

Consequently, on this basis, the Commissioner determines that the School Ethics violation of Ms. Jackson here warrants a more severe sanction than that imposed on Ms. Davis. As such, the Commissioner hereby imposes a penalty of a two-month suspension on Ms. Jackson.

Accordingly, IT IS hereby ORDERED that Sara Davis be censured and Rosemary Jackson be suspended from the Board for a period of two-months,[1] as school officials found to have violated the School Ethics Act.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 2/27/03

Date of Mailing: 2/27/03

[1] Such suspension shall be effective beginning three days after the issuance of this decision.
[2] This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

92-03

CATHOLIC FAMILY AND COMMUNITY SERVICES *ET AL.*,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF COMPLIANCE,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petititioners, Catholic Family and Community Services and Mount St. Joseph Children's Center which operate a daytime program and a full-time resident program for handicapped children, challenged the Department's audit for 1993-94 that determined petitioners had included non-allowable costs in the calculation of the per pupil tuition charge. Following an order granting partial summary decision with respect to the issue of rental charges, the only issues remaining were related to the disallowance of salary for uncertified staff, the allocation of occupancy expenses, as well as the allocation of food expenses.

The ALJ found that petitioners did not demonstrate that the Department's determinations were not reasonable by a preponderance of the evidence. The ALJ found that regulations disallowed the salary of the professional staff member. The ALJ also found that the Department made its determinations concerning the food and occupancy expenses based on the documentation it had before it. Thus, petitioners did not sustain the burden of proof that the Department acted improperly.

The Commissioner concurred with the ALJ that petitioners failed to sustain their burden of establishing that the audit disallowances were arbitrary, capricious or unreasonable. The Commissioner upheld said disallowances. The petition was dismissed.

March 3, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1051-01
AGENCY DKT. NO. 389-11/00

CATHOLIC FAMILY AND COMMUNITY SERVICES, ET AL.,
Petitioner,
v.
DEPARTMENT OF EDUCATION, OFFICE OF COMPLIANCE,
Respondent.

Vito A. Gagliardi, Jr., Esq., appearing for Petitioner
(Porzio, Bromberg & Newman, attorneys)

Allison Colsey-Eck, Deputy Attorney General, appearing for Respondent
(David Samson, Attorney General of New Jersey, attorney)

Record Closed: December 6, 2002 Decided: January 14, 2003

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter arises from an audit the Department of Education (Department) performed on Petitioner's records for the period of July 1, 1993 through June 30, 1994,

which identified several costs that were improperly included in the calculation of the per pupil tuition charge. Specifically, Petitioner disputes the Department's determinations concerning the disallowance of rental charges, the salary of an uncertified speech professional, and the allocation of food and occupancy expenses.

The issue of rental charges was decided on May 24, 2002, at which time an order granting summary disposition in favor of Respondent was entered. Accordingly, only the issues relating to disallowance of the salary and the allocation of food and occupancy costs remain.

The regulations disallow payments made to uncertified staff, *N.J.A.C.* 6:20-4.4(a)(4),[1] and require allocations of administrative and enterprise costs to be based upon the direct costs of each program, *N.J.A.C.* 6:20-4.1(c)[2], (d).[3]

The parties represented, on the record, that the original total amount disallowed by the audit was $250,000; upon appeal, that amount was, at first, reduced to $153,000; thereafter, it was further reduced to $136,000. As a result of the appeal, Catholic Family was credited with approximately $100,000 for tuition credits not sought. The parties agreed that, at the time of hearing, a total of $20,000 was still at issue.

FINDINGS OF FACT

I. *Stipulated Facts*

The following undisputed facts relate only to the issues to be resolved herein, specifically, the disallowance of salary for uncertified staff, the allocation of occupancy expenses, as well as the allocation of food expenses.

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[1] *N.J.A.C.* 6:20-4.4(a)(4) has been recodified as *N.J.A.C.* 6A:23-4.5(a)(6) without substantive amendment. 33 *N.J.R.* 1437 (May 7, 2001)

[2] *N.J.A.C.* 6:20-4.1(c) has been recodified as *N.J.A.C.* 6A:23-4.2(f) without substantive amendment. 33 *N.J.R.* 1415, 1433 (May 7, 2001)

[3] *N.J.A.C.* 6:20-4.1(d) has been recodified as *N.J.A.C.* 6A:23-4.2(g) without substantive amendment. 33 *N.J.R.* 1415, 1433 (May 7, 2001)

1. Petitioner operates a daytime program and a full-time resident program for handicapped children.

2. The Department completed a full scope tuition audit of the business services and tuition charges of the Mount St. Joseph Children's Center (Catholic Family)[4] for the period July 1, 1993 through June 30, 1994.

3. Two auditors, Hui Ming Craft and John Cuprzinski performed the on-site audit work. Mr. Cuprzinski was in charge of the audit and prepared the report for review and approval by his superiors at the Department.

4. The audit took place over a period of time from August 14, 1995 to March 13, 1996.

5. Jacqueline Edelstein did not have an appropriate certificate from the Department to provide speech language services at the time in question.

6. No names or certificates for individuals providing speech language services at the time in question through an entity known as Jacqueline L. Edelstein Associates were provided.

7. Information regarding individual cost of meals and actual meal counts was not provided to Respondent.

8. The required exit conference between the Office of Compliance and Catholic Family was not held until September 22, 1998, over two-and-a-half years after the on-site review was completed.

9. Although the exit conference was held on September 22, 1998, the Office of Compliance did not issue its "Full Scope Tuition Audit" report until June 25, 1999.

[4] Mt. St. Joseph is a part of Catholic Family & Community Services and will be referred to as "Catholic Family."

10. There were a total of 30,396 meals served during the 10-month school year.

DISCUSSION AND CONCLUSION

The only issues to be resolved in this matter are:

a) Whether the disallowance of payment to Jacqueline L. Edelstein was reasonable;

b) Whether the allocation of food costs was reasonable; and

c) Whether the allocation of occupancy costs was reasonable.

Since Petitioner is challenging the reasonability of the audit determination the burden of proof is on CFS to demonstrate that the determinations were not reasonable by a preponderance of the evidence.

I. *Jacqueline L. Edelstein Expenses*

Turning first to the disallowance of payment to Jacqueline L. Edelstein, the regulations require that a speech language specialist, a professional staff member, must possess Department of Education certification with the appropriate endorsement for speech in order to provide services for which reimbursement is sought. *N.J.A.C.* 6:11-5.2, 6:11-6.2.

The regulations disallow the salary of a professional staff member who is not certified but is functioning in a position requiring certification from the per pupil tuition calculation. Former *N.J.A.C.* 6:20-4.4(a)(4).[5]

[5] *N.J.A.C.* 6:20-4.4(a)(4) has been recodified as *N.J.A.C.* 6A:23-4.5(a)(6) without substantial amendment. 33 *N.J.R.* 1415, 1437 (May 7, 2001).

Ms. Edelstein did not possess a current certificate for speech language specialist from the Department. Moreover, although she possessed a provisional license, it expired in June 1971. Petitioner has provided no evidence that Ms. Edelstein possessed a valid speech language specialist certificate from the Department, nor has Petitioner provided an iota of information about the purported "associates" of Ms. Edelstein who may have provided the services.

I **FIND**, therefore, that Petitioner has not sustained the burden of proof on this issue.

II. *Food Expenses*

The regulations provide that whenever a facility used by an approved private school for the handicapped is also used for unrelated activities, all costs associated with the operations shall be charged to the associated activities which they benefit. *N.J.A.C.* 6:20-4.1(d).[6]

In calculating the food costs to be attributed to the sending districts, Respondent reviewed the total food expense costs, including payroll costs, and developed a method of apportioning the costs by totaling the number of meals served based on enrollment numbers provided by the school as well as the number of residents reported on the DYFS reports. Based upon these figures, the Department developed a ratio of the number of meals served to the school program compared to the total number of meals served to both the school program and resident program. This ratio was then applied to the total food service costs which included, among other things, salary.

Respondent established that there were a total of 30,396 meals served during the 10-month school year. This total, 30,396 meals, included only breakfast, lunch and dinner. Respondent did not include meal counts for either the afternoon or evening

[6] *N.J.A.C.* 6:20-4.1(d) has been recodified as *N.J.A.C.* 6A:23-4.2(g) without substantial modification. 33 *N.J.R.* 1415, 1433 (May 7, 2001).

snack. The Department then determined how many breakfasts and lunches were served only to school students, which is 14,586 as shown on Exhibit W, Schedule C. The parties differ by only six meals in the total number of breakfasts and lunches served to students during the 10-month school year.[7] Thus, the ratio of the total number of breakfasts and lunches served to students compared to the total number of meals served is 14,586/30,396 or 47.99 percent. (Using Petitioner's calculations, the ration is 14,580/30,396 or 47.99 percent).

On the other hand, petitioner claims that the ratio should include the cost of the afternoon snack, claiming that the snack costs the same as the cost of a lunch or breakfast. While a snack does cost something, without documentation on which to base a conclusion, it is unreasonable to presume that it costs the same as full meals.

Petitioner also asserts that the daytime lunch meal costs $1.50 more than the evening meal because it is a more substantial, hot meal. While the rationale for providing the hot meal at lunch time is reasonable, as is the presumption that such a meal costs more than the lighter evening meal, there is no documentation in the body of evidence in this matter on which to base a calculation. There is not even a hypothetical cost analysis presented by Petitioner to support the $1.50 additional cost of the noon meal.

Finally, I note that Petitioner raises the issue of the allocation of the salaries from the three cooks at this juncture. Once again, the issue is really whether the Respondent had sufficient information on which to base a determination that the salaries should have been allocated differently. Despite having been given numerous opportunities at the time of the audit, the various levels of appeals and at this hearing, Petitioner failed to adequately document the allocation of time and therefore, salary, for the cooks. The Department made its determinations based on the documentation it had before it; I **FIND** that, because of the absence of documentation to support Petitioner's contention that the salaries should have been allocated differently, that the

[7] Petitioner's calculations indicated that 14,580 breakfasts and lunches were served to school students.

determination of Respondent, which was based on available documentation was reasonable.

Accordingly, I **FIND** that Petitioner has not sustained the burden of proof on the issue of food costs; I **CONCLUDE**, therefore, that the determination disallowing the expenses should be affirmed.

III. *Occupancy Costs*

Costs of occupancy are to be allocated based on the activities which they benefit. Former *N.J.A.C.* 6:20-4.1(d). Also, in accordance with former *N.J.A.C.* 6:20-4.1(c),[8] indirect costs which are incurred for a joint purpose must be included on a consistent and equitable basis.

Mr. Cuprzinski testified that when he reviewed the apportionment of occupancy expenses, he discovered that Catholic Family charged 60 percent of the costs to the school program. Mr. Cuprzinski testified further that the 60 percent figure used by Catholic Family was an estimate that had historically been charged to the school program. With no support to justify the 60 percent apportionment, Mr. Cuprzinski recalculated the costs based upon verifiable factors.

Contrary to Catholic Family's assertions, the Department did not arbitrarily or unreasonably exclude the square footage of common areas from the calculation of the percentage of occupancy costs attributable to the school program. The Department did not consider the square footage of the common areas in determining the ratio of the school program square footage usage to the combined school and residential program square footage usage; however, common area costs were included in the total occupancy costs to be apportioned between the programs and were to be split

[8] *N.J.A.C.* 6:20-4.1(c) has been recodified as *N.J.A.C.* 6A:23-4.2(f) without substantial modification. 33 *N.J.R.* 1415, 1433 (May 7, 2001).

according to the ratio of the school program square footage usage to the combined school program and residential program square footage usage.

With respect to Petitioner's assertion that all of the rooms which should have been apportioned to the school program were not included, Mr. Cuprzinski testified that the Department did consider all of the versions of the floor plans submitted by Catholic Family. In the Final Audit Determination, the Department states that it used the reconfigured floor plans provided by Catholic Family at the July 10, 2000 appeal meeting and revised the percentage of floor space used by the school. Mr. Cuprzinski explained that he could not recall specifically which rooms got reassigned, but looking at Exhibit U, page 10, he was certain that all of the space was accounted for in the Department's revised calculation, including Room #12, which Catholic Family has indicated was used as a gym.

I **FIND,** therefore, that the Department did consider the floor plans provided by the school, including those provided at the appeal hearings, in its calculation of occupancy expenses; I further **FIND** that the Department's calculation of occupancy expenses was reasonable and should be affirmed.

ORDER

I hereby **ORDER** that the determinations of Respondent with respect to each of the issues raised in this petition be and hereby are **AFFIRMED**. I further **ORDER** that this petition be and hereby is **DISMISSED WITH PREJUDICE**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of

Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

January 14, 2003
DATE

Maria M. LaFiandra
MARIA MANCINI LA FIANDRA, ALJ

Receipt Acknowledged:

January 17, 2003
DATE

M. Kathleen Duncan (LA)
DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JAN 21 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

jb

APPENDIX

Witnesses

John Kuprzinski

Anthony Novembre

Bob Jacob

Exhibits

J-1 Joint Stipulation of Statement of Facts

P-1 Responses to Interrogatories

P-2 Former Regulations – *N.J.A.C.* 6:20-4.1 (Official Notice)

P-3 Missing pages of Audit Report, Exhibit N.

A Certificate of incorporation for the Roman Catholic Diocese of Paterson

B Certificate of incorporation for Catholic Family & Community Services (formerly known as the "Associated Catholic Charities of the Roman Catholic Diocese of Paterson).

C Certificate of change of name for Catholic Family & Community Services

D Contract for the rental of land and buildings executed by the Roman Catholic Diocese of Paterson and Catholic Family & Community Services on July 2, 1990

E Letter from Joseph A. Besser, CPA, to Anthony Novembre, Ed.D., August 2, 2001

F Current informational leaflet regarding the services of Mt. St. Joseph Children's Center

G Roman Catholic Diocese of Paterson's "Financial Statements as of June 30, 1995 and 1994," prepared by the accounting firm of Arthur Anderson, LLP.

H Organizational chart for Catholic Family & Community Services

I List of members holding positions on the Catholic Family & Community Services Board of Trustees for the 1993-94 fiscal year.

J List of members currently holding positions on the Catholic Family & Community Services Board of Trustees

K Letter from the Director of the Mt. St. Joseph Children Center, sister Dorothy Sheahan, Ph.D., R.N., August 10, 2001

L Letter (along with accompanying documents) from Mr. Jacob, Chief Financial Officer for Catholic Family & Community Services to John M. Cuprzinski, State auditor for the Office of Compliance, January 11, 1999

M Letter from Thomas J. King, Director of the Office of Compliance to Sister Dorothy Sheahan, June 25, 1999

N "Full Scope Tuition Audit" (along with supporting documentation) of Catholic Family & Community Services for 1993-94 fiscal year

O Letter from Mr. Jacob to Jeffrey F. Fox, Director of Investigations and Special Audits for the Office of Compliance, September 7, 1999

P Letter from Mr. Fox to sister Sheahan, reducing the total non-allowable costs indicated in the tuition audit from $225,303.31 to $240,647.06, November 30, 1999

Q "First Level Appeal Decision

R Letter from Mr. Jacob to Mr. King, appealing the Office of Compliance's "First Level Appeal Decision, December 8, 1999

S "Report of Additional Information to the Office of Compliance" (along with accompanying documentation prepared by Catholic Family & Community Services, April 4, 2000

T Letter from Roger Bell, Planning Associate for the Office of Compliance to Mr. Jacob, regarding additional issues to be addressed by Catholic Family & Community Services prior to the preparation of a final determination by the Office of Compliance, April 24, 2000

U Supplemental report (along with supporting documentation) prepared by Catholic Family & Community Services, July 10, 2000

V Letter from Mr. King to Sister Sheahan, reducing the total non-allowable costs from $240,647.06 to $139,337.85, July 24, 2000

W "Final Audit Determination" prepared by the Office of Compliance

X An itemization of the operating costs for Catholic Family & Community Services for the 1993-94 fiscal year

Y An itemization of the operating costs for Mount Saint Joseph Children's Center for the 1993-94 fiscal year

Z Letter from Dr. Anthony Novembre, Educational Consultant to Catholic Family & Community Services' intent to file a formal appeal with the Commissioner of Education for the State of New Jersey, August 15, 2000

AA Memorandum from Sister Sheahan to Joseph Duffy, concerning the midday meal, December 7, 1998

BB Diocesan Self Insurance invoice, July 1, 1993

CC Diocesan Self Insurance invoice, January 21, 1994

DD A true and correct copy of a journal entry page evidencing the payment of rent to Diocese of Paterson, June 1994

EE A ledger sheet titled "Education Salaries Con't."

FF An invoice payment check request and copy of invoice from Jackie (Jacqueline) Edelstein in the amount of $240

GG Computer printout listing certificates held by Leah Edelstein

HH Computer printout pages listing certificates issued to persons with the last name of Edelstein

II Computer printout listing certificates issued to Jacqueline L. Edelstein

JJ A Board of Directors meeting agenda and minutes for Catholic Family & Community Services, March 22, 1994

KK A Board of Directors meeting agenda and minutes for Catholic Family & Community Services, January 25, 1994

LL A Board of Directors meeting agenda and minutes for Catholic Family & Community Services, September 22, 1993

MM A Board of Directors meeting agenda and minutes for Catholic Family & Community Services, June 30, 1993

NN Catholic Family & Community Services – Mount St. Joseph's Children's Center Report of Audit for the Fiscal year ended June 30, 1994

OO Catholic Family & Community Services Roman Catholic Diocese of Paterson Financial Statement June 30, 1994

PP Catholic Family & Community Services mission statement and accompanying information brochure

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

SUMMARY DECISION

OAL DKT. NO. EDU 1051-01

AGENCY DKT. NO. 389-11/00

CATHOLIC FAMILY AND COMMUNITY SERVICES AND MOUNT ST. JOSEPH CHILDREN'S CENTER,

Petitioners,

v.

DEPARTMENT OF EDUCATION, OFFICE OF COMPLIANCE,

Respondent.

Vito A. Gagliardi, Jr., Esq., appearing for Petitioner
(Porzio, Bromberg & Newman, attorneys)

Allison C. Eck, Deputy Attorney General, appearing for Respondent
(David Samson, Attorney General of New Jersey, attorney)

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

STATEMENT OF THE CASE

This action arises out of the on-site audit review of the Mount St. Joseph Children's Centers (Mt. St. Joseph's) business services and tuition charges for the period of July 1, 1993 to June 30, 1994.

In this action, Petitioner is challenging four specific findings of the auditors wherein certain costs were found to be non-allowable pursuant to the New Jersey Administrative Code (NJAC). These four costs were: $31,000 for Catholic Family & Community Services' (CFCS) rental of a facility from the Diocese of Paterson ("Diocese"); $7,999 paid to an allegedly uncertified teaching consultant, Jacqueline L. Edelstein; $44, 459.15 for food service costs; and $61,132.77, later reduced to $47,692.94, for occupancy expenses. Petitioner challenged these audit findings as arbitrary, capricious and unreasonable.

The Department of Education transmitted the matter to the Office of Administrative Law (OAL) on January 3, 2001, for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13.

FINDINGS OF FACT

A. Stipulated Facts

The following facts were stipulated by the parties and are incorporated herein and made a part of this decision.

1) The Office of Compliance for the Department of Education conducted an on-site audit review of the business services and tuition charges of Mt. St. Joseph's for the period July 1, 1993 through June 30, 1994.

2) State auditors John Cuprzinski and Hui-Ming Craft conducted the on-site audit review of Mt. St. Joseph's from approximately August 14, 1995 through March 13, 1996.

3) The required exit conference between the Office of Compliance and Mt. St. Joseph's was not held until September 22, 1998, over two-and-a-half years after the on-site review was completed.

4) Although the exit conference was held on September 22, 1998, the Office of Compliance did not issue its "Full Scope Tuition Audit" report until June 25, 1999.

B. Undisputed Facts

The following facts have been gleaned from the documents which the parties had submitted as a part of their joint statement of stipulated facts and are incorporated herein as findings of fact.

1) During the course of the audit, the Office of Compliance auditors never questioned or communicated with CFCS's CPA Joseph A. Besser about the financial statements that he prepared for CFCS or his knowledge of the corporate structure between the Diocese and CFCS (Certification of Besser at ¶ 9 & 10). The Office of Compliance's audit report stated that direct expenditures were charged to the private school's account which were non-allowable in accordance with NJAC. (See the Joint Statement of Stipulated Facts, Ex. N).

2) The Office of Compliance cited $31,000 for the rental or facilities from the Diocese of Paterson, alleging the Diocese and CFCS were "related parties," pursuant to the NJAC. (Ex. N)

3) The Diocese of Paterson was incorporated on April 29, 1938 and the offices of the corporation are perpetually comprised of individuals holding certain positions in the Diocese. Those positions are Right Reverend Bishop, Right Reverend Vicar General or during a vacancy in such office the administrator of the Diocese, Reverend Chancellor and two priests in good standing. (Ex. A)

4) CFCS was separately incorporated on December 26, 1946. The incorporation documents provided for six trustees in said incorporated

offices and the individuals associated with the incorporation of CFCS were principally different from the original offices of the Diocese. (Ex. B)

5) CFCS has its own Board of Trustees and its own Executive Director. (Ex. U). The Bishop of the Diocese is not a member, officer or even a "Ex Officio" member of the Board of Trustees for CFCS. (Ex. U)

6) Through various locals of appeals and in this action as well, the Office of Compliance has asserted that $31,000 of rental expenses must be excluded from the certified cost per pupil because the Diocese and CFCS are considered by the office to be related parties.

7) In the audit report as well as the various appeals, the Office of Compliance upheld the finding.

8) It was found that $7,990 paid to an outside consultant, Jacqueline L. Edelstein, who worked in a position requiring certification. However, CFCS had provided no proof of certification.

9) In total, there are four items in dispute in this matter which were contested after the audit at the first and second level appeals and which were upheld on those appealed by the Office of Compliance.

10) As a result of the Office of Compliance's position on the four issues in dispute in this matter, CFCS should owe $139,337.85. However, because it did not charge full tuition, which would have entitled CFCS to an additional $118,985, the amount to be refunded per the second level appeal decision is $20,352.85.

LEGAL DISCUSSION AND CONCLUSION

The parties have stipulated to most of the facts and have stipulated to evidence concerning the contested facts with their briefs. Since the underlying issues relate to

legal interpretation of regulations, the parties have made cross application for summary decision.

Summary decision should be granted when the papers and discovery which have been filed, together with any affidavits, show that there is no genuine issue as to any material fact challenged and the moving party is entitled to prevail as a matter of law. The standards governing the grant or denial of summary judgment are set forth by the New Jersey Supreme Court in *Brill v. Guardian Life Insurance Co. of America*, 142 *N.J.* 520 (1995). *Brill* requires a factfinder to consider whether the evidentiary material presented when viewed in the light most favorable to the non-moving party are sufficient to permit a rational factfinder to resolve the alleged dispute in favor of the non-moving party. *Id* at 523.

In the administrative forum, *N.J.A.C.* 1:1-12.5 provides the standard for summary decision. The New Jersey Supreme Court sustained the validity of *N.J.A.C.* 1:1-12.5, "noting that it is related to and, indeed essential to the proper conduct of administrative hearings in a contested matter." *Contini v. Bd. of Education of Newark*, 286 *N.J. Super.* 106, 116 (App. Div. 1995) (Citations omitted).

Since the parties have been able to stipulate to most of the facts and evidence has been submitted with the respective briefs and the underlying issues relate to a legal interpretation of regulations, this matter is ripe for summary decision. There are four issues to be resolved by this application. The first is whether the Department of Education correctly determined that Petitioner and the Diocese of Paterson are related parties and proper disallowed $31,000 in rent for the audit period in question; the second issue is whether the disallowance of $7,990 paid to an allegedly uncertified speech therapist was properly disallowed; third is the issue of whether the Department of Education properly determined that $44,459 in food expenses should be excluded from the certified actual cost per pupil; and finally, whether the Department of Education properly determined that $47,692.94 in occupancy costs were non-allowable.

The State legislature has provided for the education of handicapped children in Chapter 46 of the school laws which set forth the types of facilities and programs in which such youngsters may be enrolled. Public schools having handicapped students whom they are unable to educate through other means, may send these students to approved private schools for handicapped children, provided that certain specific options are not otherwise available. *N.J.S.A.* 18A:46-14(a) through (g). A private school which receives handicapped students from a public school district may not charge the local board tuition which exceeds the actual costs per pupil as determined under rules prescribed by the Commissioner of Education and approved by the State Board of Education. *N.J.S.A.* 18A:46-21.

The Legislature has vested the Commissioner and the State Board of Education (State Board) with the authority to promulgate rules and regulations to provide quality educational opportunities to handicapped children. The statute provides that the Commissioner, with the consent of the State Board, shall approve special facilities and education programs which meet the requirements of the statutory scheme found in Chapter 46 of the school law. In exercising his rule making authority, the Commissioner, with the approval and consent of the State Board, has promulgated rules and regulations governing tuitions for private schools, the handicapped. The regulation at issue here, *N.J.A.C.* 6:20-4.4(a)45, provides that rental costs in excess of the actual allocated cost of ownership with an allowance of two-point-five percent for profit, are disallowed in transactions between related parties.[1] Accordingly, the first determination which must be made is whether Petitioner and the Roman Catholic Diocese of Paterson are related parties pursuant to the regulations.

The regulations provide that certain costs which are not allowable in the calculation of the certified actual cost per pupil include costs related to transactions between related parties. Within the regulations, the term "related party" is defined as a transaction in which one party to the transaction is able to control or substantially influence the actions of the other. Such transactions are defined by the relationship of

[1] *N.J.A.C.* 6:20-4.4(a)45 has been recodified as *N.J.A.C.* 6A:23-4.5(a)47 without substantive amendment. 33 *N.J.A.R.* 1437 through 1438 (May 7, 2001).

the parties and include but are not limited to include those between divisions of an institution; institutions or organizations under common control through common officers, directors, or members, and an instruction and a director, trustee, officer or key employee of the institution or his or her immediate family either directly or through corporations. *N.J.A.C.* 6:20-4.4(a)45.

It is clear, therefore, that the nature of the relationship between CFCS and Roman Catholic Diocese of Paterson must be examined. The Diocese was incorporated on April 29, 1938. The officers of that corporation are perpetually comprised of individuals holding positions with the Diocese. On the other hand, CFCS was separately incorporated on December 26, 1946 and the incorporation documents provides for six trustees instead of corporate officers and the individuals associated with the incorporation of CFCS were principally different from the original officers of the Diocese. In addition, CFCS has its own Board of Trustees and its own Executive Director. Although the Bishop of the Diocese is not a member, officer or even "Ex Officio" member of the Board of Trustees for CFCS and has no authority to dictate the daily operations of CFCS or Mt. St. Joseph's, the fact that the Chancellor of the Diocese of Paterson has been on the Board for many years, as well as the fact that the bylaws of CFCS which spell out the qualifications for membership in the corporation, were not submitted with the briefs, permitting me to draw a negative reference, tend to indicate a relationship between Petitioner and the Diocese.

Moreover, Petitioner's mission is to carryout the "spiritual and corporal work of mercy and any or all kinds of charitable, educational, benevolent, philanthropic and eleemosynary works, which shall be primarily for the benefit of the Catholics of the Roman Catholic Diocese of Paterson. Petitioner's reliance on the fact that the 15 member CFCS Board has only two or three members of the clergy at any given time and none of them are decision makers for the Diocese as well as the fact that there is no requirement that CFCS must have Diocesan representatives on its Board of Directors as indications that the two entities are not related in an "interlocking directorate" is misplaced. Although Petitioner cites to the cases of *Coastal Learning Center, Inc.,* EDU 2535-91, June 30, 1995, Final Dec. January 17, 1996 and *Passaic*

Co. Elks and Cerebral Palsy Treatment Center Board of Trustees, EDU 1371-98 to demonstrate that an essential element to support any "related parties" finding must be an interlocking directorate which demonstrates interlocking control between the parties, the plain language of the regulation clearly contemplates a broader application than that which the Petitioner asserts. The regulation as cited above contemplates various relationships between the parties but also contains non-limiting language to those relationships which are set forth in the regulation. I **FIND** that the Diocesan guarantee of CFCS's ability to continue as an ongoing concern, the long-term debt notation in the amount of $466,600 with no interest rate charged and the participating in the automobile self-insurance fund as well as the pension fund indicate a relationship between the parties. That is to say I **FIND** an ongoing relationship with the Diocese.

Accordingly, the next issue to be resolved is whether the rental agreement in which the parties engaged is an arms length transaction. An arms length transaction has been described as involving actions of essentially unrelated willing parties, each being relatively free to act in its own self-interest, involving actions which are voluntary and actions which generally take place in an open market. *C.F. Saxon Constr. and Mgmt. Corp. v. Master Clean of North Carolina, Inc.,* 273 *N.J. Super.* 231, 235 (App. Div. 1994), cert. denied, 137 *N.J.* 314 (1994).

In the case at bar, the rental agreement between the Diocese and Petitioner is left completely to the discretion of the landlord and does not contain provisions concerning the rights and responsibilities of the landlord and tenant. Moreover, it does not provide the basis upon which the Diocese shall determine the amount of the rent. In short, I agree with Respondent's assertion that the rental agreement evidences a relationship or understanding between the landlord and lessee that suggests more than the usual arms length agreement. It is certainly unusual for an entity to agree to lease space for an unspecified amount of money and does not demonstrate the type of rental agreement that Petitioner would enter in a normal market setting. Accordingly, I **FIND** that the determination to disallow the cost of rent was correct and should be affirmed.

Turning now to the second issue to be resolved, whether the department properly disallowed $7,990 paid to an uncertified speech therapist, Petitioner concedes that Respondent has successfully raised a contested fact regarding Jacqueline L. Edelstein and asserts that this matter can no longer be resolved by way of motion. Indeed, the certification submitted by Jacqueline Lois Edelstein in support of Respondent's position that this is the uncertified speech therapist does contain a Social Security number which is different from the Social Security number reflected in Petitioner's initial brief for Jacqueline or Leah Edelstein. Accordingly, I **FIND** that there is an issue to be determined with regard to the identity of Jacqueline L. Edelstein as well as whether she was certified for the position she held.

Third, Petitioner asserts that CFCS has provided the Office of Compliance with unrebutted evidence that $11,796 in additional costs should be added as allowable food service expenses. A review of the argument of both sides on this issue, however, reveals that the assertions of both are grounded in opinion rather than fact or law. Respondent asserts that its approach to accurately allocate food service expenses is reasonable and based on estimates of meals served as a result of Petitioner's failure to keep meal counts. On the other hand, however, Petitioner asserts that its food expenses were based on attendance records of students present during the year as well as actual food costs. Neither cites to a regulation regarding the determination of food expenses other than to note that regulations require that food service expenses be accurately allocated. Accordingly, neither party has demonstrated a right to a determination on this issue as a matter of law.

The final issue to be determined is whether the Department correctly determined that certain occupancy costs are non-allowable. The Department asserts that it based the calculation of occupancy expenses upon the total square footage used by the school program compared to the square footage used by both the school program and the residence program. The determination which was based on floor plans provided by Petitioner to the Department. On the other hand, however, Petitioner asserts that at least a portion of the square footage in question is occupied and used by the gymnasium located in the basement which is used for physical education and assembly

events during the course of the school program. Accordingly, I **FIND** that there is a genuine issue of material fact to be determined with regard to this issue.

ORDER

It is, therefore, hereby **ORDERED** that summary decision be **GRANTED** on Respondent's cross application; it is further **ORDERED** that the determination that the rental costs are not allowable be and hereby is **AFFIRMED**.

It is further **ORDERED** that the remaining portions of the cross application by Respondent be **DENIED.**

It is further **ORDERED** that all portions of Petitioner's cross application be and hereby are **DENIED.**

This order may be reviewed by the **COMMISSIONER OF EDUCATION,** either upon interlocutory review, pursuant to *N.J.A.C.* 1:1-14.10, or at the end of the contested case, pursuant to *N.J.A.C.* 1:1-18.6.

May 24, 2002
DATE

Maria M La Fiandra
MARIA M. LA FIANDRA, ALJ

jb

OAL DKT. NO. EDU 1051-01
AGENCY DKT. NO. 389-11/00

CATHOLIC FAMILY AND COMMUNITY SERVICES *ET AL.*,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF COMPLIANCE,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioners' exceptions[1] and respondent's reply thereto were filed in accordance with the provisions of *N.J.A.C.* 1:1-18.4, and were fully considered by the Commissioner in reaching his determination herein.

Petitioners' exceptions essentially recast and reiterate their arguments advanced below. Additionally, petitioners charge that in reaching her conclusions here the Administrative Law Judge (ALJ) failed to give sufficient credence to the unrebutted evidence and the testimony of the witnesses, Dr. Novembre and Mr. Jacob, presented on each of the disallowances which formed the basis of this appeal.

[1] Petitioners' exceptions purport to include a copy of "transcripts" of the September 18, 2002 hearing conducted at the OAL. Such submission appears to be a privately procured transcription of "unofficial" hearing tapes. The Commissioner notes that *N.J.A.C.* 1:1-14.11 specifies the mechanism for bringing transcripts to the record. Further, *N.J.A.C.* 1:1-14.11(h)1 directs that all transcripts be prepared in accordance with state standards established by the Administrative Director of the Courts. Petitioners' submission does not even approximate conformance with such standards, lacking, among other things, a Title page, an Index page, and Line numbers. Moreover, even assuming, *arguendo*, that petitioners' "transcripts" were in compliance with the applicable rule, they were so poorly produced that any assistive value they might otherwise have had in this matter was greatly reduced.

Upon a thorough and independent review of the full record, and finding nothing in petitioners' exceptions which would compel a contrary result, the Commissioner agrees with the ALJ's findings and conclusion that each of the audit disallowances at issue in this matter must be sustained. Initially, he agrees with the ALJ, for the reasons outlined in her May 24, 2002 partial summary decision order, (appended to this decision as pages 13a through 13j), that petitioners and the Diocese of Paterson ("Diocese") are "related parties," within the intendment of *N.J.A.C.* 6:20-4.4(a)45,[2] and, therefore, respondent's disallowance of $31,000 for petitioners' rental of facilities from the Diocese during the relevant audit period was proper. The Commissioner further concurs, for the reasons detailed in the ALJ's January 14, 2003 Initial Decision, that petitioners failed to sustain their burden of establishing that any of the remaining disallowances of the respondent, which formed the basis of this appeal, *i.e.*, food service expenses, occupancy expenses, and payment to Jacqueline L. Edelstein, was arbitrary, capricious or unreasonable and such disallowances must, therefore, be upheld.

Accordingly, the Initial Decision of the OAL is adopted for the reasons clearly articulated therein and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 3|03|03

Date of Mailing: 3|03|03

[2] Recodified as *N.J.A.C.* 6A:23-4.5(a)47 without substantive amendment May 7, 2001.

[3] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

102-03

IN THE MATTER OF FRANK PIZZICHILLO, :

FAIRVIEW BOARD OF EDUCATION, : COMMISSIONER OF EDUCATION

BERGEN COUNTY. : DECISION

:

SYNOPSIS

The School Ethics Commission determined that respondent Board member violated *N.J.S.A.* 18A:12-24(e) and (g) of the School Ethics Act for revealing confidential employee documents to a member of the public. After considering the nature of the charge and respondent's submission, the Commission recommended a penalty of reprimand.

Upon review of the record, the Commissioner, whose decision was restricted solely to a review of the Commission's recommended penalty, concurred with the Commission's recommendation and, thus, ordered respondent reprimanded as a school official found to have violated the School Ethics Act.

March 6, 2003

IN THE MATTER	:	
	:	**BEFORE THE SCHOOL**
OF	:	**ETHICS COMMISSION**
	:	
FRANK PIZZICHILLO,	:	**Docket No.: C17-02**
FAIRVIEW BOARD OF EDUCATION,	:	
BERGEN COUNTY	:	**DECISION**
	:	

PROCEDURAL HISTORY

This matter arises from a complaint filed by Radomir Glavan alleging that Respondent Frank Pizzichillo violated the School Ethics Act, N.J.S.A. 18A:12-21 et seq. Specifically, Mr. Glavan alleged that Respondent Pizzichillo, as a member of the Fairview Board of Education (Board) revealed to him confidential information regarding a Board employee. He alleged that this conduct, along with other alleged conduct, violated N.J.S.A. 18A:12-24.1(a), (e), (g) and (i) of the Code of Ethics for School Board Members.

Mr. Pizzichillo filed a timely answer to the complaint, admitting to releasing documents to Mr. Glavan at his request and discussing the request with him. He denied having committed any violation of the School Ethics Act.

The Commission advised the parties that it would discuss this matter at its meeting of August 27, 2002 and invited them to attend and bring counsel and witnesses. Both parties appeared, Mr. Pizzichillo with counsel.

At its public meeting of August 27, 2002, the Commission found probable cause to credit the allegation that Mr. Pizzichillo revealed confidential employee records in violation of N.J.S.A. 18A:12-24.1(e) and (g) of the School Ethics Act. The Commission dismissed the remainder of the charges. The Commission found that the material facts regarding the conduct on which the Commission found probable cause were not in dispute and, therefore, the Commission determined that it would decide the matter on the basis of written submissions. Mr. Pizzichillo provided a timely written submission to the Commission pursuant to a requested extension setting forth why the Commission should not find him in violation of N.J.S.A. 18A:12-24.1(e) and (g) of the School Ethics Act in connection with providing the documents in question to Mr. Glavan and disagreeing with some of the undisputed facts.

FACTS

The Commission found the following facts to be undisputed. Frank Pizzichillo is a member of the Fairview Board of Education (Board). Radomir Glavan ran for a seat on the Fairview Board of Education in 2002, but was unsuccessful. Mr. Glavan has known Mr. Pizzichillo for many years due to his longstanding involvement with the Parent Teacher Association (PTA).

In or around December 2001, Mr. Pizzichillo and Mr. Glavan saw each other at a pizza restaurant. [1] At the pizza restaurant, Mr. Glavan was with his three sons. There, Mr. Pizzichillo provided Mr. Glavan with information provided to the Board concerning a school administrator's stipend. The information included correspondence from the school administrator's attorney to the Board and the school administrator's payroll records indicating all of the deductions coming out of the school administrator's paycheck each pay period between March and June 2000. Mr. Pizzichillo spoke to Mr. Glavan later that evening, but the nature of this conversation cannot be confirmed.

In his testimony and his written submission, Mr. Pizzichillo denies providing the documents at this time and says that he did not provide them to Mr. Glavan until later, after he received confirmation from the board secretary that they were public documents that could be disseminated. He also asserts that Mr. Glavan requested them. Although the Commission believes that Mr. Pizzichillo gave Mr. Glavan the documents at the restaurant without request as Mr. Glavan testified, the main issue is whether they were confidential documents that Mr. Pizzichillo should have disseminated. This is a legal issue.

The documents in question were submitted in connection with a discrepancy with a member of the administrative staff in the District. Although the administrator could have had the matter discussed in a closed session meeting of the Board, she waived the right to a private meeting and opted to have the matter discussed publicly. The discussion of the discrepancy was held at a special meeting on May 9, 2001. The administrator was asked to be there, but not given a chance to speak.

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[1] The Commission set forth in its probable cause decision that the meeting took place in January 2002, which Mr. Pizzichillo disputed in his written submission. The Commission does not find this change to be material to its determination.

ANALYSIS

The Commission found probable cause to credit the allegation that Mr. Pizzichillo revealed employee documents to Mr. Glavan that were provided to the Board as part of the Board's dispute with an employee in violation of N.J.S.A. 18A:12-24.1(e) and (g).

N.J.S.A. 18A:12-24.1(e) of the Code of Ethics sets forth:

> I will recognize that authority rests with the board of education and will make no personal promises nor take any private action that may compromise the board.

In response to this allegation, Mr. Pizzichillo argues that the documents provided to the complainant were public documents because the employee requested that her personnel matter be discussed at a public meeting rather than in executive session. He cites to what appears to be the Open Public Meetings Act for the proposition that an employee can request that a Board discuss his or her employment in open session. However, the provision does not go on to set forth, as he asserts, that the employee therefore waives the right to maintain the privacy of the documents at issue. The Commission has not found authority for the proposition that, because the documents were given to the Board at a public meeting, all of the documents, including those with an employee's withholding information revealing the extent to which deductions were withdrawn from the employee's paycheck, her salary and her benefits, became public and could be distributed to anyone by any Board member. The Commission therefore concludes that the documents contain confidential information of an employee that was to remain with the Board. The Commission also concludes that the Board could be subject to adverse consequences if the employee were to find out that her payroll records were circulated to a member of the public that had no relationship to her dispute with the Board. The Commission therefore concludes that Mr. Pizzichillo failed to recognize that authority rests with the board of education and took private action that may compromise the Board in violation of N.J.S.A. 18A:12-24.1(e).

N.J.S.A. 18A:12-24.1(g) provides:

> I will hold confidential all matters pertaining to the schools which, if disclosed, would needlessly injure individuals or the schools. In all other matters, I will provide accurate information and, in concert with my fellow board members, interpret to the staff the aspirations of the community for its school.

As set forth above, the Commission has concluded that the documents that Mr. Pizzichillo provided to the complainant were confidential. Although Mr. Pizzichillo testified that he believed that the records were public, the specific personal information in the documents should have convinced him that they were not. If he was advised by the Board secretary that the documents were public, then he should have referred Mr. Glavan to the board secretary to let him or her provide the documents. For the foregoing reason, the Commission concludes that Mr. Pizzichillo failed to hold confidential a matter pertaining to the schools which, if disclosed, would needlessly injure an individual or the schools in violation of N.J.S.A. 18A:12-24.1(g).

DECISION

For the foregoing reasons, the Commission finds that Mr. Pizzichillo violated N.J.S.A. 18A:12-24.1(e) and (g) of the School Ethics Act. The Commission is persuaded that his penalty should be minimal since the Commission finds credible his stated belief that the documents were not confidential due to the discussion of the employee in a public meeting. Therefore, the Commission recommends a penalty of reprimand.

This decision is a final decision of an administrative agency. Therefore, it is appealable only to the Superior Court--Appellate Division.

This decision has been adopted by a formal resolution of the School Ethics Commission. This matter shall now be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction only, pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Paul C. Garbarini
Chairperson

Resolution Adopting Decision – C17-02

Whereas, the School Ethics Commission has considered the pleadings, documents, testimony and written submission in this matter; and

Whereas, the Commission found probable cause to credit the allegations in the complaint; and invited respondent to provide a written submission setting forth why he should not be found in violation of the School Ethics Act; and

Whereas, the Commission reviewed and thoroughly considered respondent's submission;

Whereas the Commission concluded at its meeting of December 17, 2002, that respondent violated the Act and recommended a penalty of reprimand and directed staff to write a decision; and

Whereas, the Commission agrees with the draft decision;

Now Therefore Be It Resolved that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the Commission's decision herein.

Paul C. Garbarini, Chairperson

I hereby certify that the School
Ethics Commission adopted
this decision at its public meeting
on January 28, 2003.

Lisa James-Beavers
Executive Director

IN THE MATTER OF FRANK PIZZICHILLO,	:	
FAIRVIEW BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
BERGEN COUNTY.	:	DECISION
	:	

The record of this matter and the decision of the School Ethics Commission ("Commission"), including the recommended penalty of reprimand, have been reviewed. Upon issuance of the decision of the Commission, respondent was provided 13 days from the mailing of such decision to file written comments on the recommended penalty for the Commissioner's consideration. Respondent submitted no comments.[1]

This matter comes before the Commissioner to impose a sanction upon Respondent Frank Pizzichillo, member of the Fairview Board of Education, based on findings of fact and conclusions of law by the Commission that he violated *N.J.S.A.* 18A:12-24 (e) and (g) of the School Ethics Act for revealing confidential employee documents to a member of the public.

Initially, it must be emphasized that pursuant to *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6A:3-9.1, the determination of the Commission as to violation of the Act is **not reviewable by the Commissioner.** Only the School Ethics Commission may determine whether a violation of the School Ethics Act occurred. The Commissioner's jurisdiction is limited to reviewing the sanction to be imposed following a finding of a violation by the School Ethics

[1]Complainant Radomir Glavin submitted comments to the Commission's decision by letter dated January 30, 2003. However, pursuant to *N.J.A.C.* 1:6C-1.1 *et seq.* and *N.J.A.C.* 1:1-18.4, Mr. Glavin is not a party to the within matter so as to provide him with the requisite standing to file written exceptions to the Commission's decision. *See, also,* the State Board decision in *In the Matter of Frank Pennucci, Board of Education of Brick Township, Ocean County,* March 1, 2000. Accordingly, Mr. Glavin's comments were not considered.

Commission. Therefore, this decision is restricted solely to review of the recommended penalty and its implementation.

Upon a thorough review of the record, the Commissioner determines to accept the Commission's recommendation that reprimand is the appropriate penalty in this matter for the reasons expressed in the Commission's decision. In so ruling, the Commissioner is satisfied that, in recommending a penalty for the violations it found, the Commission fully considered the nature of the offense and weighed the effects of aggravating and mitigating circumstances. Therefore, the Commission's recommended penalty in this matter will not be disturbed.

Accordingly, IT IS hereby ORDERED that Frank Pizzichillo be reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED. [2]

COMMISSIONER OF EDUCATION

Date of Decision: 3/6/03

Date of Mailing: 3/6/03

[2] This decision, as the Commissioner's final determination regarding penalty in this matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

100-03

J.B., on behalf of R.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF WESTFIELD, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning parent, on behalf of R.B., an adult student classified eligible for special education and related services, alleged the District's high school transcript form impermissibly identifies the student as disabled, through annotation to the effect that all courses ere "transfer credits from other public or private schools." Petitioner sought emergent relief to declare that the policy violated R.B.'s privacy rights pursuant to the Individuals with Disabilities Education Act (IDEA) and Section 504 of the Rehabilitation Act of 1973.

The ALJ concluded that R.B. was not harmed by the District's transcript policy. The ALJ noted that if the parents wanted more information in the record, they might request to have additional information and/or reasonable comments as to the meaning or accuracy of the record inserted and maintained as part of the record. (*N.J.A.C.* 6:3-6.7(e)) Petition was dismissed.

The Commissioner found that a request for relief, such as petitioner's, which was based upon claimed violations of rights guaranteed pursuant to the IDEA and/or Section 504, falls outside the Commissioner's general jurisdiction to decide controversies and disputes under school laws. The Commissioner, therefore, cannot consider petitioner's claim that the Board violated R.B's right to privacy and confidentiality. Petition was dismissed.

March 5, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
EMERGENT RELIEF
OAL DKT. NO. EDU 1132-02
Agency Dkt. No. 399-12/02

J.B. o/b/o R.B.,

Petitioner,

v.

WESTFIELD BOARD OF EDUCATION,

Respondent.

Sherry Chachkin, Esq., for petitioner
(Loughlin & Latimer, attorneys)

Richard Kaplow, Esq., for respondent

Record Closed: January 15, 2003 Decided: January 17, 2003

BEFORE **MUMTAZ BARI-BROWN**, ALJ:

STATEMENT OF THE CASE

Petitioner alleges that the school district's high school transfer form impermissibly identifies the student as disabled. Respondent, Westfield Board of Education transcript form for all students who have attended school out of district indicates that the student

has received "transfer credits from a private or public school." Petitioner seeks emergent relief to declare that the policy violates R.B.'s privacy rights pursuant to the Individuals with Disabilities Education Act ("IDEA"), 20 *U.S.C.A.* §1415 and Section 504 of the Rehabilitation Act of 1973 (29 *U.S.C.A.* §794a).

The parties have advised me that no other issues remain once the emergent relief is resolved.

FACTS

I **FIND** the relevant **FACTS** are undisputed:

1. R.B. is a 12th grade student who is classified eligible for special education and related services pursuant to IDEA and Section 504 of the Rehabilitation Act of 1973.

2. R.B. is enrolled in the Westfield Public School District.

3. In compliance with her Individual Educational Program ("IEP"), R.B. attended ninth grade in the Behavioral Healthcare outpatient program at the University of Medicine and Dentistry of New Jersey. She received her academic instruction from program staff.

4. For grades ten, eleven, and twelve, R.B. attended Collier High School, an approved in-state private school for the disabled. R.B. will graduate in June 2003.

5. R.B. requested the district to forward her transcript to the colleges and universities for which she has applied admission.

6. The Westfield School District's transcript state, "credits have been transferred from a public or private school." The transcript does not identify the out of district school or the placement. The transcript policy is applied to "all students who graduate from Westfield High School and receive a Westfield High School diploma, irrespective of whether a student is eligible for or receives special education and related services."

DISCUSSION

Petitioner contends that the Board's transcript annotation effectively identifies her as a special education student. Therefore, the Board's policy violates her right to privacy and confidentiality.

Respondent argues that the New Jersey Department of Education permits school districts to include information on the student's transcript that may directly or indirectly identify the student as educational disabled. Respondent relies on the Code Clarification issued by the Director of Special Education Programs. The memorandum states in part,

> (1) A district may include information that identifies a pupil as educationally disabled on a transcript or report card. For example, a transcript or report card may indicate that a course was modified in accordance with an IEP.
>
> (2) Identifying information contained on a transcript or report card regarding special education does not automatically constitute needless public labeling. Including such information is acceptable when the information is educationally relevant.
>
> [Respondent's Exhibit A]

Respondent further notes that for all students, third party access to transcripts must comply with the consent provisions of the Administrative Code, *N.J.A.C.* 6:3-1 *et seq.*

Indeed, *N.J.A.C.* 6A:14-2.9(a) provides, "All student records shall be maintained according to *N.J.A.C.* 6:3-6". Thus, the parents who challenge information in the student records bear the burden of proving that the information is inaccurate, irrelevant, and improper and/or not a permitted disclosure. *N.J.A.C.* 6:3-6.7. *See also*, *B.M. v. Union County Regional High School*, 95 *N.J.A.R.*2d (EDS) 149, 153 (Parents failed to meet burden of showing why reports contained in a student's record must be expunged).

Further, *N.J.A.C.* 6:3-6.3(a)(1) provides that the student record include the student's daily attendance and description of the student's progress "according to the system of ...evaluation used in the district." Consequently, listing the grades given by another district, which may or may not use the same system of evaluation, would be a potential violation of the regulation. Furthermore, *N.J.A.C.* 6:3-6.4(b) requires a school to identify, in the record, locations of student records.

Westfield does not identify the out of school district or information, which directly identifies a student as disabled. Indeed, the district provided an explanation of its transcript policy:

> The out of district schools from which Westfield accepts credits vary widely with regard to the nature of their academic programs and the grading criteria, which is utilized. For this reason...it is important to include a notation regarding credits transferred and accepted from out of district, so that colleges and universities will have the most complete and accurate information regarding students who graduate with a Westfield High School diploma. If postsecondary educational institutions want to make further inquiry regarding the specific nature of the out of district schools from which Westfield has accepted credits, that is their prerogative, and we do not believe that our District should be legally compelled to hide the fact that the students affected have not spent four years at Westfield High School.
>
> [Respondent's Exhibit A]

Petitioner's argument that the transcript annotation is a signal to the college that she has a disability is unpersuasive. Further, I reject petitioner's assumption that the annotation "may" subject her to discrimination by the educational institution.

Based on the above I **CONCLUDE** that petitioner is not harmed by the district's transcript policy. If the parents want more information in the record, the parents may request to have addition information and/or "reasonable comments as to the meaning and/or accuracy of the records" inserted into a student's record. Further, "a parent or adult pupil shall be permitted to place a statement in the pupil record commenting upon the information in the pupil record." And, the parent's statements "shall be maintained as part of the pupil record as long as the contested portion of the record is maintained.

If the contested portion of the record is disclosed to any party, the statement commenting upon the information must also be disclosed to that party." *N.J.A.C.* 6:3-6.7(e).

I **CONCLUDE** that petitioner failed to prove that the district's transcript policy violates R.B.'s privacy rights pursuant to IDEA and Section 504 of the Rehabilitation Act of 1973.

ORDER

It is **ORDERED** that the petition of J.B. o/b/o R.B be **DISMISSED.**

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

January 17, 2003
DATE

MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged:

January 22, 2003
DATE

M. Kathleen Duncan (for)
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 27 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE
LAW

sej

J.B., on behalf of R.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF WESTFIELD, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions were submitted in accordance with *N.J.A.C.* 1:1-18.4.

Petitioner's exceptions maintain that the Board's transcript annotation, although facially neutral, effectively identifies R.B. as a student with a disability by indicating that all of her credits have been earned out of district, reasoning that college admissions personnel understand that a student who is placed out of district for her entire high school career is so placed for purposes of special education. (Petitioner's Exceptions at 3, 4) Petitioner also asserts that by disclosing R.B.'s status as a student with a disability, the Board's transcript annotation violates Section 504. (*Id.* at 4) Here, petitioner cites to federal regulations, and guidance relative thereto, arguing that "transcript language which discloses a student's disabled status to a college considering the student for admission *** is enough to constitute a violation of Section 504." (*Id.* at 5) Finally, petitioner asserts that the Board's annotation is neither educationally relevant nor required by State regulation.

Upon careful and independent review of the record in this matter, the Commissioner first notes its unusual procedural history. Petitioner initially filed a request for emergent relief on October 29, 2002 before the Office of Special Education. Following its transmittal to the OAL, on December 9, 2002, Administrative Law Judge (ALJ) Bari-Brown dismissed the matter for lack of jurisdiction. The ALJ therein noted that due process hearings were limited to those subject matters expressly enumerated within the provisions of federal and State regulations and that "challenges to the contents of pupil records are not the type of subject matter contemplated by these regulations." (*J.B. on behalf of R.B. v. Westfield Board of Education,* OAL Dkt. No. EDS 9535-02, slip op. at 2-3, *citing to R.S. v. Hillsborough Board of Education,* OAL Dkt. NO. EDS 2168-00 (2000 WL 558892). The ALJ, therefore, concluded that because petitioner does not challenge issues arising under IDEA and State special education regulations, but, rather, challenges the Board's policy and practice regarding the form of high school transcripts used for all students, disabled and non-disabled, petitioner's dispute was governed by general education rules, rather than the IDEA. (*J.B , supra* at 3) There is no indication in this record whether the ALJ's determination was appealed.

Thereafter, on December 13, 2002, petitioner filed a Petition of Appeal and request for emergent relief before the Commissioner alleging that "[t]he Board's transcript annotation effectively identifies R.B. as a special education student, thereby violating her right to privacy and confidentiality." (Petition at 1, paragraph 4) By way of relief, petitioner requests "that the Board be directed to immediately remove the aforesaid annotation from R.B.'s official high school transcript." (*Id.* at 2) The matter was transmitted to the OAL for hearing, whereupon ALJ Bari-Brown concluded that petitioner failed to demonstrate that the Board's transcript policy violates R.B.'s privacy rights pursuant to IDEA and Section 504 of the

Rehabilitation Act of 1973. (Initial Decision at 5) The ALJ also determined that the Board's policy did not violate State regulations.

The Commissioner recognizes that "[p]upil records are subject to challenge by parents and adult pupils on grounds of inaccuracy, irrelevancy, impermissive disclosure, inclusion of improper information or denial of access to organizations, agencies and persons."[1] *N.J.A.C.* 6:3-6.7(a). Notably, however, State regulation specifically provides that *"[a]ppeals relating to the pupil records of educationally handicapped pupils shall be processed in accordance with the requirements of N.J.A.C. 6A:14."* (emphasis added) (*N.J.A.C.* 6:3-6.7(c)) Moreover, quite apart from this directive, the Commissioner finds that although the transcript annotation at issue *is* facially neutral and applied to all students, *this matter* is grounded in R.B.'s status as a special education student and, as such, petitioner *clearly* seeks to invoke the protections of federal law and regulation. A request for relief, such as petitioner's, which is based upon claimed violations of rights guaranteed pursuant to the IDEA and/or Section 504, falls outside the Commissioner's general jurisdiction to decide controversies and disputes under school laws. *I.D. and M.D. on Behalf of C.D. v. Board of Education of the Township of Hazlet, Monmouth County*, State Board Decision April 2, 1997; s*ee also*, *East Brunswick Board of Education v. New Jersey State Board of Education,* EHLR DEC. 554:122 (DCNJ 1982); *A.N. v. Clark Bd. of Ed.*, 6 *N.J.A.R.* 360 (1983). The Commissioner cannot, therefore, consider petitioner's claim that the Board is violating R.B.'s right to privacy and confidentiality.[2]

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[1] Pursuant to such an appeal, a "parent or adult pupil may seek to: 1. Expunge inaccurate, irrelevant or otherwise improper information from the pupil record; 2. Insert additional data as well as reasonable comments as to the meaning and/or accuracy of the records; and/or 3. Request an immediate stay of disclosure pending final determination of the challenge procedure as described in [applicable regulations.]" *N.J.A.C.* 6:3-6.7(a).

[2] To the extent petitioner contends that the transcript annotation either violates administrative code or is not required thereunder, the Commissioner finds that petitioner has not satisfied his burden of proof.

Accordingly, the within Petition of Appeal is dismissed.[3]

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: 3|05|03

Date of Mailing: 3|05|03

[3] The parties agree that no other issues remain once the emergent matter is resolved. (Initial Decision at 2)

[4] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

109-03

G.L.L. AND N.M.L., on behalf of minor child, C.C.L.,

PETITIONERS,

V.

BOARD OF EDUCATION OF UPPER TOWNSHIP, CAPE MAY COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning parents sought admission of their child, C.C.L., into the French Immersion Program offered for the kindergarten by the District. The District contended C.C.L. was not admitted because he scored below 30 on the Kindergarten Readiness Test (KRT), the test used to screen for eligibility for the program. Parents sought a retest.

The ALJ found that the criterion for the French program was developed in a fair and reasonable manner and that the District's action was well within management's prerogative. In addition to a lottery, the ALJ found that the District used the KRT to establish the child's level of maturity and skills and to reduce the pool of students who applied for the French program. The ALJ determined that petitioners did not meet their burden of establishing that the District's use, administration or grading of the KRT was unfair or arbitrary. Moreover, petitioners had signed a letter of commitment for the French program that contained clear and unambiguous language regarding the necessity of a satisfactory KRT score before a student would be admitted into the program. The ALJ denied petitioners' request to admit C.L.L. into the French Immersion Program or to retake the KRT.

Upon review of the record, including testimony, exhibits and petitioners' exceptions, the Commissioner adopted the findings and determination in the Initial Decision as his own.

March 14, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

EMERGENT RELIEF

AND RELIEF ON THE MERITS

OAL DKT. NO. EDU 6173-02

AGENCY DKT. NO. 262-8/02

G.L.L. and N.M.L. o/b/o C.C.L.,

Petitioner,

v.

UPPER TOWNSHIP BOARD OF EDUCATION,

Respondent.

Clement F. Lisitski, Esquire for petitioner

Louis J. Greco, Esquire, for respondent

Record Closed: January 14, 2003 Decided: January 22, 2003

BEFORE **W. TODD MILLER** , ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The New Jersey Department of Education Bureau of Controversies received a request for emergent relief on August 29, 2002. G.L.L. and N.M.L. parents of C.C.L. (collectively as "petitioner") requested an emergent hearing seeking admission of their child into the French Immersion Program offered by the Upper Township School District (district). The matter was transmitted to the Office of Administrative Law (OAL) on September 3, 2002. The Director of

the OAL assigned the undersigned to hear this matter pursuant to *N.J.S.A.* 52:14F-5o. The parties were contacted for the scheduling of an immediate hearing and the matter was then scheduled for hearing on September 6, 2002. The hearing on the application for emergent relief was adjourned, on the record, on September 6, 2002 due to the fact that petitioner, C.C.L. was in France until approximately September 25, 2002. The need for emergent relief was moot since petitioner was in France. Moreover, on September 6, 2002 petitioner was not ready to present the necessary witnesses regarding the merits of the underlying claim. Petitioner opted to proceed directly to a plenary hearing in lieu of addressing the issues at an abbreviated emergent hearing.

On October 11, 2002 petitioner filed a motion seeking leave to take the depositions of Debbie Miller, a teacher and Janet Norbury, a member of the child study team. The Motion was denied on October 23, 2002. Additionally, C.C.L.'s actual Kindergarten Readiness Test (KRT) (P-18) and Manual (P-19) were offered into evidence with a joint motion that they be sealed. Accordingly, an Order was issued sealing C.C.L.'s KRT test manual (P-19) and booklet (P-18) containing his actual answers.

Based upon the aforementioned events, the emergent hearing was waived and a plenary hearing on the merits was held on October 3, 25, November 4, 2002 at the OAL offices located in Atlantic City, New Jersey. After the November 4, 2002 hearing petitioner requested a thirty (30) day adjournment to prepare and supply an expert report. The hearing continued on January 3, 2003. Post hearing briefs were submitted by both parties on January 14, 2003 and the record closed on that date.

SUMMARY OF RELEVANT FACTS AND TESTIMONY

The Upper Township School District was offering a French Immersion Program[1] ("Program") for the kindergarten class of 2002-2003. The same program was offered to the

[1] This controversy is one of a series of contested matters that were filed with the Commissioner of Education challenging the district's decision-making in connection with enrollment in a French immersion program offered by the district. *See, J.L.D. o/b/o N.D. v. Board of Education of the Upper Township School District,* OAL Dkt. No. 4841-02, Agency Dkt. No. 239-8/02 and *D.M.L. v. Board of Education of the Upper Township School District,* OAL

kindergarten class of 2001-2002. The programs were titled by the district as Cohort I and Cohort II. The children in this program are taught the New Jersey core curriculum courses in French except, assignments are sent home in French and English. Petitioner's parents were advised of the program during kindergarten registration on February 7, 2002. By letter dated February 12, 2002 petitioner was notified that he was accepted into the program, subject to receiving a score above 30 on the KRT. The KRT examination was not a condition of the first cohort in 2001-2002. The applications for the first cohort were sparse and the district had to initially "push" the program in order to meet the necessary minimum enrollment. The French government sponsored the program and wanted at least 18 students to attend after factoring in a dropout rate. However, after creating more awareness for the program, the district received enough applications to start the course for the 2001-2002 school year. Twenty students were ultimately selected. Because of the low participation rate and the fact that the program was new, the first cohort did not necessitate a lottery or KRT examination. Admission into the program was on a "first come-first serve" basis. (P-9).

The district's public relations effort for the second cohort was more aggressive. As a result, significant interest was expressed for the program by 2002-2003 kindergarten class. The district received approximately forty (40) applications. Upon revising the program for the second year, the district concluded the academic intensity of the French Immersion Program together with the increased applications for the program, necessitated that a lottery method of selection and a minimum threshold-readiness be part of the admission process. Petitioner is not disputing the lottery method for selection of students for the second program. Instead, petitioner is disputing the use, administration and grading of the KRT examination resulting in C.C.L.'s exclusion from the program.

On May 30, 2002 the KRT exam was administered. Petitioner scored a 28 on the test. A score of 31 or better was required to be admitted into the second French program. According to the standardized KRT test, a score below 31 is considered as "questionable readiness." (P-18, p.33). Petitioner avers that the KRT examination was administered and graded unfairly. Further, petitioner contends that while he is not classified, he is burdened with some learning difficulties

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Dkt. No. 4641-02, Agency Dkt No. 207-7/02 While the issues were different in each of the aforementioned matters, the Commissioner affirmed the district's decision in each case.

and therefore, should have been provided extra aides, services or consideration for the KRT examination and resulting score. They further contend that the district arbitrarily denied petitioner the opportunity to retake the KRT exam in spite of the board policy which guarantees equal access to all educational programs. (Policy 0125, 0134, 2110.1 and 5750; P-24 to P-29). Petitioner suggest that, base upon the foregoing, the actions of the district were arbitrary and capricious.

Petitioner's adoptive parents, G.L.L. (father) and N.M.L. (mother) (hereinafter "parents") testified on behalf of C.C.L. They explained that the Division of Youth and Family Services placed C.C.L. in the custody of G.L.L. and N.M.L. on February 20, 2001. He was formally adopted on December 7, 2001. (P-1). Prior to being adopted petitioner was in foster care. His adoptive parents contend that C.C.L.'s natural mother was dependent on drugs and alcohol. They suggest that C.C.L. must contend with the residual effects from these substances and that it may have impacted his KRT score. (See, P-2, Adoption Summary Report). N.M.L. is a French National and is fluent in French. She converses with C.C.L. at home in French. From the onset G.L.L. and N.M.L. were very interested in the French program and, like many other parents, were active in getting the program off the ground. Moreover, because N.M.L. is a French National, the program was even more appealing to the family. Based upon the foregoing, C.C.L.'s parents were very disappointed that he was not accepted into the French program.

Prior to kindergarten C.C.L. attended a local preschool entitled Tomorrows World. His 2001-2002 evaluation from preschool demonstrates that he was progressing satisfactorily. (P-3). Nevertheless, his parents were concerned about his behavior and requested an evaluation from the district's Child Study Team (CST). The district offers free screening for any parent/child who request it. In February 2002 the parents met with the district's CST team. The Tomorrow's World progress report (P-3) was not provided to the CST team. Nor was the adoption summary referencing petitioner's physical and mental history provided to the CST team. (P-2). Janet Norbory, a social worker and CST member administered an early screening examination entitled Developmental Indicator for the Assessment of Learning, Third Edition. (hereinafter "DIAL 3") (P-22). The screening test measures a child's development of motor skills, concepts and language. The test was completed and scored in accordance with instructions contained in the manual. Petitioner scored satisfactory according to Norbory. Norbory noted that the examination

is only a tool for screening and that test scores could vary significantly depending upon the child's age at the time the test is administered. For example, a 3-year old child may score 1 out of 10 which could be acceptable for that age bracket while a 4-year old child may score 5 out of 10 which would be acceptable for that age bracket. Norbory was satisfied from the test results that C.C.L. was progressing and developing adequately for his age.

Norbory also cited a section of the DIAL 3 booklet that contains a parental evaluation of the child. The parental evaluation contained in the booklet, in this instance, indicates that according to his parents, C.C.L. is performing adequately in all areas except general development, understanding and thinking. (P-22). In these areas the parents marked that they were "a little worried" which is the first tier below "my child is doing ok." (See, P-22). Otherwise, C.C.L.'s parents noted that he was performing adequately in health, motor skills, language skills, self help skills, social skills, vision and hearing. (P-22). The parent's chief concerns at this time were related to C.C.L's behavior rather that his skills.

In early 2002 the district distributed information for the second cohort including a commitment letter. On or about February 3, 2002 petitioner executed a letter of commitment for the French program. (P-4). The commitment letter contains clear and unambiguous language regarding the necessity of a satisfactory KRT score before a student would be admitted into the program. It provides, in relevant part, as follows:

> Full understanding that if your child **scores 30 or below** on the KRT (Kindergarten Readiness Test) that your child **will not be admitted to the program.**
>
> Waive your rights to appeal admittance due to the limited enrollment or due to Board of Education decision.
>
> I have read the above and understand fully my commitment if this program is offered and signify my understanding by my signature.
>
> Parent/Guardian Signature /S/_____

On February 12, 2002 the district provided notice of the lottery results to all parents. (P-6). C.C.L. was accepted pursuant to the lottery however, his parents were alerted in the acceptance letter as follows:

> Please be aware that the status of your student in the program **will depend on** their performance in the Kindergarten Readiness Test (must test above a 30) which will be conducted in June. (P-6).

On May 24, 2002 Debbie Miller administered the KRT test to C.C.L. Miller has been a schoolteacher for fifteen years. Miller is a basic skills teacher and had taught kindergarten for two years. In 2002 she was assigned to teach first and second grade. As a basic skills teacher her duties involved instruction and teaching for students with the lowest readiness. She specifically worked with students in the area of reading and language arts. Miller had previously administered the KRT exam to about 40 students. In preparation for the KRT exam she reviewed and read the test booklet. The test was presented one-on-one. (i.e., without other students in the room). According to the instructions, the test is not time restricted but, if student does not respond to a question after a reasonable period, the itemed is considered failed. (P-21, p. 3) Moreover, the instructions further provide:

> **Do not** prompt the child into answering or performing certain items. Any additional help, other than what is listed on the test in completing a task will make the scoring invalid. So, remember let the child complete the task, without your help. **Do not** give credit for an item unless the child performs the task when you request him/her to do it, even though a parent may have noticed the child doing it at an earlier time. *The objective of the task, is that the child performs the task on request.* (P-21, p.2)

Based upon the instructions, Miller did not prompt or aid C.C.L. during the course of the exam. Miller stated that she would not have aided C.C.L. even if she was aware of his personal and medical history. Miller explained that the test consists of twenty-six tasks. Her role was to present the tasks or questions to the child and keep them "on task" during the exam. Upon completion, she also was required the grade the test. Grading the exam consisted of comparing the student's answers for each task to a predetermined answer or range of answers provided in the booklet. If the student's actual answer was not in the booklet, no credit is given for the

Monillas noted that his specific area of training and expertise is in educational administration. He explained that he designed the criteria for the first and second cohorts. Monillas was extremely active in getting the French program started and very familiar with all aspects of the program. He testified that the French Government wanted at least 18 students in each cohort through eighth grade. Monillas concluded that each class should initially consist of 20-24 students, before allowing for attrition. He adopted the state guideline for class size and explained that if a class runs over 24 students, an aide would be required. Since the French Government desired at least 18 students, Monillas estimated that if 22 students were initially accepted, the sized would diminish to 18-20 after dropouts and KRT results. If the list dropped below the desired level before the program started in September 2002, more students could be added from the waiting list. (P-6). Once the school year began the waiting list expired and the class was fixed. Monillas testified that in his educational judgment and based upon the intensity of the French program, a smaller to moderate class size was more appropriate. He opined that a smaller class would better serve the program and students.

Dr. Monillas emphasized that the French program was academically demanding since all in-class work and exams are in French. It is an all day program as opposed to the district's normal half-day program. The French program focuses less on play and more of French culture. Writing is done in script not print. More focus is placed on literacy. Based upon the demands of the program and results from the first cohort, Monillas opined that a full day kindergarten program that was taught in French warranted a preliminary assessment of the student readiness. In Dr. Monillas' opinion, this would be an improvement over the first cohort program because two students were having difficulty in the first cohort.

Monillas attempted to develop an objective method for admission into the second cohort. The district uses the KRT test for all students entering kindergarten. Monillas concluded that the KRT test was an appropriate screening tool for the French Immersion program since it was a nationally recognized readiness test as well as the test most familiar to the district. He also stated that if a student scored below 31 and thus evidenced a lack of readiness, they would be permanently excluded from the program. He did not intend for the KRT test or a different test to be retaken. Monillas explained that the KRT test was one indicator of readiness that was fair and

reasonable. In his educational judgment, the KRT test was an objective criteria and a reasonable indicator of a student's readiness for kindergarten as well as for the French program.

Notwithstanding the KRT results, Monillas stated that generally he would look at what was best for the child. On this point petitioner's counsel questioned whether Monillas would have given C.C.L. additional consideration if he was superintendent in May 2002 and had known that he was the son of a French National and suffered from residual effects of his natural mother's substance abuse. Dr. Monillas explained that he did not design the criteria for admission into the French program to be weighted upon social or family factors. The admission criterion was intended to be simple and free from subjective interpretation so as to avoid appeals and disputes such as the present matter. Accordingly, Monillas stated that he would not guess what he would have done if he were still the superintendent.

Petitioner offered the testimony of Janice G. Dennis. This witness offered a new attack on the district's decision to ues the KRT. Petitioner's case through December 2002 challenged the administration and grading of the KRT exam. The approach taken by Ms. Dennis was to challenge the district's use of the KRT exam as an inappropriate tool. Ms. Dennis is a retired educator with substantial experience and qualifications. (P-30). They include an M.A. degree in educational psychology, clinical psychology, New Jersey certifications as a school administrator, student personnel services, school psychologist and social worker as well as panoply of actual experience ranging from social worker, CST team coordinator of special education and director of special services. Ms. Dennis emphasized that during the period 1986-1989 she was employed by the Pemberton Township Board of Education and participated in crafting a kindergarten screening program that was very similar to the KRT exam. Based upon Dennis' experience and qualifications petitioner moved that she be recognized as an expert in the areas of her training and experience. The motion was granted without objection except, respondent noted that Dennis was not an expert in the area of the KRT exam or kindergarten admissions. Finally, her report and addendum were moved into evidence (P-31).

Dennis' preparation for the present matter consisted of interviewing C.C.L. and his parents, reviewing the tapes or transcripts of prior proceedings and testimony and performing research on the internet with respect to other districts that offered immersion programs.

Dennis' interview of petitioner confirm that they were highly motivated by the French program and that C.C.L. experienced a difficult early childhood by virtue of his exposure to drugs, alcohol and foster care. The fact that the household included a French National and that the C.C.L. had unique socio-economic history were important criteria that the district should have considered, according to Dennis. Dennis reviewed the testimony of witnesses and suggested that the district did not consider these important factors. Dennis cited the KRT exam booklet to support her opinion that personal factors were relevant and material to the decision making process. The KRT booklet provides, in part:

A Word of Caution:

> The KRT was designed as a screening device for kindergarten readiness, to be used with other methods in determining readiness. The instrument has a number of limitations which should be kept in mind. Handicapped children and non-English speaking children may have difficulties on some items. These children should be assessed using a wide variety of measures and techniques. Although it was intended to remove as much ethnic and socioeconomic biases as possible in the instrument, it is advised that considerations be given to a child's social, familial, and cultural environments when a significantly low score is obtained. (P-19, p. 13).

Based upon her research, experience and the KRT exam booklet, Dennis opined that the KRT exam should not be used as an exclusionary device. She concluded that it should only be used as a screening tool in conjunction with other important factors such as socioeconomic background.

Dennis also searched the internet as a means of comparative analysis regarding immersion programs. She found approximately 48 districts offering some type of immersion program. The data was then narrowed to only those districts that offered a total immersion program. Dennis found that all districts used either an application and/or a lottery method of admission. She also found that, of the districts she surveyed, none used an entrance or admission exam unless there were special or unusual circumstances (see P-31). For instance in Duval County, Florida, the district requires older students who desire to enter the program late, to take a

foreign language test. Similarly, in Prince George's County, Maryland, students take a test after completing the first year of the program. If the student is found to be struggling the district and parents discuss continued participation in the program. The data accumulated by Dennis supported her contention that the KRT exam should not be used as an exclusionary entrance exam. She concluded that such use was inappropriate and arbitrary.

ISSUES FOR CONSIDERATION

1. Was the action of the district, including the use, administration and grading the kindergarten readiness test (KRT), unreasonable, arbitrary, capricious, conducted in bad faith, without rationale basis or discriminatory? If so,

   (a) Should C.C.L. be permitted to retake the KRT test? or,

   (b) Should C.C.L. be admitted into the French immersion course on a permanent basis?

LEGAL DISCUSSION

It is a well-settled principle that policy, legislative and quasi-legislative determinations are committed to the judgment of local governmental bodies. *Riggs v. Long Beach Tp.,* 109 *N.J.* 601, 610-11, 538 *A.*2d 808 (1988); *United Advertising Corp. v. Metuchen,* 42 *N.J.* 1, 8, 198 *A.*2d 447 (1964). Such determinations enjoy a distinct presumption of validity, *First Peoples Bank of N.J. v. Medford Tp.,* 126 *N.J.* 413, 418, 599 *A.*2d 1248 (1991); *Hutton Park Gardens v. West Orange Town Council,* 68 *N.J.* 543, 564, 350 *A.*2d 1 (1975), and will remain left undisturbed absent a showing of arbitrary, capricious or unreasonable action on the part of the governmental agency. *Palamar Constr., Inc. v. Pennsauken Tp.,* 196 *N.J.Super.* 241, 250, 482 *A.*2d 174 (App.Div.1983). These principles apply to policy determinations made by local boards of education. *See Parsippany-Troy Hills Educ. Ass'n v. Board of Ed. of Tp. of Parsippany-Troy Hills,* 188 *N.J.Super.* 161, 167, 457 *A.*2d 15 (App. Div. 1983), *certif. denied,* 94 *N.J.* 527, 468 *A.*2d 182 (1983); *Kopera v. Board of Ed. of West Orange,* 60 *N.J.Super.* 288, 294,

158 *A.*2d 842 (App.Div.1960). Local boards of education are vested with broad powers in the making of decisions affecting the day-to-day operation of the schools under the jurisdiction. They have the authority to adopt rules and policies for the government and management of the schools, provided such regulation are not inconsistent with the school laws or rules of the State Board. *R.S.* 18:7-56. In the exercise of this authority boards of education are constrained to act as reasonably and in ways which are not arbitrary or capricious. *Angell et al.* v. *Board of Education of Newark,* 1959-60 *S. L. D.* 141, 143, dismissed by State Board of Education, October 17, 1964.

In the present matter petitioner is not afforded any protected property right or constitutional right for an individual component of the curriculum. Administrative Law Judge Diana Sukovich discussed a student's due process rights in *E.A., Sr. And D.A., o/b/o E.A., Jr., v. State-Operated School District of the City of Jersey City,* OAL DKT. NO. EDU 3499-98; AGENCY DKT. NO. 50-3/98; Decided October 28, 1999. Judge Sukovich relied upon *Glidden v. County of Monroe*, 950 *F.Supp.* 73 (W.D.N.Y. 1997) and stated:

> In [*Glidden*] the court held that a high school student did not have a protectable property interest in participation in a school marching band, whether such was deemed to be a curricular or extra-curricular activity, although, under applicable state law, he had a legitimate claim of entitlement to a public education. The court interpreted *Gross v. Lopez 419* U.S. *565, 95* S. Ct. *729, 42* L.Ed. *2d. 728* (1975) as follows:
>
> > Therefore, under *Gross*, the property interest which is protected by the Due Process Clause is the right to participate in the entire educational process and not the right to participate in each individual component of that process. Accordingly, it is only when a student is excluded from the entire educational process that due process must be afforded. His exclusion from a particular course, event or activity is of no constitutional import. *Glidden* at 73.

Therefore, the proper standard in this matter, which involves a dispute over participation in a specific course, is whether the district acted arbitrary or capricious. Arbitrary and capricious is defined as an "unreasonable action without consideration or in disregard of the facts or without determining principle." *Blacks Law Dictionary* (Fifth Edition). In *Bayshore Sew. Co. v. Dep't of*

Env., N.J., 122 *N.J. Super.* 184, 199 (Ch. Div. 1973) the Court expounded upon the meaning of this standard and stated:

> In law, 'arbitrary' and 'capricious' means having no rational basis. *Bicknell v. United States,* 422 *F.2d* 1055, 1057 (5 Cir. 1970). The terms 'arbitrary' and 'capricious' embrace a concept which emerges from the due process clauses of the 5th and 14th Amendments of the United States Constitution and operate to guarantee that acts of government will be grounded on established legal principles. See *Canty v. Bd. of Education, City of New York,* 312 *F.Supp.* 254, 256 (D.C.S.D.N.Y.1970). Arbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration and in disregard of circumstances. Where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached. Moreover, the court should not substitute its judgment for that of an administrative or legislative body if there is substantial evidence to support the ruling. *Kansas City Southern Ry. Co. v. Louisiana Public Service Comm'n,* 254 *La.* 160, 223 *So.2d* 132, 136 (La.Sup.Ct.1969).

The burden of proving unreasonableness for actions that are within the management's prerogative for a local board of education is on petitioner. *G.M. v. Roselle Park Borough Board of Education*, 95 *N.J.A.R* 2d. (EDU) 107, 109. It will not be "usurped or assumed by the Commissioner of Education absent a definitive showing of bad faith or arbitrary actions taken in bad faith without a rational basis." *Ibid.* Local boards of education have reasonable discretion for various managerial matters.

In a matter similar to the present, the Commissioner held that the matter of class assignment, and specifically, the session assignment of kindergarten pupils, constitutes a `management prerogative' of local boards of education, which will not be assumed nor usurped by the Commissioner unless there is " . . . a definite showing that the action of a local board of education was arbitrary, in bad faith, without rational basis, or discriminatory." *Paddock v. Demarest Bor. Bd. of Educ.*, 1974 *S.L.D.*, 435, 440. Similarly, local boards of education's authority to design school attendance area boundaries is "well-established." *Hoffman v. Board of Education of the Twp. of Cherry Hill*, 1 973 *S.L.D* 406, 408 (citations omitted.) A board's determination in that respect will be upheld if such action were not arbitrary, capricious, or discriminatory. *See*, *Hoffman,* at 409. A local board of education has discretion to determine pupil attendance zones. In the absence of prejudice or discrimination, a board may transfer

students from school to school. The Commissioner will not interfere with the determination of a local board regarding school attendance lines unless there is " . . . evidence of unjust discrimination." *J.A.P. v. Morristown Board of Education,* 1988, *S.L.D.* 2651,270 (citation omitted). The import of the aforementioned authorities is that a board of education is free to utilize its' management prerogative when dealing internal matters involving curriculum, attendance and other similar areas so long as it is rationally based and free from any arbitrary action.

The Board is responsible for the production of a "thorough and efficient" school system (*N. J. Const.* (1947), Art. VIII, § IV, par. 1) and particularly the statutory obligation to provide courses of study suited to the ages and attainments of all pupils. *N. J. S. A.* 18A :33-1. The Board has a continuing obligation placed upon it by the Legislature to adopt and alter courses of study. The standard of review utilized by the Commissioner of Education, when the districts performs this statutory function, is set forth in *Wasser v. Board of Education, Wharton* 1967 *S. L. D.* 125. In *Wasser*, a group of parents protested the adoption of a resolution reorganizing certain classes. Therein the Commissioner stated.

> "* * * The School Law vests the management of the public schools in each district in the local boards of education, and unless they violate the law, or act in bad faith, the exercise of their discretion in the performance of the duties imposed upon them is not subject to interference or reversal." *Kenney* v. *Board of Education of Montclair,* 1938 *S. L. D.* 647, affirmed State Board of Education, 649, 653
>
> Further:
>
> "* * * it is not a proper exercise of a judicial function for the Commissioner to interfere with local boards in the management of their schools unless they violate the law, act in bad faith (meaning acting dishonestly), or abuse their discretion in a shocking manner, Furthermore, it is not the function of the Commissioner in a judicial decision to substitute his judgment for that of the board members on matters which are by statute delegated to the local boards. Finally, boards of education are responsible not to the Commissioner but to their constituents for the wisdom of their actions." *Boult and Harris* v. *Board of Education of Passaic,* 1939-49 *S. L. D.* 7, 13, affirmed State Board of Education 15, affirmed 135 *N. J. L.* 329 (*Sup. Ct.* 1947), 136 *N. J. L.* 521 (*E. & A.* 1947)

In the matter at hand, petitioner challenges the KRT exam as being used inappropriately, unfairly administered and unfairly graded. Petitioner further asserts that the questions and the grading process did not take into consideration socioeconomic factors such as personal, family and medical circumstances as well as cultural differences. On this basis, petitioner claims that the district acted in an arbitrary and capricious manner.

Petitioner offered expert testimony and opinion of Janice G. Dennis. The testimony provided by Ms. Dennis clearly established that, of the districts she surveyed, an exclusionary entrance exam was not employed. Moreover, she opined that the KRT exam was an inappropriate tool to exclude a child from an immersion program unless, the final decision included socioeconomic factors. Based upon her research and experience she concluded that the district's entrance criteria was arbitrary and capricious because it incorporated the KRT exam solely for the purpose of excluding students without consideration of other factors. Dennis suggested that petitioner's socioeconomic history should have been considered. Notably, only after the KRT exam was administered did petitioner disclosed C.C.L.'s childhood difficulties to the district. The KRT results apparently corroborate some of C.C.L's difficulties. Petitioner cannot complain about or fault the decision by the district if petitioner withheld pertinent information prior to the KRT exam.

Dennis' opinion, while supported by the data she obtained from the internet and other sources, does not rise to the level such that the districts rational or decision connected with this matter must necessarily be deemed arbitrary and capricious. Her primary source of data was the internet. Once a pool of data was obtained from the internet, Dennis refined the data through e-mail or telephone contacts with the respective districts. The data was not an exhaustive search of all immersion programs but a sample of those available on the internet. Most programs included a lottery and application. Dennis found that of the 16 districts that offered total immersion programs, none required an initial entry exam. However, 4 out of 16 districts required some type of post-admission exam or similar action. The data supports that some districts use a post-admission exams while respondent uses a pre-admission exam. Therefore, the data from other districts outside New Jersey does not *ipso facto* mean that respondent herein made an arbitrary decision by using a well recognized, standardized, Kindergarten Readiness Test in a manner not used by other districts.

The purpose of the KRT exam is expressed as follows:

> The Kindergarten Readiness Test (KRT) is an assessment tool developed to measure a child's functioning through various developmental tasks. Any one or a combination of poor performance on skill areas can contribute to interference with a child's success in Kindergarten. The developmental skills which are measured in the KRT are usually considered stepping stones for success in school. Most pre-school children have acquired the skills used in this test by the time they are five. The items on this test are intended ONLY as a general screening of where a child performs in maturity, when compared with other children of this age group.
>
> The KRT is designed and intended to be used by early education teachers and other professionals who work with this age group of children. To assess levels of maturity and development of the typical later-four, five, and six year old children who are entering our kindergarten classes today. Its primary purpose is to provide additional information in helping a parent determine if his/her child is developmentally ready to begin kindergarten, in a given school year. The KRT is not meant to be used inclusively, but rather, in combination with other decision making factors. (P-20, p. 1)

It was undisputed that the KRT exam is a well-recognized, reputable, kindergarten-screening exam. Respondent uses it for all students entering kindergarten as well as by other districts for children entering kindergarten. The French program was "extra-curricular" and therefore it was not unreasonable for the district to use the KRT exam as a screening device. *Glidden, supra.*

While the districts surveyed by Ms. Dennis did not use a screening exam, it does not mean that respondent acted without reason, logic, or rational purpose. *Wasser, supra.* As explained by Dr. Monillas, the French program was intense and difficult. Two students experienced problems in the first cohort. The intent was to screen students before they entered the program so as to prevent or avoid problems up front. C.C.L.'s KRT score confirmed that he may not even be ready for kindergarten much less an intense all day foreign language program. While C.C.L. was not classified, his evaluations, parental observations and records from pre-

school confirm that he was at the low-end of kindergarten readiness. When interpreting the test results the KRT test booklet provides:

> If a child scores somewhat lower, LOWER AVERAGE this suggests that a child has not yet mastered some of the necessary developmental skills which will more than likely be needed for success in kindergarten. A parent may want to, at home, work with these weaker performance areas, or consult with private, professional or school personnel, before beginning their child in school. The KRT also indicates to the examiner, possible significant problems. If BELOW AVERAGE- QUESTIONABLE READINESS characterizes a child's performance, the parent should consult with professionals at school or in their community. (P-20, p.2).

Accordingly, based upon the KRT results, C.C.L. had not yet mastered some of the developmental skills needed for success in a regular kindergarten class. This is undisputed by the test results. How the district used or interpreted the results, in terms of petitioner's kindergarten curriculum, was clearly within its' discretion. *Glidden, supra.*

I **FIND** that the criterion for the second French program was developed in a fair and reasonable manner. Dr. Monillas utilized impartial and acceptable methods for determining which students would be admitted into the program. The lottery system was rational, fair and reasonable for a situation where forty students wanted to participate in an intense French course that the district opened to only 22 students. The logic behind the criteria had a sufficient nexus to a meaningful educational purpose. The French program is a full-day program as opposing to the districts half-day regular kindergarten program. It is taught entirely in French except for homework. More emphasis is placed on French culture rather than more traditional activities. Dr. Monillas wanted the student-teacher ratio to be in the 20-24-pupil range because of the intensity of the program. Based upon the experience from the first program, where two students were having difficulty, Monillas reasoned that a class size of 22 students was reasonable in light of the intensity of the program. He also relied upon state law as a reference for comparative class size and noted that any class above 25 students would require an aide. Based upon all these factors, Dr. Monillas relied upon his educational judgment and concluded that the class size should be small (20-24 students) and that a KRT exam should be used as a screening mechanism. The

KRT test was selected because it is a well recognized, standard screening test, which has been used by the district. I **FIND** that the action and decision by the district in connection with development of the criteria for the French program were well within management's prerogative. The criteria developed by the district was rational and within the realm of management decision-making.

I FIND that the district used the KRT exam for two purposes. First was to establish whether the child possessed the level of maturity and skills to successfully complete an intense immersion program. The evidence and testimony support respondent that the primary purpose of the KRT exam was to make sure that a child who was not ready for kindergarten did not find their way into a more intense program. The second, indirect purpose was to reduce the pool of students who applied for the French program. This too was a valid use of the KRT exam because it was clearly set forth in the program commitment letter signed by petitioner (P-4) and it provided a means of keeping the student ratio adequate for the program. I **FIND** that either use of the KRT exam was within the discretion of the district. While some districts may opt to let all students in the program and then deal with those students who struggle later, respondent choose to pre-screen admission into the program in order to avoid placing an immature child into a difficult program. Moreover, the district determined that the class size should be limited and therefore using the KRT exam for that purpose was within their discretion.

The KRT test was properly administered and graded by Debbie Miller, an experienced teacher. She performed her function strictly in accordance with the KRT instruction booklet. She painstakingly reviewed each and every question/task during the hearing. She was objective and fair in her assessment of C.C.L. Miller stated that she was not pressured by the district to produce a predetermined result or to engage in favoritism. Petitioner wanted Miller to accept C.C.L.'s various answers on the KRT test or give credit because they thought the answers were close enough. As explained by Miller, either the answer is right or wrong. The KRT exam does not permit the instructor to subjectively give credit for certain answers that are not provided in the answer booklet. Petitioner wanted additional consideration for C.C.L.'s as though he was a classified student. There was no evidence that C.C.L. was a classifiable child at the time he applied for the French program or the time of the KRT exam. Petitioner was progressing

satisfactorily, albeit at the low end, as indicated from the results of the district's DIAL 3 screening as well as from the preschool report from Tomorrows World. Even the parental portion of the DIAL 3 screening test did not strongly suggest or raise a "red flag" regarding any potential disability. Finally, the KRT test clearly states that the instructor may not assist or aid the student on any task. Miller explained that any assistance during the test by the instructor would defeat the purpose of the exam.

Petitioner relies upon *Board of Education of the Borough of Lawnside v. Board of Education of the Borough of Haddon Heights*, OAL Dkt. No. 5749-84; Agency Dkt. No. 333-6/84, Decided May 5, 1986 wherein the Commissioner reversed a decision of the district that denied a black pupil, with an exceptional academic record, entry into the National Honor Society. Petitioner's brief at page 30. That decision is distinguishable from the present matter. In *Lawnside* the district's decision was reversed because they gave no reason for denying the student admission into the honor society. The Commissioner found that the district's decision was based upon a flawed methodology and that the decision makers lacked familiarity with the criteria. In the present matter, the district clearly set forth the criteria and followed the criteria in such a way to be fair to all those students who wanted to participate in the program. Moreover, this is not a case where the petitioner was a gifted student and was denied access. To the contrary, petitioner herein has some academic problems in terms of kindergarten readiness. Those who made the decision in the present matter were aware of petitioner's problems thorough the KRT exam and from subsequent conversations with his parents. Unlike *Lawnside,* the district's decision in this matter was based upon sufficient familiarity with the pupil and the criteria was rationally related to a meaningful educational purpose.

I **FIND** that based upon all the educational information and data that was available to the district in May 2002, the district did not act in an arbitrary or unreasonable manner. I therefore **FIND** and **CONCLUDE** that Petitioner has not met its burden in establishing that the district's use, administration or grading of the KRT exam was unfair or arbitrary.

Petitioner should be commended for their zeal in seeking to educate their child especially under the circumstances presented in this matter. However, in spite of the compelling personal factors relating to C.C.L. and his family, the district discharged their duties evenhandedly.

Petitioner faced a difficult burden because, as set forth above, managerial decisions of the district must be presumed as valid absent a showing that they acted in an arbitrary, capricious or unreasonable manner. *First Peoples Bank of N.J., supra.* I note that C.C.L's father testified that the KRT test was a reasonable tool to screen students for the French program. Although he did not agree with its use in excluding C.C.L. from the French program, he nonetheless, did agree that the district's use of the KRT exam was reasonable. Moreover, Petitioner had great respect for Debbie Miller. These observations by petitioner further supported the decision of the district. Finally, petitioner believed that he had the legal right to be in the French program since he knew French. Petitioner's brief at page 14. Petitioner did not offer any authority to support such a conclusion. In fact, it has been held that the right to be included in an extra-curricular course is not a protectable property right. *Glidden, supra*

CONCLUSION AND ORDER

I **CONCLUDE** that petitioner has not satisfied its burden that the district acted in an arbitrary or capricious manner. Accordingly, petitioner's request to be admitted into the French Immersion Program (Cohort II) or to retake the KRT exam is hereby **DENIED.**

For the reasons set forth above, it is hereby **ORDERED** that petitioner's request for relief is hereby **DENIED** and petitioner's action is hereby **DISMISSED**.

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

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

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

1-22-03
DATE

W. T. Miller
W. TODD MILLER, ALJ

January 28, 2003
DATE

M. Kathleen Duncan Ed
DEPARTMENT OF EDUCATION

JAN 29 2003
DATE

Mailed to Parties:
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

APPENDIX

Documents In Evidence

For Petitioner:

P-1 Judgment of Adoption
P-2 Letter from DYFS – C.C.L.'s Personal History
P-3 Tomorrows Work – Progress Report
P-4 French Immersion – Commitment Letter
P-5 Basic Kindergarten Readiness – Skills Check List
P-6 Letter: February 12, 2002 – Notice of Lottery Results
P-7 District Minutes – January 22, 2001
P-8 District Minutes – March 21, 2002
P-8a District Minutes – January 14, 2002
P-9 French Immersion – Commitment Letter
P-10 Letter: June 5, 2001 – Monillas to J.B.
P-11 District's Kindergarten Entrance Requirements
P-12 District Minutes – May 20, 2002
P-12a District Minutes – June 17, 2002
P-12b District Minutes – June 24, 2002
P-13 February 2001 – Application for Funding
P-14 Funding for French Program
P-15 Letter: June 5, 2001 – Monillas to J.B.
P-16 District's Policy #5112
P-17 Letter: August 3, 2002 Repici to R.K. & J.K.
P-18 KRT Test Booklet (Sealed)
P-19 C.C.L.'s KRT Test Manual (Sealed)
P-20 KRT Manual Excerpt
P-21 Intentionally Skipped (See P-19)
P-22 DIAL-3 Parent Questionnaire
P-23 Intentionally Skipped (See P-19)
P-24 District Policy 0134
P-25 District Policy 0125
P-26 District Policy 5750
P-27 French Immersion Committee Minutes
P-28 District's Mission Statement - April 15, 2002
P-29 District Policy 2110.1
P-30 Resume'/Curriculum Vitae-Janice G. Dennis, M.A.
P-31 Report of Janice G. Dennis, M.A.

For Respondent:

None

WITNESSES

For Petitioner:

G.L.L.	Father of C.C.L.
N.M.L.	Mother of C.C.L.
Debbie Miller	Teacher & KRT Examiner
Janet Norbury	Social Worker and CST Member
John Phillips	Principal Primary School
Carmine Bonanni	Former Superintendent of Schools
Dr. Albert Monillas	Former Superintendent of Schools
Janice G. Dennis, M.A.	Petitioner's Expert

For Respondent:

None

OAL DKT. NO. EDU 6173-02
AGENCY DKT. NO. 262-8/02

G.L.L. AND N.M.L., on behalf of minor child, C.C.L.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF UPPER TOWNSHIP, CAPE MAY COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, including nine hearing tapes, and the Initial Decision of the Office of Administrative Law have been reviewed. Petitioners' exceptions[1] were submitted in accordance with *N.J.A.C.* 1:1-18.4[2] and were duly considered by the Commissioner in reaching his determination herein.[3]

In their exceptions, petitioners take issue with 15 of the "Factual Findings," in the Initial Decision, as follows:

> 1) Page 17 and 21 of the Initial Decision wherein the French Immersion Program was referred to as "extra-curricular." Petitioners submit that the French Immersion Kindergarten Class is a regular kindergarten class in which the New Jersey Core Curriculum courses are taught and that the only difference in this program as opposed to the standard kindergarten program is that most subjects are taught in French. (Petitioners' Exceptions at 2)

[1] Petitioners enclosed an unofficial transcript of the hearing conducted on October 3, 2002 and Petitioners' Closing Argument Brief, which was filed in proceedings before the Administrative Law Judge (ALJ) with their exceptions.

[2] Notwithstanding the filing of exceptions by counsel on their behalf, petitioners submitted a letter, dated February 19, 2003 and received on February 24, 2003, pertaining to the instant matter. In that petitioners' submission was not timely filed pursuant to *N.J.A.C.* 1:1-18.4, this letter was not considered.

[3] Respondent did not file exceptions to the Initial Decision, nor reply to petitioners' exceptions.

2) Page 8 of the ALJ's summary of facts, wherein it is stated that "[o]nce a standardized test is administered, it is preferable not to have the student re-take the test." Petitioners point out that the Kindergarten Readiness Test (KRT) booklet states that "the test may be re-administered within a month's time, if the examiner feels it is warranted." (Petitioners' Exceptions at 2)

3) "There was not sufficient time to permit a reexamination of the test. Page 8 of the Decision." Petitioners claim that there was more than enough time to re-administer the KRT to their child, given that the test was administered at the end of May and the Commitment Letter for the Cohort II class provides for the administration of the test in June. (*Ibid.*)

4) "The French Immersion Program is more intense and more difficult than the regular Kindergarten class." Petitioners assert that the program is for all levels of students and that the immersion program covers the same curriculum as the regular kindergarten class. The extended day, petitioners posit, is for additional curricular areas including cultural factors and writing in script. (*Id.* at 3)

5) "The KRT is objective and an indicator of readiness for kindergarten as well as French." Petitioners argue that "the primary purpose of the KRT is to assess the child's readiness for school" and that, according to petitioners' expert witness, Janice Dennis, the KRT is "not an appropriate instrument to be used as a determining factor in admission into a foreign language immersion program" and that the KRT is meant to be used in combination with other factors. (*Id.* at 3-4) Moreover, petitioners assert that the previous superintendent, Dr. Monillas, a witness for petitioner, testified that, if he were still the superintendent, he would consider the KRT as one indicator of readiness for kindergarten. Petitioners also aver that Dr. Monillas stated that, in considering the child for admittance into the immersion program, he would consider the fact that the child's mother spoke French in the home and then determine what was in the best interest of the child. (*Id.* at 4)

6) "On Page 71 of the opinion, the Court finds that the KRT was used as a screening device." Petitioners take issue with this language and aver that the KRT was used as an exclusionary device. (*Ibid.*)

7) "Page 19 of the opinion. The evidence and testimony support respondent that the primary purpose of the KRT was to make sure that a child who was not ready for kindergarten did not get into a

more intense program." Petitioners submit that the French Immersion Program was not a more difficult program and that that was not the purpose of the KRT. Petitioners also point to Janice Dennis's testimony that none of the other French Immersion Programs she studied administered an entrance or admission exam. (*Id.* at 5)

8) "Page 21 of the Decision. C.C.L.'s father testified that the KRT test was a reasonable tool to screen students for the French program. He did agree that the District's use of the KRT exam was reasonable. Petitioners claim that these answers were elicited by the ALJ from the father, a layman, who did not understand the implications of his answers and that in direct examination afterwards, the father clarified that it was reasonable to administer the KRT as an assessment, but not reasonable to exclude a child from a program by that assessment alone. (*Ibid.*)

9) "Page 16 of the opinion. In referring to Janice Dennis's opinion concerning other districts 'the data supports that some districts use a post-admission exam while Respondent uses a pre-admission exam.'" Petitioners argue that there is a big difference between a post-admission and pre-admission exam because the pre-admission exam excludes students from participating. (*Id.* at 6)

10) "Page 16 of the Decision. Petitioner cannot complain about or fault the decision by the District if Petitioner withheld pertinent information prior to the KRT exam." Petitioners advance the argument that they did contact the child study team concerning their son's background and difficulties in January 2002, prior to the KRT test, and also requested a retest on the KRT within 30 days of the child's testing, which is provided for in the KRT manual. (*Ibid.*)

11) "Page 3 of the Decision. Upon revising the program for the second year, the district concluded the academic intensity of the French Immersion Program together with the increased applications for the program, necessitated that a lottery method of selection and a minimum threshold-readiness be part of the admission process." Petitioners rely on Dr. Monillas' testimony, who, according to petitioners, testified that he established the lottery to exclude students from the program and that the KRT was established not to limit the number of students in the class, but to give an opportunity to go into a remedial reading program. (*Ibid.*) Petitioners also claim that Dr. Monillas testified that it was not his intent that if a child was educationally handicapped and would

have difficulty in taking the test, that he would be excluded from the immersion program. (*Id.* at 7)

12) "The parents' [chief concerns] at the time of the Dial 3 evaluation were related to C.C.L.'s behavior rather than the skills." Petitioners dispute this, stating that the child study team, in particular Janet Norbury, was advised as to the problems relating to their son's academics, as well as behavior. (*Ibid.)*

13) "The KRT test was properly administered and graded by Debbie Miller, an experienced teacher." Petitioners aver that Ms. Miller admitted that she had trouble scoring the test ad that she was not aware that the KRT could be re-administered within 30 days. (*Id.* at 8)

14) "Debbie Miller stated that she would not have aided CCL even if she was aware of his personal medical history." Petitioners deny that Ms. Miller gave such testimony, proferring that she did not know the child's history to even speculate on what she might have done. (*Id.* at 9)

15) "[Dr. Monillas] also stated that if a student scored below 31 and thus evidenced a lack of readiness, they would be permanently excluded from the program. He did not intend for the KRT test or a different test to be retaken." (Initial Decision at 9) Petitioners contend that Dr. Monillas did not have much knowledge about the KRT test, did not read the manual or the part of the test that said it may be re-administered and never said that he did not intend for the KRT test to be retaken. (Petitioner's Exceptions at 10)

As part of their exceptions, petitioners also submit what are characterized as "Additional Factual Findings," which aver that: 1) the letter of commitment for the French Immersion Program did not specify that a child scoring below 30 on the KRT would be offered the Title I full-day kindergarten program (*Id.* at 7); 2) although the KRT booklet specifies that the examiner has the option to re-administer the test, the decision as to whether to retest was made by the principal and supported by the acting superintendent (*Id.* at 8); 3) Ms. Miller and the principal were advised of the child's background by his father (*Ibid.*); 4) the reasons provided to petitioners for not allowing the retest were that Dr. Monillas had established the rules and the principal and acting superintendent could not change them, the visibility of the immersion

program, the lack of time to retest and the effect on others who wanted to be in the program (*Ibid.*); 5) it is not educationally unreasonable to have 23 students in the class (*Id.* at 9); 6) the child's Dial 3 assessment indicated that he was progressing and developing adequately for his age (*Ibid.*); 7) the father testified that the test was given in 15-minute periods (*Ibid.*); 8) the child did better at the beginning of the test and faltered as the test went beyond 15 minutes, toward 30 minutes (*Ibid.*); 9) "the child's attention span was not adequate for the complete evaluation session as he would not focus and the child needed repeated instructions to stay on track" (*Ibid.*); 10) the KRT manual states that the KRT is intended to be used in combination with other factors in helping a parent to determine whether the child is developmentally ready to begin kindergarten (*Id.* at 10); 11) the KRT manual states that the KRT is sensitive to identifying those children with handicapping conditions and those children scoring below the average range should not be discouraged from beginning school until formal evaluations are made to determine whether a child has such handicapping condition (*Ibid.*); and 12) the KRT manual states that handicapped and non-English speaking children should be assessed using a variety of measures and that social, familial and cultural environments should be considered when a significantly low score is obtained. (*Ibid.*)

Additionally, petitioners submit "Legal Exceptions," essentially restating arguments presented in the "Factual Findings" and "Additional Factual Findings." Petitioners do state their agreement that the appropriate standard to be applied to the district's administrators' decision in this matter is that of whether such decision was arbitrary, capricious and unreasonable. (*Id.* at 11) Petitioners also agree that holding a lottery for admittance into the French Immersion Program in order to limit the size of the class was an objective method of limiting the class size. (*Ibid.*) However, petitioners take issue with the requirement that a child score above a 30 on the KRT as a condition of admittance into the French Immersion Program.

(*Ibid.*) Petitioners point out that the French Immersion Program is not a gifted and talented program and that practically everyone can be successful. (*Ibid.*)

Petitioners also argue, *inter alia,* that the Board did not take into consideration the fact that the child's mother is a French national, that French is spoken in the home, that the child is an adopted child of African-American descent, who has a history of being born drug-addicted, with a hearing problem and raised in foster homes, and that the child study team evaluated the child with a Dial 3 screening and found the child to be "okay," with no further assessment for handicapping conditions warranted. (*Id.* at 12) Petitioners reiterate their argument that the KRT gives the discretion of whether to retest a child to the person administering the test, not to the principal and acting superintendent. (*Ibid.*) Petitioners further claim that to use the KRT as an exclusionary device for admission into the French Immersion Program is an unreasonable and arbitrary use of this instrument because the KRT is not designed for this purpose. (*Ibid.*) Moreover, petitioners submit that the principal's decision denying re-administration of the test after petitioners provided information on the child's history was an arbitrary and capricious act. (*Id.* at 13) Petitioners further argue that the use of the KRT score to exclude a child from the immersion program is making use of a test which is not rationally related to the learning of the French language and, therefore, the question is posed, "How could one use a test for kindergarten readiness that is not even used to exclude a child from entering the kindergarten class, to now preclude a child from entering into a French program?" (*Id.* at 14)

Finally, petitioners take exception to the ALJ's conclusion that *Borough of Lawnside* is distinguishable from this matter. (*Id.* at 14) Petitioners aver that *Lawnside* is on point because the KRT is an assessment test and is meant to be utilized with other factors in making decisions concerning the child being tested. (*Ibid.*) Moreover, petitioners assert, that, as

in *Lawnside*, the decision makers in the instant matter lacked familiarity with the provisions for the re-administration of the KRT. (*Ibid.*)

Upon his full and independent review, the Commissioner concurs with the ALJ that petitioners have failed to establish that the managerial decisions of the District denying petitioners' son admission into the French Immersion Program for the kindergarten class of 2002-2003 were arbitrary, capricious or unreasonable.

In so determining, the Commissioner notes that the fact that petitioners disagree with the Board's selection criteria for the French Immersion Program and its decision not to waive its policy as to their son does not make the Board's decision improper; nor does petitioners' suggestion that other school professionals or Boards might establish different criteria for admission to a French Immersion Program or decide differently with respect to the appropriateness of re-administering the KRT when a low score is achieved, render the Board's decision arbitrary. As set forth by the ALJ, the standard of review for arbitrary, capricious or unreasonable action is narrow in its scope and consequently imposes a heavy burden on those who challenge actions of boards of education. The standard defined by the New Jersey courts states:

> In the law, "arbitrary" and "capricious" means having no rational basis. (citation omitted) *** Arbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration and in disregard of circumstances. Where there is room for two options, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached. (citations omitted) Moreover, the court should not substitute its judgment for that of an administrative or legislative body if there is substantial evidence to support the ruling. (citation omitted) *Bayshore Sew. Co. v. Dep't. of Env.*122 *N.J. Super.* 184, 199-200 (Ch. Div. 1973), *aff'd* 131 *N.J. Super.* 37 (App. Div. 1974)

In the instant matter, the Board established clear selection criteria, including selection via a lottery and a score of 31 or above on the KRT, for admission into the French Immersion Program and applied such criteria in a consistent manner. Moreover, the commitment letter, signed by the child's mother and faxed to the Board on February 3, 2002, prior to the administration of the KRT test, contains clear and unambiguous language, advising that:

> As the parent or guardian of an enrolling student, you are hereby stating your interest and commitment to enrolling your child in this program *with the following conditions:*
>
> * * * * *
>
> Full understanding that if your child scores 30 or below on the KRT (Kindergarten Readiness Test) that your child will not be admitted to the program. (emphasis in text) (Exhibit P-4, in evidence)

In assessing the reasonableness of the Board's cutoff score of 31 as the minimum score for entry into the program, the Commissioner observes that the Scoring Interpretation appearing in the KRT booklet provides school districts with the following evaluative information:

45-49	above average
42	the median score
38-44	average
31 to 37	lower average
24-30	below average, questionable readiness
below 23	a parent should check with local school personnel (Exhibit P-18 at 33)

Given these evaluative interpretations, the Commissioner finds that the Board's decision to establish a cutoff score of 31 on the KRT as a minimum score for participation in the French Immersion Program to avoid placing an immature child in a difficult program was rational and within the realm of the Board's decision-making authority. In that C.C.L.'s score of

28 falls in the 57th percentile and in the below average, questionable readiness range, it is undisputed that his score did not meet the minimum score required. (Exhibit P-18) Although the Board was not precluded from re-administering the test to C.C.L. as requested by his parents, there was no provision, nor requirement to do so in the Board's established selection process for the immersion program.

With respect to petitioners' claim that the French Immersion Program is a regular kindergarten class except that most classes are taught in French, and, thus, not "extra-curricular" as the ALJ states, the Commissioner points out that the ALJ most likely characterized this program as "extra-curricular" because school districts are not required by law to offer kindergarten programs, but may do so pursuant to *N.J.S.A.* 18A:44-2. It makes no difference for purposes of entitlement, however, whether the French Immersion Program is deemed curricular or extra-curricular because it is well-established that the protected interest is "the right to participate in the entire educational process and not the right to participate in each individual component of the process." *Glidden, supra* at 73. Thus, petitioners cannot establish a protected property interest in participating in an individual component of the school's curriculum, such as the French Immersion Program, at issue herein. *See E.A., Sr. supra; Glidden, supra; and Gross, supra.*

Additionally, the Commissioner agrees with the ALJ that this matter is distinguishable from the *Borough of Lawnside, supra,* in that, unlike *Lawnside*, the selection criteria established in this instance was clearly set forth and administered in such a way as to be fair to all students who desired to participate. Also, in *Lawnside*, a gifted student was denied access to the National Honor Society due to a flawed methodology and the decision makers' unfamiliarity with the selection criteria; whereas the child in this matter was administered the

KRT by a qualified staff member and simply did not meet the selection criteria due to a low score on the KRT indicating questionable readiness to enter kindergarten.

The Commissioner, therefore, concludes that petitioners have failed to meet their burden in establishing that the Board's use, administration or grading of the KRT as a selection criterion for the French Immersion Program was arbitrary, capricious or unreasonable. Accordingly, the Initial Decision of the OAL is affirmed for the reasons detailed therein and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED. [4]

COMMISSIONER OF EDUCATION

Date of Decision: 3/14/03

Date of Mailing: 3/14/03

[4] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

110-03

IN THE MATTER OF THE TENURE	:	
HEARING OF ERNIE CHAVEZ,	:	
SCHOOL DISTRICT OF THE TOWN OF	:	COMMISSIONER OF EDUCATION
PHILLIPSBURG, WARREN COUNTY.	:	DECISION
_____	:	

March 14, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 3312-02

AGENCY DKT. NO. 73-3/02

IN THE MATTER OF THE TENURE HEARING OF ERNIE CHAVEZ, PHILLIPSBURG BOARD OF EDUCATION, WARREN COUNTY

Richard H. Bauch, Esq., appearing for petitioner Board of Education of the Town of Phillipsburg (Schenck, Price, Smith & King, LLP, attorneys)

Mary Frances Palisano, Esq., appearing for respondent Ernie Chavez (Law Office of Alan L. Zegas, attorneys)

Record Closed: January 21, 2003 Decided: January 29, 2003

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

STATE OF THE CASE AND PROCEDURAL HISTORY

Petitioner Phillipsburg Board of Education (Board) certified tenure charges of conduct unbecoming a school employee against teacher Ernie Chavez (respondent) under the Tenure Employees Hearing Law, *N.J.S.A.* 18A:6-10 to 18.1. The Bureau of Controversies and Disputes of the Department of Education transmitted the matter to the Office of Administrative Law (OAL) on April 5, 2002, for hearing as a contested case,

At the settlement conference on June 11, 2002, settlement discussions were held and a settlement was reached. Ultimately, the settlement was reduced to writing signed

by the parties and approved by the Board. Based upon a review of the record and testimony at the hearing, I **FIND** that the proposed settlement is consistent with the public interest for the following reasons:

1. Mr. Chavez has been an employee of the Board and has acquired tenure as a teaching staff member.

2. During the 1999-2000 and 2000-2001 school years, certain allegations of improper conduct toward a female student were made against Mr. Chavez.

3. The Board determined, after investigation, to charged Mr. Chavez with multiple counts of conduct unbecoming a school employee, as this term is used in *N.J.S.A.* 18A:6-9, and charged that this conduct warranted Mr. Chavez's dismissal (See Board's Petition and Statement of Supporting Evidence).

4. Prior to the hearing, the parties became convinced that it was in the public interest to settlement this matter.

5. The Board represented that it decide to settle rather than try the matter for several reasons, including that the students involved, of middle school year, feared testifying, the Board's sincere belief that the students might be traumatized by a formal hearing, inconsistencies in student's statements could undermine the Board's case, a settlement would result in a complete and permanent separation as desired by the Board, and the Board's concern with litigation expense.

6. Mr. Chavez, under oath, testified credibly and appropriately that he understood the ramifications of the settlement and he agreed to them.

7. Mr. Chavez expressly understood that the Commissioner of Education may refer this matter to the State Board of Examiners for possible certificate revocation proceedings. Before entering into the agreement, Mr. Chavez was advised by counsel and fully understood his rights.

8. The parties have voluntarily entered into the agreement, which fully disposes of all issues in controversy and is consistent with law.

Therefore, I **CONCLUDE** that the terms of the settlement are in the public interest as well as the parties' interest and otherwise meets the requirements of *N.J.A.C.* 6A:3-5.6.

ORDER

It is **ORDERED** that the parties comply with the terms of the settlement and that these proceedings are hereby concluded.

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

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

January 29, 2003
DATE

MARGARET M. HAYDEN, ALJ

Receipt Acknowledged:

January 31, 2003
DATE

M. Kathleen Dennean (for)
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 4 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jb

SETTLEMENT AGREEMENT AND GENERAL RELEASE

THIS SETTLEMENT AGREEMENT AND GENERAL RELEASE (hereinafter "Agreement") is made and entered into this 6th day of ~~December, 2002~~ January, 2003, by and between the BOARD OF EDUCATION OF THE TOWN OF PHILLIPSBURG, WARREN COUNTY, with its administrative offices located at 445 Marshall Street, Phillipsburg, New Jersey 08865 (hereinafter referred to as the "Board" or "District") and ERNIE CHAVEZ, whose address is P.O. Box 204, 2570 Route 57, Stewartsville, New Jersey 08886 (hereinafter referred to as the "Employee").

WITNESSETH:

WHEREAS, the Employee is an employee of the District and presently is employed as a teaching staff member by the Board; and

WHEREAS, the Phillipsburg Education Association (hereinafter, the "Association") is the exclusive majority representative of all non-supervisory teaching staff members employed in the District, including Employee: and

WHEREAS, the Employee's current terms and conditions of employment are set forth in a collective negotiations agreement between the Board and the Phillipsburg Education Association covering the period of July 1, 1999 through June 30, 2002 (hereinafter "PEA Agreement"); and

WHEREAS, during the 1999-2000 and 2000-2001 school years certain allegations of inappropriate conduct toward a female student were made in connection with the Employee during the course of teaching his Careers Class; and

WHEREAS, the Employee was suspended with pay pursuant to said allegations on or about November 1, 2000 pending further investigation; and

WHEREAS, investigations of the alleged incident were conducted by the Warren County Prosecutor's Office and the Division of Youth and Family Services ("DYFS"); and

WHEREAS, said investigation conducted by the Warren County Prosecutor's Office did not result in the filing of criminal charges against the Employee; and

WHEREAS, said investigation conducted by DYFS did not result in the filing of formal charges against the Employee; and

WHEREAS, the District conducted an internal investigation of said allegations; and

WHEREAS, as a result of the District's internal investigation, the Superintendent recommended to the Board that the filing of tenure charges against the Employee for conduct unbecoming a teacher was justifiable and warranted; and

WHEREAS, the Superintendent did, in fact, file with the Board Secretary a Statement of Charges Under the Tenure Employee Hearing Act charging the Employee with Conduct Unbecoming a Public Employee ("Charges"); and

WHEREAS, the Employee, through his attorneys, responded to the Charges, denying that he had committed any acts constituting conduct unbecoming a public employee and noting that he had been cleared of charges by the Warren County Prosecutor's Office and the Division of Youth and Family Services; and

WHEREAS, case was transferred by the Commissioner of Education to the Office of Administrative Law ("OAL") and assigned for hearing before the Honorable William Jeremiah, A.L.J.; and

WHEREAS, Judge Jeremiah, so that they might avoid the uncertainties of litigation and the time, expense and trauma that would be incurred by a protracted hearing, urged the parties to consider potential settlement of this matter; and

WHEREAS, all the key fact witnesses for the Board concerning the main series of incidents which led to the filing the Charges, were children of middle school age who were testifying against their will and who expressed themselves and through their parents, their significant fear and anxiety of testifying in court; and

WHEREAS, prior statements given by these students to the police and to the District had a number of inconsistencies which would have subjected the students to rigorous cross-examination, possibly undermining the Board's case against Employee; and

WHEREAS, the students' parents urged the Board to attempt to resolve the case so that their children would not have to testify; and

WHEREAS, in view of its sincere concerns that the student witnesses might be traumatized by a formal hearing, that inconsistencies in student statements and testimony could undermine the Board's case, its determination that any settlement must include a complete and permanent separation between the Employee and the District, a result that might not be achieved if the litigation proceeding to a plenary hearing, and its concern that litigation expenses could cause the expenditure of monies that otherwise could be used to support education within the District, the Board determined that it would be in the public interest to enter into settlement negotiations with Employee; and

WHEREAS, the parties agreed to utilize mediation with the Honorable Margaret Hayden, A.P.A.L.J.; and

WHEREAS, after negotiating in good faith, with the assistance of Judge Hayden, the parties, through their respective counsel, reached an agreement on June 11, 2002 providing for a complete a resolution of their dispute within the parameters of the law regarding the settlement of tenure charges, and which precluded the necessity of having children of impressionable years testifying in court and provided for the Employee's complete separation from employment in the District; and

WHEREAS, following the execution of a Memorandum of Understanding setting forth the terms and conditions of the parties' agreement, which included their agreement to enter into this more formal and comprehensive Settlement Agreement, Judge Hayden took testimony from the Employee confirming that he was entering into the settlement of his own free will, voluntarily and without coercion, and that he was satisfied with the legal representation he had received throughout this matter and specifically during the settlement negotiations; and

WHEREAS, pursuant to the aforesaid Memorandum of Understanding, the parties hereto wish to memorialize their promises and covenants more formally in this Agreement; and

WHEREAS, the Association consents to the parties entering into this Agreement;

NOW, THEREFORE, the Board and the Employee, for the consideration specified below, set forth the following mutual covenants and agreements:

1. RESIGNATION. The Employee hereby tenders with this Agreement his signed and irrevocable resignation from employment with the District, which shall be effective immediately upon the approval by the Commissioner of Education of this Agreement.

2. COMPENSATION. As partial consideration for the Employee's agreements in this Agreement, the Board agrees that, following the approval of this Agreement by the Commissioner of Education, the Board will pay to the Employee, commencing thirty (30) days following the approval of this Agreement by the Commissioner, pursuant the payment schedule set forth below in this paragraph, the amount of $30,000.00, plus $3,352.00 representing a senior service increment he would have received during the 2000-2001 school year, plus a prorated amount of the I.A. Club Co-Advisor stipend, Soccer Club stipend, and Freshman Boys Soccer Coach stipend, all amounts based upon the collective negotiations agreement between the Board and the Association in effect covering the 2000-2001 school year. All amounts set forth in this paragraph are gross amounts and will be subject to required withholding including taxes and pension. The amounts to be paid pursuant to this paragraph will be paid in biweekly equal payments on the 1st and 15th of each month for a period of three (3) months until fully paid. Other than the aforesaid amounts set forth specifically in this paragraph, the Employee will not be entitled to any other payment from the District of any kind whatsoever for any period of time.

3. OTHER PROCEEDINGS. The Employee expressly understands that the Commissioner of Education may refer this matter to the State Board of Examiners for possible certificate revocation proceedings. By entering into this Agreement, the Employee is not waiving any rights he may have to defend against such a proceeding. Despite this understanding that he may suffer revocation of his teaching certificate, the Employee agrees to enter into this Agreement.

4. The Board Agrees not to initiate any proceedings before the Division of Pensions that would prejudice the Employee's pension rights. The Employee understands that the Board of

Trustees of the Teachers Pension and Annuity Fund may determine to take action regarding the Employee's pension which may adversely affect his right to receive a pension. Despite this understanding that his pension rights may be adversely affected by entering into this Agreement, the Employee agrees to enter into this Agreement.

5. FUTURE EMPLOYMENT. The Employee agrees that, subsequent to the approval of this Agreement by the Commissioner of Education, he will not apply for employment with the Board or volunteer for any Board-sponsored programs/activities.

6. NO CONTACT. The Employee agrees that he will not knowingly initiate any contact with any witnesses set forth on the witness list provided to him by the Board during the pending litigation and that he will have no knowing contact with the student witness designated as B.V.N. or any member of her family.

7. ATTENDANCE AT BOARD-SPONSORED EVENTS. The Employee agrees that, for a period of seven (7) years commencing September 1, 2002, he will not come on Board property or attend any athletic events at any other location involving Phillipsburg School District students with the following exception: The Employee may attend athletic events in which his son, K.C., is participating provided that Employee will use his best efforts to avoid direct contact with any students who were in his 2000-2001 7th period Careers Class.

8. SERVICE LETTER. Upon request, the Board will provide a neutral service letter stating the Employee's dates of employment, positions held in the District, and reason for separation. Nothing in this Agreement will preclude the Board from releasing information required by law, regulation and/or Executive Order.

9. CONFIDENTIALITY. As further consideration for this Agreement, the parties agree that, following the full execution of this Agreement, they will keep all terms of this Agreement completely confidential. It is expressly understood and agreed that, following the full execution of this Agreement, neither the District, the Employee, or their attorneys or representatives will take any action to publicize the terms or nature of this Agreement, except that disclosure is permitted: (1) as necessary with regard to any proceeding for the enforcement

of this Agreement; (2) as may be required by any court or agency of competent jurisdiction; and (3) as may be required by law.

10. NO ADMISSION. By entering into this Agreement, the Employee is not admitting liability or guilt regarding any of the factual or legal allegations set forth in the Charges or in other related documents. The Employee reserves all his defenses for any future proceeding.

11. NO REIMBURSEMENT OF ATTORNEYS FEES AND COSTS. The Employee and the Board each are responsible for the payment of their own attorneys fees and costs incurred in this matter.

12. GENERAL RELEASE. As further consideration for the Board's covenants as set forth in this Agreement, upon the full execution of this Agreement, the Employee, for himself and his past, present and future heirs, agents and representatives, forever and irrevocably releases and discharges the Board, its members, officials, employees, representatives, agents and attorneys (collectively referred to as the "Board") from any and all claims they may have against the other resulting from anything that has happened up to the date of this Agreement, including claims of which he is unaware and claims which are not specifically released and given up in the following language. The Employee specifically releases and gives up any and all claims which he may have against the Board arising from or relating to Employee's employment with the Board and/or arising from or relating to the filing and prosecution of the Charges and/or Employee's separation from employment with the Board, including, but not limited to, claims arising under (1) the Constitution of the United States, (2) the Education Laws of the State of New Jersey, *N.J.S.A.* 18A:1-1 *et seq.,* including but not limited to the Tenured Employees Hearing Act, *N.J.S.A.* 18A:6-10 *et seq.,* (3) Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000(e) *et seq.*, (4) the Civil Rights Act of 1866, 42 U.S.C. § 1981 *et seq.*, (5) the Rehabilitation Act of 1973, 29 U.S.C. § 791 *et seq.*, (6) the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, (6) the Family and Medical Leave Act, 29 U.S.C. § 2601 *et seq.*, (7) the Family Leave Act, *N.J.S.A.* 34:11B-1 *et seq.*, (8) the Constitution of the State of New Jersey, (9) the New Jersey Law Against Discrimination, *N.J.S.A.* 10:5-1 *et seq.*, (10) the Conscientious Employee Protection Act, *N.J.S.A.* 35:19-1 *et seq.*, (11) the

New Jersey Employer-Employee Relations Act, *N.J.S.A.* 34:13A-1 *et seq.*, (12) any expressed or implied contract between the Board and the Employee, whether oral or written, (13) any collective negotiations agreement, (14) all regulations promulgated pursuant to any of the aforementioned laws, (15) any other Federal, State, County, local or Board common law, statutes, ordinances, resolutions and regulations not mentioned above, and (16) any employment manual or handbook or personnel or Board policies. Specifically excepted from this release are any claims or rights arising under the Workers' Compensation Act, *N.J.S.A.* 34:15-1 *et seq.*, the Teachers' Pension and Annuity Fund Law, and for health insurance continuation coverage under and pursuant to Consolidated Omnibus Budget Reconciliation Act (commonly referred to as "COBRA"), provided that the Employee is not entitled to have the Board pay any amounts for her or his dependents' health insurance continuation coverage under COBRA.

13. CONSULTATION. The Employee represents that he has been offered the opportunity to consult with an attorney during the negotiations and development of this Agreement. Employee further represents that during the negotiations and development of this Agreement he has been represented by his attorneys, Mary Frances Palisano, Esq. of the Law Offices of Alan L. Zegas, and that she fully explained all provisions of this Agreement and its consequences to the Employee before the Employee signed this Agreement. The Employee represents that he is fully satisfied with the advice he received from Ms. Palisano.

14. NO COERCION. The Employee represents that the only consideration for signing this Agreement is the terms actually stated in this Agreement and that no other promises or agreements of any kind have been made to the Employee by any person or entity whatsoever to cause the Employee to sign this Agreement. The Employee represents that he fully understands the meaning and intent of this instrument and that he is voluntarily signing this Agreement of his own will without coercion or duress. The Employee understands, accepts and agrees to all of the terms of this Agreement.

15. APPROVAL. This Agreement is subject first to the approval of the Phillipsburg Board of Education, then by the Office of Administrative Law, and finally by the Commissioner of

Education, before it becomes a legally binding document. The parties agree to produce and execute any documents and to take any acts that may be required to effectuate the terms, conditions and spirit of this Agreement.

16. NO TAX ADVICE. The Employee acknowledges that the Board has made no representations to him regarding the tax implications of this Agreement.

17. GOVERNING LAW. This Agreement is made and entered into in the State of New Jersey and shall in all respects be interpreted, enforced and governed under the laws of the State of New Jersey.

18. PLAIN MEANING. The terms and conditions of this Agreement shall be construed according to their plain meaning, and shall not be construed in favor of or against either the Employee or the Board.

19. HEADINGS. The headings set forth in this Agreement are merely for the convenience of the reader and it is expressly understood and agreed that the headings shall not control or modify the meaning of this Agreement in any way.

20. WHO IS BOUND. All parties are bound by this Agreement and each of its provisions. Anyone who succeeds to their rights and responsibilities, such as their successors and assigns, as well as the Employee's heirs and the executor of his estate, also are bound. This Agreement is made for the benefit of all the parties hereto and all who succeed to their rights and responsibilities, and expressly includes their officials, employees, agents, attorneys, successors and assigns.

21. NOTICES. Any notices required to be sent pursuant to this Agreement shall be considered to be effective when sent by certified mail, return receipt requested, to:

To the Employee:

Ernie Chavez
P.O. Box 204
2570 Route 57
Stewartsville, NJ 08886

To the Board:

Board Secretary
Phillipsburg Board of Education
445 Marshall Street
Phillipsburg, New Jersey 08865

Any changes in the above addresses must be provided by certified mail, return receipt requested to the other party.

22. NON-AGREEMENT OR NO APPROVAL. If this Agreement is not fully executed by all parties, then this Agreement shall become null and void and shall be of no effect and, whereupon, the District immediately shall proceed with the continued prosecution of the Charges against the Employee as provided by law and regulation. In the event that either the Office of Administrative Law or the Commissioner of Education fail to approve this Agreement, then, subject to the parties' appellate rights, the parties agree to follow the last legal ruling and either pursue continued efforts to settle this matter or proceed to litigation as directed by the Commissioner of Education or other tribunal of competent jurisdiction. In the event that this Agreement is not approved by the Office of Administrative Law or the Commissioner of Education neither party shall refer to it in the pending or any future litigation.

23. COMPLETE AGREEMENT. This Agreement embodies the entire agreement between the parties hereto and supersedes any prior or contemporaneous agreement, representation or understanding, whether written or oral. This Agreement may not be modified except by written instrument executed by all the parties hereto and approved by the Commissioner of Education.

END OF PAGE

PLEASE READ THIS SETTLEMENT AGREEMENT CAREFULLY. IT IS A LEGAL DOCUMENT. IT INCLUDES ERNIE CHAVEZ'S AGREEMENT TO GIVE UP CERTAIN KNOWN AND UNKNOWN CLAIMS AGAINST THE BOARD OF EDUCATION OF THE TOWN OF PHILLIPSBURG, WARREN COUNTY, ITS MEMBERS, OFFICIALS, OFFICERS, EMPLOYEES, AGENTS, REPRESENTATIVES AND ATTORNEYS.

IN WITNESS WHEREOF, the parties hereto set their hands and seals to this Separation Agreement effective on the day and year first above written.

ERNIE CHAVEZ

STATE OF NEW JERSEY, COUNTY OF WARREN SS.:

I CERTIFY that on the 17th day of December, 2002

Ernie Chavez personally came before me and acknowledge under oath, to my satisfaction, that this person:

(a) is named in and personally signed this document; and
(b) signed, sealed and delivered this document as her act and deed.

Sworn and subscribed to before me
this 17th day of December, 2002.

Mary Frances Palermo

BOARD OF EDUCATION OF THE
TOWN OF PHILLIPSBURG,
WARREN COUNTY

By: _____
Roderick L. Pianelli
President

ATTEST:

_____
William W. Poch
Board Secretary

CONSENT

The Phillipsburg Education Association, Inc. hereby consents to the implementation of the terms and conditions of this Agreement this _____ day of December, 2002.

PHILLIPSBURG EDUCATION ASSOCIATION, INC.

By: _____
George Chilmonik
President

December 17, 2002

To the Phillipsburg Board of Education

Please be advised that I hereby resign my employment with the Board of Education of Phillipsburg, effective immediately, pursuant to and in reliance upon the Board's performance of the material terms and conditions of the attached Separation Agreement and General Release ("Agreement").

Sincerely,

Ernie Chavez

EXHIBIT "A"

Document #: 559606/RHB

EXTRACT FROM THE MINUTES OF A MEETING OF THE BOARD OF EDUCATION OF THE TOWN OF PHILLIPSBURG, WARREN COUNTY, NJ AS RECORDED IN THE OFFICIAL MINUTE BOOK

The Board of Education of the Town of Phillipsburg in the County of Warren, NJ, convened in Regular Session on Tuesday, February 25, 2003, at 7:30 p.m., in the Commons of the Phillipsburg Middle School, 525 Warren Street, Phillipsburg, New Jersey.

The following members of the Board of Education were present:

Mrs. Patricia Babcock
Mr. Bernie Brotzman
Mr. D. John Harper
Mr. Stanley Hughes
Mr. Thomas F. McGuire
Mr. Paul Rummerfield
Mr. Richard Pensack
Mrs. Irene M. Weller
Mr. Gary R. Willis
Mr. Chafik Zarbatany
Mr. Roderick L. Pianelli

The following members of the Board of Education were absent:

Mr. Frank Kish

The following resolution was offered by Mr. Hughes and seconded by Mr. McGuire and adopted by the Board of Education by the following Roll Call vote:

TITLE: Adopt resolution ratifying final executed form of Settlement Agreement

RESOLVED: Move to adopt the attached resolution ratifying the final executed form of Settlement Agreement, as recommended by the Superintendent.

AYES: Mr. Brotzman, Mr. Harper, Mr. Hughes, Mr. McGuire, Mr. Rummerfield, Mrs. Weller, Mr. Willis, Mr. Zarbatany, President Pianelli

NAYS: None

STATE OF NEW JERSEY)
COUNTY OF WARREN)

I, William W. Poch, Secretary of the Board of Education of the Town of Phillipsburg, in the County of Warren, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of the Board of Education of said district duly called and held on February 25, 2003, has been compared by me with the original minutes as officially recorded in the minute book of said Town of Phillipsburg, Board of Education and is a true, complete copy thereof and of the whole of said original minutes so far as the same relate to the subject matter referred to in said extract in witness I have hereunto set my hand and affixed the corporate seal of said Board of Education this 26th day of February, 2003.

AFFIX SEAL:

William W Poch
Signature of Secretary

PHILLIPSBURG BOARD OF EDUCATION

ITEM NUMBER: 1.3

ACTION ITEM: Adopt resolution ratifying final executed form of Settlement Agreement

RESOURCE STAFF MEMBER(S): H. G. Pethick, J. Attinello, J. Milone

X **Regular Meeting** February 25, 2003

___ **Special Meeting**

X **Board Affairs**

___ **Business Affairs**

___ **Personnel Affairs**

___ **School Programs**

PERTINENT INFORMATION:
See attached resolution.

Account Number(s): N/A

RECOMMENDATION:
Move to adopt the attached resolution ratifying the final executed form of Settlement Agreement, as recommended by the Superintendent.

X **ITEM REQUIRES A ROLL CALL VOTE**

EXTENDED BOARD

RESOLUTION RATIFYING
FINAL EXECUTED FORM OF SETTLEMENT AGREEMENT
WITH ERNIE CHAVEZ

WHEREAS, Ernie Chavez (hereinafter the "Employee") currently is employed in the Phillipsburg Public School District ("District") as a tenured teaching staff member by the Phillipsburg Board of Education ("Board"); and

WHEREAS, following an internal investigation concerning allegations that the Employee engaged in conduct unbecoming a public employee, the Superintendent of Schools determined to file and did, in fact, file tenure charges against the Employee seeking his removal as a tenured teaching staff member in the District; and

WHEREAS, the Board subsequently met pursuant to its obligation under the Education Laws to consider the tenure charges and at that time voted to certify the tenure charges to the Commissioner of Education; and

WHEREAS, the Commissioner, pursuant to law and regulation, transferred the tenure charges to the Office of Administrative Law ("OAL") for a hearing before an administrative law judge; and

WHEREAS, on the first day scheduled for hearing the OAL conducted a settlement mediation conference and at that time the Board and the Employee, through their designated counsel negotiated for a non-litigation resolution to this matter; and

WHEREAS, during the settlement mediation, following extensive negotiations, the District's counsel was able to negotiate settlement terms that met the District's objectives in this litigation of seeking the Employee's removal as a tenured teaching staff member; meeting its responsibilities as a public school board; while sparing the Board's witnesses

from being required to testify in a formal tenure hearing; and minimizing the expense to the Board and the public from this tenure proceeding; and

WHEREAS, such settlement is subject to the Board's approval; and

WHEREAS, prior to the execution of a formal Settlement Agreement, the parties' reached agreement on a Memorandum of Understanding which was executed by the Employee and his counsel and which the Employee, on the record before the Honorable Margaret Hayden, A.L.J., stated he understood and agreed to; and

WHEREAS, the Board previously approved and ratified the confidential Memorandum of Understanding executed by the Employee and his counsel on June 11, 2002, and authorized the District's Special Counsel to finalize the language of a formal Settlement Agreement which will effectuate the terms of the confidential Memorandum of Understanding, and

WHEREAS, the Board authorized the Board President to execute the final form of the Settlement Agreement on the Board's behalf, upon receiving the approval of the District's Special Counsel and the Superintendent of Schools of the Agreement; and

WHEREAS, the parties' representatives did, in fact, reach a final form of the Settlement Agreement which was approved by District's Special Counsel and the Superintendent of Schools and which, pursuant to the Board's earlier resolution, was executed by the Board President in the presence of the Board Secretary; and

WHEREAS, the Superintendent of Schools recommends that the Board approve and ratify the final form of Settlement Agreement with the Employee; and

WHEREAS, the Board wishes to confirm that it approves of the final form of Settlement Agreement that has now been executed by all parties;

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF EDUCATION OF THE TOWN OF PHILLIPSBURG, WARREN COUNTY, that the Board hereby approves and ratifies the final form of Settlement Agreement executed by all parties and transmitted to the Office of Administrative Law and is of the opinion that this agreement is consonant with the Education Laws and is in the best interests of the District, its constituents and all persons involved on behalf of the District in this matter; and

BE IT FURTHER RESOLVED that the District's Special Counsel is hereby authorized to take whatever actions are necessary and required to obtain final approval of the Settlement Agreement by the Commissioner of Education.

OAL DKT. NO EDU 3312-02
AGENCY DKT. NO. 73-3/02

IN THE MATTER OF THE TENURE	:	
HEARING OF ERNIE CHAVEZ,	:	
SCHOOL DISTRICT OF THE TOWN OF	:	COMMISSIONER OF EDUCATION
PHILLIPSBURG, WARREN COUNTY.	:	DECISION
	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 3/14/03

Date of Mailing: 3/14/03

111-03

BOARD OF EDUCATION OF THE CALDWELL-WEST CALDWELL SCHOOL DISTRICT, ESSEX COUNTY,

PETITIONER,

V.

THE CHILDREN'S INSTITUTE,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning Board alleged that respondent, The Children's Institute (TCI), a nonprofit organization which operates an approved New Jersey State Department of Education private school for children with special education needs, submitted a tuition rebill for the 1999-2000 school year that was unreasonable, invalid and void *ab initio*. Respondent argued that the petition should be dismissed for failure to timely file.

Initially, the ALJ found that summary decision should not be granted against petitioner based on the issue of untimeliness since time limitations might have been relaxed if it was shown that petitioner was led to believe that it could informally seek relief and not be concerned with the time limitations. The ALJ, however, granted respondent TCI's Motion for Summary Decision finding summary decision was appropriate on the grounds that the record did not show that TCI's inclusion of lease termination costs and unamortized depreciation on leasehold improvements in the expenses of TCI for the 1999-2000 school year, in accordance with Generally Accepted Accounting Procedures, was patently unreasonable.

The Commissioner adopted the Initial Decision with modification.

March 14, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. : EDU 5132-02

AGENCY DKT. NO.: 67-3/02

BOARD OF EDUCATION CALDWELL – WEST CALDWELL,

Petitioner,

v.

THE CHILDREN'S INSTITUTE,

Respondent.

Mark A. Wenczel, Esq., for petitioner (Gaccione, Pomaco & Beck, attorneys)

Rodney T. Hara, Esq., for respondent (Fogarty and Hara, attorneys)

Record Closed: January 22, 2003 Decided: January 28, 2003

BEFORE **CAROL I. COHEN**, ALJ:

FACTS AND PROCEDURAL HISTORY

TCI is a nonprofit organization, which operates an approved New Jersey State Department of Education private school for children with special education needs. TCI had entered into a 15-year lease with the Livingston Board of Education for land and a building to be used for a school. The lease began on July 1, 1990 and was due to expire on June 30, 2005. There existed a need for additional space at the leased facility. One of the components of the special education plan submitted to the Department of Education by TCI in 1992 was to address the need for building expansion. Continued permission from the Department of Education to utilize portable

classrooms was dependent on the good faith implementation of TCI's construction plans. TCI pursued the possibility of a purchase or long-term lease of their facility to address this need for additional space. There was also a concern by TCI, parents and students over the impact of electromagnetic fields from high-tension wires adjacent to the school. Readings of electromagnetic fields were taken in and around TCI's facility. Although the testing did not require the closing of the school, TCI continued to have concerns. TCI then terminated negotiations with the Livingston Board of Education. TCI accepted a donation of property in Verona from Hoofman-LaRoche, Inc. to be used as a school. Subsequently, TCI negotiated with the Livingston Board of Education to reach a lease termination agreement. After unsuccessful attempts to obtain a tenant on its own, TCI retained the services of a realtor, who was able to secure another tenant to mitigate TCI's financial obligations under the lease. TCI had five and one-half years remaining on its lease for a total obligation of $1,274,196.45. However, TCI negotiated a lease termination agreement in the amount of $361,998.00, in exchange for a release of its obligations. The realtor's commission resulted in an additional cost of $22,805.00.

During the 1999-2000 school year, five children from Caldwell's school district were placed with TCI. In 1999, Caldwell and TCI executed a tuition contract for each student, pursuant to which Caldwell paid TCI a tentative tuition charge of $166.00 per student. Based upon a ten-month school year, the tuition charge for the year was $29,880.00 per student.

Susan T. White of McKinley, White & Co., LLP, Certified Public Accountants, prepared the TCI audit for the 1999-2000 school year. The audited expenses included lease termination costs in the amount of $341,887.00 and $112,495.00 in unamortized leasehold improvements for TCI's former facility in the Township of Livingston. Based upon the audit, the certified actual cost per pupil was calculated by the auditor as $37,612.66 for the ten-month school year, which was $7,732.66 in excess of the tentative tuition rate of $29,880.00. TCI determined, after discussions between the auditor and Bruce Ettinger, Executive Director/Superintendent for TCI, that it would establish the tuition rate at $34,580.00 per pupil, which was $3,032.66 less than the certified actual costs per pupil.

TCI sent Caldwell a letter, dated December 5, 2000, with an invoice, dated December 1, 2000, rebilling Caldwell an additional $4,700.00 per student for $21,542.00[1] for the 1999-2000 school year to recover additional expenses associated with TCI's move to a new facility. By letter dated December 21, 2000, Thomas C. McMahon, Assistant Commissioner, Division of Finance, Department of Education, notified all public school districts, including Caldwell, that the per pupil undercharge reported by TCI was $7,600.00 and that the school districts should include the undercharges in the 2001-2002 budget, since payment must be made to the private school no later than June 30, 2002. However, this letter also stated that these preliminary adjustments must not be used for billing purposes and that the Office of Fiscal Policy and Planning, Department of Education, would review the private school audits to determine whether the costs were properly calculated and whether the audit meets the department's compliance requirements. The Office of Fiscal Policy and Planning approved TCI's tuition adjustment and audit by letter, dated May 3, 2001. This letter recommended that the private school promptly notify each district board of education of the audit adjustments within 30 days.

In a letter to the Commissioner from Ronald P. Skopak, Board Secretary/Business Administrator, dated May 30, 2001, Caldwell acknowledged receipt of notification from TCI that "an adjustment had been approved by the State Department of Education for the 1999/2000 school year of $4,7000.00 per pupil," and requested that the Commissioner review "the extraordinary charges" that were included in TCI's tuition adjustment. Mr. Skopak states, in his certification, that he drafted the letter after Jim Verner, Section Supervisor, Division of Finance, Department of Education, had told him that his only recourse was to send a letter to the Commissioner asking for an evaluation of the appropriateness of TCI's actions in incurring the lease termination and moving expenses.

By letter dated December 11, 2001, from Peter E. Genovese, III, Assistant Commissioner, Division of Finance, the Department of Education upheld TCI's rebill for the additional tuition as being for costs that were properly expensed on TCI's audited financial statements in accordance with regulations governing the assessment of tuition

[1] It is unclear how TCI arrived at this figure.

for private schools for the disabled and generally accepted accounting principles. As set forth in TCI's financial statements, TCI incurred costs in 2000 for the termination of its prior lease and also sustained a loss on the disposal of leasehold improvements.

On or about March 8, 2002, Caldwell filed a verified petition of appeal with the Commissioner, which challenged charges for additional tuition for the 1999-2000 school year. An answer was filed by TCI on or about April 26, 2002. The court issued a Prehearing Order in this matter on August 23, 2002. On December 6, 2002, TCI filed a brief in support of its motion for summary decision. Caldwell filed its brief in opposition to the motion on or about December 27, 2002. The court granted an extension for TCI to file its reply by January 21, 2003.

LEGAL DISCUSSION

Legal Issues and Arguments of the Parties

There are two issues that are involved in the motion for Summary Judgment:

The first deals with the issue of whether the Caldwell-West Caldwell Board of Education's ("Caldwell") petition of appeal should be dismissed for failure to timely file. The petitioner argues that the 90 day requirement for filing did not begin to run until after the district received a letter from Peter E. Genovese, III, Assistant Commissioner, Division of Finance, the Department of Education upholding the TCI's rebill for additional tuition. Under this scenario, the appeal petition filed on March 8, 2002 would be within the prescribed 90-day period. In the alternative, they argue that the "90 day rule" has been relaxed by the courts in special circumstances and that this matter falls under those exceptions.

The Respondent takes the position that the Board of Education received notice triggering the "90 day rule" as early as 2000, but at the latest May 2001. The petitioner failed to file within the prescribed time and therefore, their claim should be barred. In addition, they argue that there are no special circumstances that would call for an exception from the 90-day rule.

The second issue is whether the inclusion of lease termination costs and depreciation on leasehold improvements in The Children's Institute's ("TCI") expenses for the school year was patently unreasonable. The Respondent argues that the inclusion of lease termination costs and unamortized depreciation on leasehold improvements for the 1999-2000 school year was in accordance with G.A.A.P. and therefore, was not patently unreasonable. Caldwell argues that the standard should be whether the lease termination and moving costs incurred by TCE during the 1999-2000 school year were "ordinary and necessary and not in excess of the cost which would be incurred by an ordinarily prudent person in the administration of public funds." Therefore, to find out if the costs were reasonable, testimony would have to be taken and Summary Judgment should be denied.

DISCUSSION:

STANDARD FOR SUMMARY JUDGMENT

The rules governing practice in the Office of Administrative Law provide that a motion for summary decision may be granted if there is no genuine issue of material fact and the moving party is entitled to prevail as a matter of law. The determination should be based on the papers presented as well as any affidavits, which may have been filed with the application. In order for the adverse, i.e., the non- moving party, to prevail in such an application, responding affidavits must be submitted showing that there is indeed a genuine issue of fact, which can only be determined in an evidentiary proceeding.

N.J.A.C. 1:1-12.5(b).

The courts have further elaborated upon the issue of granting summary decision. The court, in *Brill v Guardian Life Ins Co of America*, 142 *N.J.* 520, 541 (1995), encouraged trial judges to evaluate and analyze competent evidential materials presented with the application and to consider whether when they are viewed in the light most favorable to the non-moving they are sufficient to permit resolution of the

alleged dispute in favor of the non- moving party. Id. at 540. Moreover, once the moving party has presented evidence in support of its application, the burden is on the non-moving party to set forth specific facts showing that there is a genuine issue for trial. Id. at 529. If the non-moving party's evidence is merely colorable, or is not significantly probative, summary judgment should not be denied. See Bowles v. City of Camden, 993 *F. Suppl.* 255, 261 (D.N.J. 1998).

ISSUE #1—*THE "90-DAY" RULE*

The threshold issue deals with whether Caldwell's claim was timely filed pursuant to *N.J.A.C.* 6A:3-1.3(d).[2] *N.J.A.C.* 6A:3-1.3(d) governs the filing of an action arising under the school laws and states in part that:

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

[*N.J.A.C.* 6A:3-1.3(d).]

In Kaprow v. Bd. of Ed. of Berkeley Township, 131 *N.J.* 572 (1993), the New Jersey Supreme Court held that the Commissioner and the State Board of Education have the authority to establish a time limitation for the resolution of disputes arising under the school laws and addressed the public policy reasons behind the 90-day rule:

The limitation period provides a measure of repose, an essential element in the proper and efficient administration of the school laws. It stabilizes the relationship between the teachers and the administration. ... The limitation period gives school districts the security of knowing that administrative decisions regarding the operation of the school cannot be challenged after ninety days. ... *N.J.A.C.* 6:24-1.2(c) represents a

[2] *N.J.A.C.* 6:24-1.2(c) was recodified as *N.J.A.C.* 6A:3-1.3(d), effective April 3, 2000. The language of *N.J.A.C.* 6A:3-1.3(d), except for an addition not relevant here, is identical to *N.J.A.C.* 6:24-1.2(c). Therefore cases interpreting *N.J.A.C.* 6:24-1.2(c) apply to *N.J.A.C.* 6A:3-1.3(d).

fair and reasonably-necessary requirement for the proper and efficient resolution of disputes under the school laws."

[*Kaprow v. Bd. of Ed. of Berkeley Township*, 131 *N.J.* at 582.]

The public policy, which favors providing school districts (in this case TCI, a private school) with a measure of repose must be weighed against the right of Caldwell, the petitioner, to be notified that TCI has taken a position adverse to it:

Adequate notice must be sufficient to inform an individual of some fact that he or she has a right to know and that the communicating party has a duty to communicate. Moreover, adequate notice under the regulation must be sufficient to further the purpose of the ninety-day limitations period. ... [T]he notice requirement should effectuate concerns for individual justice by not triggering the limitations period until [the petitioner has been alerted to the existence of facts that would be adverse to it]. At the same time, it should further considerations of repose by establishing an objective event to trigger the limitations period in order "to enable the proper and efficient administration of the affairs of government." *Borough of Park Ridge v. Salimone*, 21 *N.J.* 28, 48 (1956).

[*Kaprow*, 131 *N.J.* at 587.]

Adequate notice under *N.J.A.C.* 6A:3-1.3(d) should accommodate the dual purposes of the limitations period:

[T]he first is to stimulate litigants to pursue a right of action within a reasonable time so that the opposing party may have a fair opportunity to defend, thus preventing the litigation of stale claims. ... The second purpose is "'to penalize dilatoriness and serve as a measure of repose'" by giving security and stability to human affairs.

[*Kaprow*, 131 *N.J.* at 587 (internal citations omitted).]

In *Kaprow*, the petitioner was notified, by a secretary of the respondent board of education, that someone else was given her job. The Court held that such informal notice satisfied the "notice of a final order, ruling or other action" by the respondent, as required by *N.J.A.C.* 6:24-1.2(c). *Id.* at 588.

The ninety-day requirement has been strictly followed and applied almost without exception. Specifically, in *Dreher v. Jersey City Bd. of Ed.*, EDU 2777-87, (December 18, 1987), adopted Comm'r. (February 2, 1988), aff'd. State Bd. of Ed. (July 8, 1988), a petition filed just two days after the ninety-day period was dismissed. *Ibid.* Other cases have also strictly applied the ninety-day rule. In *Eisenburg v. Bd. of Ed. of the Borough of Fort Lee*, EDU 9451-01, Final Decision, (October 3, 2002) http://lawlibrary.Rutgers.edu/oal/search.html>, the Commissioner held that the petitioners formal appearance before the respondent Board of Education and subsequent notice that the Board had not reversed or modified a resolution not to offer the petitioner continued employment did not change the point at which the 90-day period began to run, which was determined to be at the time of an earlier letter notifying the petitioner of the resolution because it "alerted petitioner to the existence of facts that might equate in law with a cause of action and was sufficient to enable him to pursue a claim thereby triggering the 90-day filing period in *N.J.A.C.* 6A:3-3(d)." *Ibid.*

Generally, the courts' interpretations of *N.J.A.C.* 6A:3-.3(d) and its predecessor would precipitate a finding that Caldwell was on notice of TCI's additional tuition charges when it received TCI's December 5, 2000 letter and invoice requesting the additional amount of tuition in the amount of $4,700.00 per student. However, in giving Caldwell the benefit of the doubt, the December 21, 2000 letter from the State Department of Education advised the parties that the preliminary per pupil rebill amounts were preliminary adjustments "strictly for budgetary purposes and must not be used for billing purposes." One could reasonably conclude, upon reviewing this letter, that approval by the Office of Fiscal Policy and Planning was necessary prior to the incurrence of an obligation by Caldwell to pay any additional tuition to TCI. Thus, it could be reasonably argued that Caldwell was not responsible for the additional payment, until it was notified that the additional amounts were approved. In a letter dated May 3, 2001 the Department of Education informed TCI that it had reviewed and

approved its tuition adjustments and recommended that TCI "properly notify each district board of education of the audit adjustments no later than 30 days after the receipt of this letter." Caldwell claims it received no such notification. Assuming that this is true and that Caldwell is given the benefit of every conceivable doubt with respect to the triggering of the ninety-day filing period, the latest starting date is May 30, 2001. Caldwell sent a letter, dated May 30, 2001, to the Commissioner, in which it acknowledges receiving notification of an adjustment that had been approved by the State Department of Education. However, Caldwell did not file its appeal with the Commissioner until March 8, 2002, more than eight months after May 30, 2001. Therefore, **I FIND** that Caldwell's petition was untimely.

The next issue is whether the circumstances in this case warrant relaxation of the rule and allow a petition to be filed after the ninety-days has lapsed. The governing regulation provides as follows:

> The rules in this chapter shall be considered general rules of practice to govern, expedite and effectuate the procedure before, and the actions of the Commissioner in connection with the determination of controversies and disputes under the school laws. Where such rules do not reflect a specific statutory requirement or an underlying rule of the OAL, they may be relaxed or dispensed with by the Commissioner, in his or her discretion in any case where a strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice.
>
> [*N.J.A.C.* 6A:3-1.16.[3]]

The ninety-day rule may only be relaxed under exceptional circumstances or if there is a "compelling" reason to do so. *Kaprow*, 232 *N.J.* at 590. Certain cases are excepted from the rule, which include "cases involving (1) important and novel constitutional questions; (2) informal or *ex parte* determinations of legal questions by administrative officials; and (3) important public rather than private interests which require adjudication or clarification." *Brunetti v. Borough of New Milford*, 68 *N.J.* 576, 586 (1975). The expenditure of public funds is not a sufficient public interest to justify a waiver or

relaxation of the ninety-day rule. Elmwood Park Bd. of Ed. v. Farrell, 95 *N.J.A.R.* 2d (EDU) 375, 378. "The authority to relax or waive the ninety-day rule is rarely invoked and is generally unsuccessful unless strict adherence would be inappropriate, unnecessary or where injustice would occur." DeMaio v. New Providence Bd. of Ed., 96 *N.J.A.R.* 2d (EDU) 449, 453 (citing Gordon v. Passaic Bd. of Ed., 1985 S.L.D. 1929, 1931, aff'd., A-3294-84T7 (*App. Div.* May 27, 1986)(unreported), certif. denied, 105 *N.J.* 534 (1986)).

I FIND that there is no important or novel constitutional question or important public interest, which requires adjudication. Therefore, the "ninety day rule" cannot be waived under those exceptions.

However, the Appellate Division has held that there is justification for relaxation of the ninety-day rule where "the Commissioner's findings that [a] petitioner was reasonably led to believe that he could continue to informally seek relief and not be concerned about the time limitations for filing his petition are adequately supported by the record and that strict adherence to the 90-day time limitation ... would result in individual justice not being served." Brown v. Bd. of Ed. of the Vocational School in the County of Sussex, A-4854-83T7 (*App. Div.* April 4, 1985)(unreported). In this case, which involves informal determinations by administrative officials (the Commissioner's representatives),the record might support the position that there was a reasonable belief on the part of Caldwell that it could informally seek relief and not be concerned with the time limitations. In viewing the affidavit of Caldwell's Business Administrator/Board Secretary, Ronald Skopak, as true, he spoke with Jim Verner, Section Supervisor in the Division of Finance, to express Caldwell's concerns about their approval of TCI's additional tuition costs. Mr. Verner told Mr. Skopak that the only recourse was to send a letter to the Commissioner asking him to evaluate the appropriateness of TCI's actions. Mr. Skopak then, as directed, drafted a letter to the Commissioner, dated May 30, 2001. Caldwell filed its appeal after receipt of the response letter from Peter Genovese, III, Assistant Commissioner, Division of Finance, dated December 11, 2001, which instructed that if Caldwell desired to appeal the determination, that it could initiate a formal proceeding by filing a "Petition of Appeal"

[3] N.J.A.C. 6A:3-1.16, effective April 3, 2000, is the recodification of N.J.A.C. 6:24-1.15. However the

with the Commissioner. One could conclude that Caldwell, based on the conversation with the Commissioner's representative and the subsequent letter received from another representative of the Commissioner giving the option of a formal appeal, had a reasonable belief that it not only could, but was required to, informally seek relief with the Commissioner before filing a formal appeal. While I am not entirely convinced that Caldwell was led to believe that it did not need to be concerned about the time deadline, because of the actions of the Commissioner's representative, on a motion for summary judgment, the facts must be considered in the light most favorable to the opposing party. Boyer v. Anchor Disposal, 135 *N.J.* 86 (1994).

Under the circumstances, **I FIND** that testimony would need to be elicited at a hearing to determine if Caldwell was led to believe that it could informally seek relief and not be concerned with the time limitations. If those facts were established, then it might be proper to relax the "ninety day rule." Therefore, **I FIND** that Summary decision should not be granted against Caldwell on this ground.

The second issue involved in this motion is whether the inclusion of lease termination costs and unamortized depreciation on leasehold improvements in the expenses of TCI for the 1999-2000 school year, in accordance with Generally Accepted Accounting Procedures ("GAAP"), were patently unreasonable.

N.J.S.A. 18A:46-21 enables the Department of Education to regulate the tuition rate a private school can charge a sending public school district for educating disabled students.[4] Under such regulations, these private schools are required to file a certified audit. *N.J.A.C.* 6:20-4.8.[5] "This audit serves two purposes; calculating the school's

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language in both regulations is substantially the same.

[4] *N.J.S.A.* 18A:46-21 states that:

> Any board of education, jointure commission, or private school for the handicapped which receives pupils from a sending district under this chapter shall determine a tuition rate to be paid by the sending board of education, but in no case shall the tuition rate exceed the actual cost per pupil as determined under rules prescribed by the commissioner and approved by the state board of education.
> [*N.J.S.A.* 18A:46-21.]

[5] *N.J.A.C.* 6:20 was repealed by R.2001 d.140, effective May 7, 2001 (operative July 1, 2001), and replaced with *N.J.A.C.* 6A:23. However it has been stipulated in this case "that, unless otherwise indicated in the regulations in effect at the time that the additional tuition charges were incurred and billed

actual cost per pupil and verifying that the school spent tuition monies it received on allowable costs. Carrier Foundation – East Mountain School v. State Bd. of Ed., EDU 508-00, Initial Decision, (February 21, 2001), adopted Comm'r. (April 12, 2001), *aff'd.* State Bd. of Ed. and remanded to Comm'r. on other limited grounds (October 3, 2001)<http://lawlibrary.Rutgers.edu/oal/search.html>(citing Coastal Learning Center, Inc. v. State Bd. of Ed., 96 *N.J.A.R.* 2d (EDU) 406,407, 415, *aff'd.* State Bd. of Ed., 96 *N.J.A.R.* 2d (EDU) 740). "The State Board promulgated two regulations regarding how private schools shall determine tuition rates charged; *N.J.A.C.* 6:20-4.1, mandating tuition rate procedures, and *N.J.A.C.* 6:20-4.4, listing non-allowable costs. While *N.J.A.C.* 6:20-4.1 and 4.4 [had] remained significantly unchanged for ten years, there is neither judicial nor administrative case law interpreting them." Carrier Foundation – East Mountain School, supra. The regulations also state that "[a]ccounts shall be kept in accordance with generally accepted accounting principles (GAAP) as defined by the American Institute of Certified Public Accountants, except as already modified in the rules." *N.J.A.C.* 6:20-4.3(a)(1).

The regulations in effect at the time the additional tuition charges were incurred and billed to Caldwell provided that:

Actual allowable costs for the 10 month school year program ... shall be consistent with the individualized education program of a handicapped pupil and shall be reasonable, that is, ordinary and necessary and not in excess of the cost which would be incurred by an ordinary prudent person in the administration of public funds.

[*N.J.A.C.* 6:20-4.1(a)(1).]

The regulations also set forth a list of fifty-four types of non-allowable costs. One such cost is "[a] cost found to be patently unreasonable by the Commissioner or his or her representative(s) or the independent auditor/accountant." *N.J.A.C.* 6:20-4.4(a)(54). There exists no case law that addresses the requirements of *N.J.A.C.* 6:20-4.4(a)(54).

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to the district are the regulations that apply to the resolution of this dispute." See Prehearing Order dated September 23, 2002.

TCI presents a substantial amount of evidence to support the proposition that inclusion of the lease termination costs and unamortized depreciation on leasehold improvements in the expenses of TCI were not patently unreasonable. Most notable is that neither an independent auditor nor two of the Commissioner's representatives found these costs to be patently unreasonable. First, the independent auditor, relying upon GAAP in accordance with the requirements of *N.J.A.C.* 6:20-4.3(a)(1), did not conclude that the costs were patently unreasonable. The auditor further concluded that GAAP required TCI to include leasehold termination costs and unamortized depreciation on leasehold improvements in the expenses of TCI for the 1999-2000 school year. Next, Jim Verner, a section supervisor, from the Office of Fiscal Policy and Planning within the Department of Education, by letter dated May 3, 2001, conveyed his findings that the report of the independent auditor satisfied the 1999-2000 State Department of Education audit and format requirements. This letter also referred to the determination of the actual tuition charge that resulted in an additional billing of $4,700.00 per pupil. Finally, Peter E. Genovese, III, Assistant Commissioner, Division of Finance, Department of Education, in response to the May 30, 2001 letter from Caldwell, confirmed the accuracy of the inclusion of these costs in the expenses of TCI for the 1999-2000 school year in a letter dated December 11, 2001.

The only evidence Caldwell offers in support of this position is that another organization now operates a school at the Livingston site and a special education plan for 1993-1996, dated December 16, 1992, provided for additional space through the building of a new wing on the existing facility. The fact that another school has chosen to use the Livingston facility and that the electromagnetic study did not recommend closing the school does not mean that TCI's decision to move was unreasonable. Neither does it shed light on the reasonableness of the costs involved in the matter. Caldwell also makes a general claim that the inclusion of the costs in question in TCI's expenses is violative of *N.J.A.C.* 6:20-4.1(a)1, in that the costs were not "consistent with the individualized education program[s] of the handicapped pupil[s]" sent by Caldwell to TCI, but rather were costs more generally incurred for the benefit of TCI. However, Caldwell fails to provide any evidence to support this argument. Thus, in light of all the evidence in the record, Caldwell, even when given the benefit of all facts and

reasonable inferences there from, can not show that the costs that it questions are patently unreasonable. Therefore summary decision is appropriate.

CONCLUSION

Thus, for the foregoing reasons summary decision should be **GRANTED** to the Children's Institute. Although Caldwell may be able to escape summary judgment with respect to the untimeliness of the filing of its petition, in that the 90-day requirement could be relaxed. Summary decision is appropriate on the grounds that the record does not show that TCI's inclusion of lease termination costs and unamortized depreciation on leasehold improvements in the expenses of CI for the 1999-2000 school year, in accordance was patently unreasonable.

ORDER

It is hereby **ORDERED** that the Children's Institute's Motion for Summary Decision be **GRANTED.**

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

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

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

1/28/03
DATE

Carol I. Cohen
CAROL I. COHEN, ALJ

Receipt Acknowledged:

January 31, 2003
DATE

H. Kathleen Duncan (for)
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 4 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

yw

OAL DKT. NO. EDU 5132-02
AGENCY DKT. NO. 67-3/02

BOARD OF EDUCATION OF THE CALDWELL-WEST CALDWELL SCHOOL DISTRICT, ESSEX COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
THE CHILDREN'S INSTITUTE,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Respondent's exceptions were submitted in accordance with *N.J.A.C.* 1:1-18.4.

In its exceptions, respondent maintains its position that the Petition of Appeal was untimely filed, arguing that petitioner was on notice, no later than December 5, 2000, that The Children's Institute (TCI) was going to rebill petitioner; however, petitioner thereafter engaged in "stalling tactics," refusing to pay the rebilled amount. (Respondent's Exceptions at 6) Although respondent acknowledges the circumstances upon which the 90-day rule may be relaxed, it contends that it was simply not reasonable in this instance for petitioner "to have relied on alleged representations made by the Department of Education that the 90-day rule was inapplicable.***" (*Id.* at 12) Respondent asserts:

> As a matter of law, it should be determined that no trier of fact would be able to conclude that it was reasonable for a sophisticated school administrator versed in the ways of the Commissioner's procedures to believe, based upon a phone conversation with Verner, that a procedural rule, which is strictly applied and enforced, would be waived under these circumstances.

> Furthermore, even if Verner advised Skopak as asserted and Skopak relied upon the information, it would have no legal significance since ignorance of the law cannot toll the limitation period, except in instances of fraud.***" (citations omitted) (*Id.* at 13, 14)

Moreover, respondent points out that a review of petitioner's May 30, 2001 letter demonstrates that Skopak did not reasonably believe that he was relieved of the obligation to file a petition with the Commissioner, where the May 30, 2001 letter specifically states that Skopak was instructed by Verner that the District's only appeal was to the Commissioner of Education. (*Id.* at 14) Instead, respondent contends that petitioner knew of its obligation to file a petition but, instead, "gambled for a favorable decision in one forum and, having been unsuccessful, now seeks further relief in another.***" (*Ibid.*) Respondent contrasts this situation with *Brown, supra*, wherein the petitioner "was a teacher who likely never had a dispute submitted to the Commissioner and would not have been versed in either the Commissioner's procedures or the substantive law." (*Id.* at 15)

Finally, respondent argues that filing an action in the wrong forum does not toll the 90-day filing rule. (*Ibid*) "Likewise, seeking an informal resolution to a controversy does not relieve the petitioner of fulfilling the 90-day requirement." (*Id.* at 16) Respondent urges, therefore, that the petition should have been filed 90 days after receipt of TCI's rebilling on December 5, 2000 or, *at the latest*, 90 days after May 30, 2001, the date when petitioner concedes in its correspondence that it was informed that the rebilling was sought. (*Id.* at 17)

Upon careful and independent review of the record in this matter, the Commissioner determines to modify the Initial Decision, as set forth herein. Initially, the Commissioner concurs, for the reasons set forth in the Initial Decision, that the within petition was untimely filed. Additionally, the Commissioner finds no cause for relaxation of the 90-day

filing requirement, since this matter presents "no important or novel constitutional question or important public interest, which requires adjudication." (Initial Decision at 10)[1] Neither does the Commissioner find that strict adherence to the 90-day rule will yield an unjust result in this instance.[2]

Notwithstanding this determination, the Commissioner notes that inasmuch as the ALJ reaches to the merits of this matter, he acknowledges his concurrence with the ALJ's conclusion that petitioner has failed to meet its burden of proving that respondent's inclusion of the lease termination costs and unamortized depreciation on leasehold improvements in TCI's expenses for the 1999-2000 school year was patently unreasonable.

Accordingly, the Commissioner concurs that summary decision must be granted in respondent's favor.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 3/14/03

Date of Mailing: 3/14/03

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[1] In this connection, the Commissioner notes that respondent correctly states that "Caldwell's reliance on *Brunetti v. Borough of New Milford*, 68 *N.J.* 576, 586 (1975) and *TriState Ship. Repair and Drydock v. City of Perth Amboy*, 349 *N.J. Super.* 418, 423 (App. Div. 2002), is misplaced since both cases pertain to actions in lieu of prerogative writs ***." (Respondent's Reply Brief in Support of Motion for Summary Decision, at 4)

[2] In so determining, the Commissioner rejects the ALJ's finding that petitioner's communications with the Department, even assuming, *arguendo*, such communications were misleading, may warrant relaxation of the 90-day rule under these circumstances. (Initial Decision at 11) *See, Board of Education of the Township of East Brunswick, Middlesex County v. New Jersey State Department of Education, Division of Finance,* Commissioner Decision August 10, 2001, slip. op. at 10, wherein the Commissioner held that it is not the responsibility of Department personnel to inform a high level administrative officer of the specific procedural requirements for filing an appeal. The Commissioner dismissed the appeal as untimely and underscored, "[a]s stated by the New Jersey Supreme Court in *Kaprow*, attempts to resolve a claim through negotiations are irrelevant. Such efforts do not negate the fact of adequate notice nor do they toll the running of the time limitation."

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

112-03

IN THE MATTER OF THE TENURE	:	
HEARING OF JOHN C. FREEMAN,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
CAMDEN, CAMDEN COUNTY.	:	

March 14, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 8567-02

AGENCY DKT. NO. 384-12/02

IN THE MATTER OF THE TENURE HEARING OF JOHN C. FREEMAN, SCHOOL DISTRICT OF THE CITY OF CAMDEN, CAMDEN COUNTY.

Karen A. Murray, Esq., for petitioner, Camden Board of Education (Murray & Murray, attorneys)

Keith Waldman, Esq., for respondent, John C. Freeman (Selikoff & Cohen, attorneys)

Record Closed: January 30, 2003 Decided: January 31, 2003

BEFORE **JOHN SCHUSTER III**, ALJ:

This matter was transmitted to the Office of Administrative Law on December 18, 2002, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Joint Request for Approval of Settlement, including Withdrawal of Tenure Charges and a Stipulation of Settlement, which is attached and fully incorporated herein.

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

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

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

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

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

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

January 31, 2003
DATE

JOHN SCHUSTER III, ALJ

Receipt Acknowledged:

2-4-03
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 5 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

jh

Karen A. Murray, Esq.
Murray & Murray
25 Sycamore Ave.
Little Silver, NJ 07739
(732) 747-2300
Counsel for Petitioner,
Camden Board of Education

SELIKOFF & COHEN, P.A.
307 Fellowship Rd., Suite 314
Mt. Laurel, NJ 08054-1233
(856) 778-6055
Counsel for Respondent,
John Freeman

IN THE MATTER OF THE TENURE HEARING OF JOHN FREEMAN, SCHOOL DISTRICT OF CAMDEN CITY, CAMDEN COUNTY.

BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY

DOCKET NO. 384-12/02

JOINT REQUEST FOR APPROVAL OF SETTLEMENT, INCLUDING WITHDRAWAL OF TENURE CHARGES

INTRODUCTION

Counsel for the Camden Board of Education ("Board") and counsel for its tenured employee John Freeman ("Freeman") join in moving for an order declaring that the Stipulation between the Parties, attached hereto as Exhibit A, meets the requirements of *N.J.A.C.* 1:1-19.1, recommending that the Stipulation be approved by the Office of Administrative Law ("OAL") and the Commissioner of Education ("Commissioner"), and on condition that the Commissioner approves without modification the Stipulation attached hereto as Exhibit A, ordering that the Stipulation be implemented, and that the tenure charges filed by the Board be withdrawn and this matter dismissed with prejudice.

PROCEDURAL STATEMENT

This matter arises out of charges certified by the Board to the Commissioner on October 25, 2002, against a tenured teaching staff member primarily on grounds of chronic absenteeism and lateness. The tenure charges were transmitted to the OAL as a contested case on December 19, 2002. A hearing concerning the Board's tenure charges has been scheduled before the Honorable John Schuster, III, ALJ, on March 21, 2003, April 1, 2 and 4, 2003. The Parties have reached a tentative settlement conditioned upon the drafting of mutually satisfactory settlement documents to be submitted for approval by the OAL and the Commissioner in accordance with which the tenure charges might be withdrawn.

The Parties have agreed under the terms of the Stipulation attached hereto as Exhibit A that Freeman will tender his resignation effective December 31, 2003 or the date that the Teachers Pension and Annuity Fund ("TPAF") grants or determines with finality Freeman's application for a voluntary disability pension, whichever is earlier ("resignation date").

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

THE JUSTIFICATION FOR WITHDRAWAL OF TENURE CHARGES

Due to the fact that the most substantial bases for the charges were the allegations of chronic absenteeism and lateness and the Parties agree that these alleged attendance problems arise from disabling conditions which also serve as the bases for an application by FREEMAN to the Teachers' Pension and Annuity Fund ("TPAF") for a voluntary disability pension, the Board has reviewed the evidence and decided to withdraw the charges upon approval of this settlement by the OAL and the Commissioner.

CONCLUSION

Counsel, as well as FREEMAN and the BOARD are satisfied with the Stipulation and believe that it fulfills the public interest with respect to these matters. For the reasons outlined above, and for good cause shown, this tribunal should conclude that the Stipulation meets the requirements of *N.J.A.C.* 1:1-19.1, recommend that the Stipulation be adopted without modification by the Commissioner, order that the Stipulation be implemented on condition that it is so approved, and therefore upon such approval dismiss with prejudice the tenure charges and petition of appeal in this consolidated matter.

Respectfully submitted,

MURRAY & MURRAY
Attorneys for the
Camden Board of Education

BY: _____
KAREN A. MURRAY

SELIKOFF & COHEN, P.A.
Attorneys for John Freeman

BY: _____
KEITH WALDMAN

Karen A. Murray, Esq.
Murray & Murray
25 Sycamore Ave.
Little Silver, NJ 07739
(732) 747-2300
Counsel for Petitioner,
Camden Board of Education

SELIKOFF & COHEN, P.A.
307 Fellowship Rd., Suite 314
Mt. Laurel, NJ 08054-1233
(856) 778-6055
Counsel for Respondent,
John Freeman

IN THE MATTER OF THE TENURE HEARING OF JOHN FREEMAN, SCHOOL DISTRICT OF CAMDEN CITY, CAMDEN COUNTY.

BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY

DOCKET NO. 384-12/02

STIPULATION OF SETTLEMENT

THIS STIPULATION OF SETTLEMENT is entered into by and between the Petitioner Board of Education of the City of Camden (hereinafter "BOARD") and Respondent JOHN FREEMAN (hereinafter referred as "FREEMAN") (the BOARD and FREEMAN are hereinafter referred to jointly as the "Parties" and each may be referred to severally as a "Party");

WHEREAS, FREEMAN has been continuously employed by the Board as a teaching staff member since September 1, 1984;

WHEREAS, on or about October 25, 2002, the BOARD certified to the Commissioner of Education ("Commissioner") charges against FREEMAN which it felt under the circumstances, if true, were sufficient to warrant his dismissal;

EXHIBIT A

3d

WHEREAS, on or about December 10, 2002, FREEMAN filed an Answer to the charges denying the allegations as stated;

WHEREAS, the Commissioner transmitted this matter to the Office of Administrative Law ("OAL") for hearing and this matter has been listed for hearing before the Honorable John Schuster, III, ALJ, on March 21, 2003, April 1, 2 and 4, 2003 and the Parties having agreed to a means of resolving this dispute in a manner consonant with the public interest;

WHEREAS, the most substantial bases for the charges were the allegations of chronic absenteeism and lateness and the Parties agree that these alleged attendance problems arise from disabling conditions which also serve as the bases for an application by FREEMAN to the Teachers' Pension and Annuity Fund ("TPAF") for a voluntary disability pension; and

WHEREAS, FREEMAN and the BOARD have entered into this Stipulation with a full understanding of their rights, recognizing that this Stipulation and their agreement is subject to the review and approval of the Commissioner, and with FREEMAN's further understanding that pursuant to *N.J.A.C.* 6:11-3.6(a)1 any determination made by the Commissioner resulting in a loss of tenure or dismissal may be referred to the State Board of Examiners for determination of possible revocation or suspension of teaching certificate;

NOW THEREFORE, the matter in difference having been amicably adjusted by and between the parties,

IT IS HEREBY STIPULATED AND AGREED AS FOLLOWS:

1. The recitals set forth above are repeated and incorporated by reference as a material part of this Stipulation.

2. Immediately upon execution of this document, the Parties will file the accompanying Joint Request for Approval of Settlement, Including Withdrawal of Tenure

Charges and this filing serves as a joint motion before the OAL and the Commissioner for an order permitting the Board to voluntarily dismiss the charges as moot.

3. FREEMAN will apply to TPAF for a voluntary disability pension. The Board will fully cooperate with Mr. Freeman's application and any appeals that he may file from the denial of his application. Neither the Board, the OAL, the Commissioner, the New Jersey Education Association, the Camden Education Association, counsel for the parties or anyone else has promised FREEMAN or can guaranty that his pension application will be approved by TPAF. FREEMAN also acknowledges the possibility that his resignation may take effect on December 31, 2003 with his voluntary disability pension application being denied.

4. By signing this Stipulation, FREEMAN tenders his resignation effective December 31, 2003 or the date that TPAF grants or otherwise decides with finality FREEMAN's application for a voluntary disability pension, whichever is earlier ("resignation date"). A copy of the letter of resignation is attached as Exhibit A to this Stipulation. The BOARD accepts FREEMAN's resignation effective on the resignation date. The Board's records will reflect that FREEMAN left the BOARD's employ to pursue an ordinary disability pension. The Board will place FREEMAN on a medical leave of absence without pay but with benefits. Benefits will continue until six (6) months from the execution of this Stipulation or until TPAF grants or otherwise decides with finality FREEMAN's application for a voluntary disability pension, whichever comes first. The medical leave of absence will continue until December 31, 2003 or until TPAF grants or otherwise decides with finality FREEMAN's application for a voluntary disability pension, whichever comes first.

5. The Board will immediately release FREEMAN's pre-suspension paychecks to him in care of Selikoff & Cohen, P.A. As is required by *N.J.S.A.* 2A:17-56.37, Selikoff & Cohen, P.A. will perform a child support arrearage search before disbursing any funds to FREEMAN.

6. The Parties enter into this Stipulation with the mutual understanding that this Stipulation will be placed into the record for this matter. He certifies that he is knowingly and voluntary waiving his tenure rights, including the right to a tenure hearing.

7. The Board and the Camden Education Association agree that this settlement will not be construed as establishing a binding precedent or past practice.

8. The Parties agree that each paragraph of this Stipulation is material. The settlement is subject to the granting of the Board's motion and the approval without modification by the OAL and the Commissioner. In the event that any portion of this settlement is not approved by the OAL or the Commissioner, the parties agree, in advance, to attempt to reform this Stipulation in good faith to provide each Party with the full benefit of the settlement memorialized by this Stipulation. In the event that reformation is not possible, this Stipulation will become null and void and the parties will return to the status quo as it existed before the settlement and the parties will have the opportunity to fully and fairly litigate the tenure charges and defenses thereto. In such event, neither this Stipulation, the Joint Request for Approval of Settlement nor the recitals contained in them will be admissible for any purpose.

9. The BOARD agrees that FREEMAN will be eligible to receive benefits at his sole expense under the Consolidated Omnibus Budget Reconciliation Act, ("COBRA"), 29 *U.S.C.* §§1161-1168, in the event that his pension is not approved within six (6) months and should he elect such coverage. BOARD agrees to cooperate with FREEMAN to the extent necessary for him to be eligible for and receive COBRA benefits;

10. The Parties agree that they and their officers, agents, and administrators will be bound by a covenant of good faith and fair dealing with respect to performance under this Stipulation. The BOARD expressly warranties that neither the BOARD nor its agents or administrators will take any retaliatory action against FREEMAN.

11. This Stipulation constitutes a full release of any and all claims of either Party against the other. Specifically, FREEMAN forever releases the BOARD from any and all complaints, charges, liabilities, demands, debts, accounts, obligations, promises, suits, actions, causes of action, demands in law or equity, including claims for damages (including but not limited to back pay and front pay), equitable relief, and attorney fees or costs, which FREEMAN now has, or claims to have, or which FREEMAN at any time may have had or claimed to have had, or which FREEMAN at any time hereafter may have, or claim to have, whether presently known or unknown, arising at any time, up to and including the date on which he signs the document. FREEMAN specifically releases the BOARD from any claims he has or may have had under the New Jersey Law Against Discrimination or the federal Americans with Disabilities Act. Nothing in this paragraph is intended to operate as a release, waiver, or forfeiture of FREEMAN's rights, and the BOARD's obligations under: (a) any state worker's compensation act or statute, or (b) any State of New Jersey retirement, pension, savings, or 401(k) plan in which FREEMAN is a participant;

12. The BOARD forever releases FREEMAN from any and all complaints charges, liabilities, demands, debts, accounts, obligations, promises, suits, actions, causes of action, demands in law or equity, including, but not limited to, claims for damages, equitable relief, attorney fees or costs, which the BOARD now has, or claims to have, or which the BOARD at any time may have had or claimed to have had, or which the BOARD at any time hereafter may have, or claim to have, whether presently known or unknown, arising at any time, up to and including the date on which this document is signed on its behalf.

13. The Parties agree to waive exceptions.

14. The Parties agree that this document constitutes their full understanding. It is agreed that there are no other understandings or agreements (either written or oral) which would have any impact upon the present action.

15. By signing this Stipulation, the Parties certify that they have had the opportunity to discuss this Stipulation with counsel. They are fully satisfied with the services of their counsel with respect to both this Stipulation and all other aspects of this case and they enter into this Stipulation knowingly, willingly and without any coercion or improper inducements.

16. By signing this Stipulation, each signatory represents that she or he is a Party or has been duly authorized by a Party to sign on that Party's behalf.

17. The Parties agree that this Stipulation may be signed in counterparts and that facsimiles of signatures will have the same force and effect as original signatures.

FOR THE CITY OF CAMDEN
BOARD OF EDUCATION

DATED: 1/28/03

By: Karen Murray
Karen A. Murray, Esq.

CAMDEN EDUCATION ASSOCIATION

DATED:

By: _____
Claraliene Gordon, President

DATED:

By: _____
John Freeman

FOR THE CITY OF CAMDEN
BOARD OF EDUCATION

DATED: By:_____
Karen A. Murray, Esq.

CAMDEN EDUCATION ASSOCIATION

DATED: 1/28/03 By: Claraliene M. Gordon
Claraliene Gordon, President

DATED: By:_____
John Freeman

FOR THE CITY OF CAMDEN
BOARD OF EDUCATION

DATED: By:_____
Karen A. Murray, Esq.

CAMDEN EDUCATION ASSOCIATION

DATED: By:_____
Claraliene Gordon, President

DATED: 1/28/03 By: John Freeman
John Freeman

JOHN FREEMAN
10109 Sunrise Dr.
Stone Harbor, NJ 08247

~~[INSERT DATE]~~
1/28/03

Leon Freeman, Board Secretary
CITY OF CAMDEN BOARD OF EDUCATION
201 North Front Street
Camden, NJ 08102-1935

re: Resignation Effective 12/31/03 or Upon Granting of Pension Application, Whichever Comes First

Dear Mr. Freeman:

Please be advised that subject to the terms of the Stipulation of Settlement, I will be resigning from my position as a teacher in the Camden City Public Schools effective December 31, 2003 or upon the granting or the final determination of my application for an ordinary disability pension, whichever comes first.

I will take with me many fond memories of the children I have taught.

Very truly yours,

John Freeman

JOHN FREEMAN

EXHIBIT A

S-

TOTAL P.13

3 M

OAL DKT. NO. EDU 8567-02
AGENCY DKT. NO. 384-12/02

IN THE MATTER OF THE TENURE	:	
HEARING OF JOHN C. FREEMAN,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
CAMDEN, CAMDEN COUNTY.	:	

The record, Stipulation of Settlement and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon review, the Commissioner finds the Stipulation to be consistent with established standards for settlement of tenure matters, and, accordingly, he approves and adopts it as the final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846; *N.J.A.C.* 6A:3-5.6(a). The matter is hereby dismissed, subject to compliance with the terms of the settlement, and a copy of this decision shall be forwarded to the State Board of Examiners for action as it deems appropriate.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 3/14/03

Date of Mailing: 3/14/03

115-03

IN THE MATTER OF THE TENURE	:	
HEARING OF JEANETTE F. NIXON,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF CRANFORD, UNION COUNTY.	:	

March 14, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 10968-94
AGENCY DKT. NO. 421-10/94
and OAL DKT. NO. 6584-95
AGENCY DKT. NO. 186-5/95

BOARD OF EDUCATION OF THE
TOWNSHIP OF CRANFORD,
UNION COUNTY,
Petitioner,
v.
JEANNETTE F. NIXON,
Respondent.

David B. Rubin, Esq., for petitioner

Louis P. Bucceri, Esq., for respondent
(Bucceri & Pincus, attorneys)

Record Closed: January 28, 2003 Decided: January 30, 2003

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

These matters concern tenure charges served against respondent, a tenured employee of petitioner, in her capacity as board secretary/school business

administrator. More particularly, on October 12, 1994, petitioner Cranford Board of Education certified tenure charges charging respondent with various acts of mismanagement, incompetence and unprofessional conduct. Petitioner accordingly suspended respondent without pay for 120 days, and with pay thereafter, pursuant to *N.J.S.A.* 18A:6-14. This matter was transmitted to the Office of Administrative Law (OAL) on November 15, 1994 for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13. It was assigned to the undersigned judge.

On or about March 17, 1995, the Board obtained a temporary restraining order freezing certain assets of respondent's and diverting her net salary into an escrow account. All tax and pension deductions were still being made, but respondent was denied access to the funds.

During respondent's suspension, petitioner uncovered evidence indicating that respondent had also engaged in embezzlement and fraud during her employment. In light of this discovery, petitioner certified additional tenure charges on May 22, 1995, and again suspended respondent without pay for 120 days.

On June 12, 1995, respondent filed a verified counterclaim seeking retroactive reinstatement of her salary payments, *albeit* into the escrow account absent further order of the Superior Court. The Board filed its answer to the counterclaim on June 21, 1995. This matter was transmitted to the OAL on June 23, 1995 for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13. It was assigned to the undersigned judge and consolidated with the previously filed case for hearing.

The discovery of fraud and embezzlement also resulted in a civil trial in which petitioner secured an injunction freezing certain assets of respondent on March 17, 1995, as well as a criminal trial which resulted in respondent's conviction in December 1995. More particularly, respondent was ultimately convicted following a jury trial before Chief Judge Thompson of the U.S. District Court and served time in a federal

penitentiary pending appeal. In December 1996, Judge Thompson issued an order requiring respondent to pay $150,900 in restitution to the Board.

On September 27, 1996, an Order of Forfeiture (attached) was entered by the Honorable Philip S. Carchman, A.J.S.C., ordering that respondent forfeit her offices as business administrator/board secretary of the Cranford Board of Education and any other public positions held by her under the government of this state or any of its administrative or political subdivisions.

These matters were placed on the inactive list at the OAL for various six month periods of time pending the final outcome of the appeals of respondent's criminal conviction. The tenure charges were held in abeyance pending the outcome of the appeals because the previously ordered forfeiture pursuant to *N.J.S.A.* 2C:51-2 would moot the charges if the conviction stood.

During the pendency of these matters on the inactive list, respondent sought summary decision on her counterclaim and the retroactive reinstatement of her salary, subject to the terms of the Superior Court escrow. By letter decision to counsel, dated June 30, 1997, the undersigned denied respondent's motion and dismissed respondent's counterclaim in regard to the issue of respondent's salary.

By letter dated October 10, 2002, the undersigned was advised by respondent's counsel that all appeals had been exhausted with no alteration of the conviction. A conference call was held with counsel on October 15, 2002, during which the undersigned requested clarification from respondent's attorney as to whether any issues remained outstanding. More particularly, at issue was whether respondent wished to pursue in any manner the salary issue. In response to this request, counsel for respondent submitted the attached letter, dated January 24, 2003, advising that no issues remain outstanding.

Based on the contents of that letter, I **FIND** that respondent does not wish to pursue the merits of any claim relative to a salary issue. Furthermore, I **FIND** that since all appeals have been exhausted in regard to respondent's criminal conviction, the attached Order of Forfeiture remains in effect thereby making the tenure charges moot.

On the strength of the foregoing, I therefore **ORDER** that these proceedings should be and are hereby **TERMINATED**.

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

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

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

January 31, 2003
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

February 5, 2003
DATE

M. Kathleen Duncan (CJ)
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 10 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

al

BUCCERI AND PINCUS
COUNSELORS AT LAW
1200 ROUTE 46
CLIFTON, NEW JERSEY 07013-2440

(973) 773-5665

FAX (973) 773-2170

SHELDON H. PINCUS
MEMBER N.J. & D.C. BARS
LOUIS P. BUCCERI
GREGORY T. SYREK

MARY J. HAMMER
MEMBER N.J. & N.Y. BARS

January 24, 2003

Hon. Elinor R. Reiner, A.L.J.
Office of Administrative Law
33 Washington Street, 9th Floor
Newark, NJ 07102

Re: In the Matter of the Tenure Hearing of Jeanette F. Nixon, Cranford Public School District
O.A.L. Docket No. EDU 10968-94
Agency Ref. No. 421-10/94
-and-
O.A.L. Docket No. EDU 06584-95
Agency Ref. No. 186-5/95

Dear Judge Reiner:

In October, 2002 we had a conference call with Mr. Rubin as to the final resolution of this matter. I was asked to confer with my client as to whether she intended to pursue the issue of her withheld salary which Your Honor had previously ruled upon on an interlocutory basis. If Ms. Nixon wished to appeal Your Honor's order denying her the salary, an initial decision would be needed. If Ms. Nixon did not wish to further appeal that question, the matter could be disposed of as moot since the Order of Forfeiture made the tenure charges unnecessary.

I was also asked to ascertain if Ms. Nixon's certificates had been formally revoked.

My client has responded and has authorized me to advise you that she does not wish to pursue the salary issue. Accordingly, the counterclaim on that issue may be deemed withdrawn or otherwise dismissed as Your Honor deems appropriate. I assume the petitioner will have no objection.

The tenure charges themselves are moot and, therefore, can be resolved without an independent decision on the merits in light of the forfeiture and criminal conviction.

My client has a recollection of certificate revocation, but cannot locate any order to that effect. It is possible that one was issued, or she could be recalling the forfeiture order which has a similar effect, though it comes from a Court as opposed to the Department of Education. I have no record of such an Order from the State.

If I can be of further service, please advise.

Respectfully submitted,

Louis P. Bucceri

/mab
cc: David Rubin, Esq.
Ms. Jeanette Nixon

5a

PETER VERNIERO
ATTORNEY GENERAL OF NEW JERSEY
ATTORNEY FOR PLAINTIFF
BY: MICHAEL J. WILLIAMS
DEPUTY ATTORNEY GENERAL
DIVISION OF CRIMINAL JUSTICE
APPELLATE BUREAU
P.O. BOX CN 086
TRENTON, NEW JERSEY 08625
(609) 292-9086

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - MERCER COUNTY
DOCKET NO. MER-L-349-96

STATE OF NEW JERSEY,	:	
Plaintiff,	:	CIVIL ACTION
v.	:	ORDER
JEANETTE FLORA NIXON,	:	
Defendant.	:	

This matter having been opened to the Court by Peter Verniero, Attorney General of New Jersey (Michael J. Williams, Deputy Attorney General, appearing), and service having been made upon defendant, and the Court having considered the papers filed and the argument of counsel presented on September 27, 1996, and for good cause shown:

IT IS on this 27th day of September, 1996,

ORDERED that defendant Jeanette Flora Nixon forfeit her offices as Business Administrator/Board Secretary of the Cranford Board of Education and any other public positions held by her under the government of this State or any of its administrative or political subdivisions;

IT IS FURTHER ORDERED that defendant Jeanette Flora Nixon is never disqualified from holding any public office or position of honor, trust, or profit under the government of this State or any of its administrative or political subdivisions; and

IT IS FURTHER ORDERED that the terms of this Order shall be deemed to have taken effect on July 3, 1996.

Hon. Philip S. Carchman, A.J.S.C.

OAL DKT. NOS. EDU 10968-94 AND E DU 6584-95 (CONSOLIDATED)
AGENCY DKT. NOS. 421-10/94 AND 286-5/95 (CONSOLIDATED)

IN THE MATTER OF THE TENURE	:	
HEARING OF JEANETTE F. NIXON,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF CRANFORD, UNION COUNTY.	:	

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

Upon his full and independent review, the Commissioner initially concurs with the Administrative Law Judge (ALJ) that the Order of Forfeiture entered by the Honorable Philip S. Carchman, A.J.S.C. on September 27, 1996, deemed to have taken effect on July 3, 1996, renders these consolidated tenure matters moot.[1] The Commissioner further agrees that, based on the January 24, 2003 letter of respondent's attorney to ALJ Reiner, there are no remaining outstanding issues to be resolved in this matter.

Accordingly, the Initial Decision of the OAL recommending dismissal of this matter is adopted for the reasons stated therein. A copy of this decision will be transmitted to the State Board of Examiners for that body's consideration.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 3/14/03
Date of Mailing: 3/14/03

[1] It is, however, unclear from the record whether notification of this forfeiture was ever communicated to the State Board of Examiners and, therefore, whether revocation of respondent's certificate(s) has been accomplished.
[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

114-03

IN THE MATTER OF THE TENURE	:	
HEARING OF PAUL A. STURM,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH	:	DECISION
OF SOUTH PLAINFIELD,	:	
MIDDLESEX COUNTY.	:	
	:	

March 14, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION –WITHDRAWAL
OAL DKT. NO. EDU 2685-02
AGENCY DKT. NO. 114-4/02
Consolidated with EDU 8559-02
AGENCY DKT. NO. 369-11/02

In the Matter of the Tenure Hearing
Of Paul A. Sturm, Board of Education of
The South Plainfield School District,
Middlesex County,

Nicholas Celso, Esq., for the petitioner Board of Education of South Plainfield School District (Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Stephen Klausner, Esq., for the respondent Paul A. Sturm (Klausner & Hunter, attorneys)

Record Closed: January 31, 2003 Decided: February 4, 2003

BEFORE: **ANA C. VISCOMI,** ALJ

Respondent herein has withdrawn his defense to two sets of separate tenure charges. A discussion of the procedural history of these cases is necessary as well as a discussion of the reasons I recommend the Commissioner of Education transmit these matters to the State Board of Examiners for possible further proceedings.

The matter of the tenure hearing of Paul A. Sturm, Docket No. EDU 2685-02, was originally transmitted to the Office of Administrative Law (OAL) on May 6, 2002 by the Department of Education for a hearing pursuant to *N.J.S.A.* 52:14B-1 through –15, *N.J.S.A.* 18A:6-11 and *N.J.S.A.* 52:14F-1 to –13. Pursuant to *N.J.S.A.* 52:14B-10.1, an expedited hearing commenced on August 21, 2002. The hearing then resumed on October 2, 2002 at which time I adjourned the proceeding with the consent of both counsel due to the emotional stress exhibited by respondent and his wife and also to allow the parties to engage in settlement discussions.

The hearing then resumed on October 10, 2002 at the South Plainfield Municipal Complex in South Plainfield. After approximately one-half day of testimony, the hearing was halted in order to resolve the potential disqualification of respondent's counsel due to his prior representation of one of the petitioner's witnesses, former principal Robert Dogget. The matter was fully briefed and I verbally advised the parties that due to the nature of Mr. Klausner's prior representation of Mr. Dogget, the timeframe in issue and in consideration of the Rules of Professional Conduct as well as a review of the case law, Mr. Klausner could continue to proceed in this matter as no basis for disqualification existed. Mr. Klausner did not violate any Rules of Professional Conduct.

The hearing was rescheduled to resume on January 13, 2003. Prior thereto, on December 16, 2002 the Department of Education transmitted a second set of separate sworn charges; *In re In the Matter of Tenure Hearing of Paul A. Sturm, Board of Education of the South Plainfield School District,* Docket No. EDU 8559-02, Agency Reference No. 369-11/02.

At a conference call to discuss scheduling matters, I requested counsel advise whether they would consent to consolidation of these two matters. Respondent's counsel indicated no objection and petitioner's counsel advised in writing shortly thereafter that petitioner did not object. Thus, in accordance with *N.J.A.C.* 1:1-17.1 and *N.J.A.C.* 1:1-14.9, I consolidated these two matters on the record in the presence of counsel on January 28, 2003. The matters were consolidated as they involved common questions of fact and law between the identical parties. Further, the criteria for consolidation as set forth in *N.J.A.C.* 1:1-17.3 was considered in reaching this decision. Although the consolidation order, *per se* is required to be disposed of by interlocutory Order prior to the commencing of the evidentiary hearing, the second set of sworn charges did not come to fruition until the proceeding on the first filed matter had already commenced. In addition, although *N.J.A.C.* 1:1-14.10 provides that the Order of Consolidation by the Office of Administrative Law is interlocutory and reviewable by the Commissioner of Education, respondent has withdrawn his defense in this case by tendering his resignation thereby rendering the matter before the OAL moot. A plenary hearing had been scheduled

2003 I received a facsimile from respondent's counsel advising that respondent had resigned from his position as music instructor.

The parties then appeared before me on January 28, 2003 for purposes of a *voir dire* of respondent Paul Sturm with regard to his resignation.

Mr. Sturm testified that approximately ten days prior to January 28, 2003 he contacted his counsel to advise of his resignation and that he had retained a new position. He testified that on January 21, 2003, he authorized Mr. Klausner to forward his resignation to petitioner School Board. At the time he drafted and executed his resignation letter (J-1), Mr. Sturm testified he was not under the influence of any medications, illicit drugs or alcohol. He indicated the only reason he resigned was based on discussions with his family as well as the fact that he had secured another position with the Avon Avenue School in the Newark Public Schools District. Mr. Sturm presented himself at this hearing before me as belligerent and continued to glare at petitioner's counsel after being instructed by me to cease that conduct. He also attempted to indicate that he felt pressure by the school board to resign but, upon further clarification as elicited by both counsel and this Judge, described the pressure to have been the pursuit of the sworn charges. He reiterated that his resignation was based exclusively on his securing a position as band director in the Newark public school system as well as discussions with his family.

He also testified that he received and understood the letter forwarded to him by his counsel (R-1)[i] in which he was advised that the Commissioner of Education had the authority to forward the charges to the State Board of Examiners to seek to have his teaching license removed even though he had withdrawn his defense in the matter before the OAL and resigned from petitioner school district.

On cross-examination Mr. Sturm testified he understood his resignation would be irrevocable once approved by the Commissioner of Education and then by the Board of Education of South Plainfield School District. He again reiterated he had resigned his position of his own free will and volition.

Based upon testimony before me by respondent on January 28, 2003, I **FIND** Mr. Sturm has voluntarily withdrawn his defense to the charges set forth in these consolidated matters and resigned from his position at the South Plainfield School District of his volition and without any duress.

In accordance with *N.J.A.C.* 1:1-19.2 the parties were advised that I would be issuing an Initial Decision memorializing the withdrawal of defense by respondent and also recommending to the

[i] The redacted portion of this letter is protected by the attorney-client privilege.

Commissioner of Education this matter be referred to the State Board of Examiners for possible further proceedings. I make this recommendation even though the consolidated matters before me would constitute a hearing *de novo* with petitioner Board of Education bearing the burden of proof by preponderance of the credible evidence as to each separate sworn charge sustained below and transmitted to the Office of Administrative Law by the Department of Education for a plenary hearing. The charges are serious in nature. (C-1, C-2) My recommendation is also based on the observations I have made during my presiding over these hearings including the hearing of January 28, 2003 where, despite previous admonishments made to respondent, he continued to glare at petitioner's counsel. During the limited proceedings conducted in these matters, respondent repeatedly ignored my directives to cease contact with school board members and cease glaring at petitioner's counsel during the proceedings. I have also considered the certification of October 11, 2002 of petitioner's counsel Marc Zitomer of what transpired at the conclusion of the hearing at South Plainfield Municipal Complex that day between respondent and himself (C-3) as well as the Order for Temporary Restraint issued against respondent herein for "good cause shown" by Superior Court Judge Honorable Joseph Messina in the matter entitled *South Plainfield Board of Education v. Paul Sturm*, Superior Court Chancery Division, Middlesex County, Docket No. C-356-02 issued on December 20, 2002 (C-4). Finally, I note on this date, counsel advised that the Honorable Joseph Messina, in a proceeding before him on January 31, 2003, found respondent herein in contempt of court and issued a permanent injunction against him as well.

Based on all of these considerations, I hereby recommend to the Commissioner of Education this matter be forwarded to the State Board of Examiners for possible further proceedings.

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

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

February 4, 2003
DATE

Ana C. Viscomi
ANA C. VISCOMI, ALJ

Receipt Acknowledged:

2/6/03
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

FEB 7 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

/jck

WITNESSES

For the petitioner:

None

For the respondent:

Paul A. Sturm

EXHIBITS

Jointly Submitted:

J-1 Letter of resignation of January 16, 2003

For the petitioner:

None

For the respondent:

R-1 January 22, 2003 letter from respondent's counsel to respondent

Judge's Exhibits:

C-1 Sworn charges, Docket No. EDU 2685-02
C-2 Sworn charges, Docket No. EDU 8559-02
C-3 Certification of Mr. Zitomer
C-4 Order Granting Temporary Restraints

IN THE MATTER OF THE TENURE	:	
HEARING OF PAUL A. STURM,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH	:	DECISION
OF SOUTH PLAINFIELD,	:	
MIDDLESEX COUNTY.	:	
	:	

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

Upon his full and independent review of the record, the Commissioner concludes that in light of Mr. Sturm's unilateral resignation from the District, there is no basis upon which he can order this consolidated matter to proceed and it must, therefore, be dismissed as moot. Notwithstanding this determination, a review of the tenure charges against Mr. Sturm reveals, *inter alia*, allegations of improper rubbing and touching of students, abusive, threatening and harassing conduct and language directed at students, parents, faculty members and administrators. The serious nature of these charges compels that this matter be referred to the State Board of Examiners for action as that body deems appropriate.[1]

Accordingly, the Initial Decision of the OAL recommending dismissal of this consolidated matter is adopted. A copy of this decision, along with the record, shall be

[1] The Commissioner also found particularly noteworthy the discussion of the ALJ, before whom respondent personally appeared, wherein, based on her in-court observations, respondent's continually defiant demeanor throughout the proceedings, and other incidents which occurred during this period, she specifically recommended that this matter be referred to the State Board of Examiners for possible further action. (Initial Decision at 4)

transmitted to the State Board of Examiners for its consideration. The District is hereby reminded of its obligations, pursuant to *N.J.A.C.* 6:11-3.5, in this regard.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 3/14/03

Date of Mailing: 3/14/03

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

JOHN CALABRIA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WINSLOW, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning teacher alleged the Board's action to nonrenew his employment for the 2002-03 school year was violative of his tenure rights, claiming that he acquired tenure on March 24, 2002. The Board contended petitioner remained in the status of "substitute teacher" during the entire 1998-99 school year and, thus, did not acquire tenure.

The ALJ found that once the teacher petitioner was hired to replace returned to the District in another position and the position from which she departed became vacant, petitioner could not properly be excluded from accruing time toward tenure since the vacant position was not filled by petitioner as a substitute teacher but as a regular teacher. The ALJ concluded petitioner acquired tenure on March 24, 2002 and the Board's failure to employ him for the 2002-03 school year was a violation of his tenure rights. The Board was ordered to reinstate petitioner to the full-time teaching position he held or to an equivalent teaching position within the scope of his teaching certificates effective immediately with compensation for lost salary, benefits and emoluments.

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

March 14, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION ON
SUMMARY JUDGEMENT
OAL DKT. NO. EDU 6403-02
AGENCY DKT. NO. 210-7/02

JOHN CALABRIA,
Petitioner,
v.
WINSLOW TOWNSHIP SCHOOL DISTRICT
BOARD OF EDUCATION, CAMDEN COUNTY,

Carol H. Alling, Esq., and **Steven R. Cohen**, Esq.
Selikoff and Cohen P.A., attorneys
for petitioner John Calabria

John J. Armano, Jr., Esq.,
Trimble and Associates, attorneys
for respondent BOE Winslow Township

Record Closed: January 17, 2003 Decided: February 4, 2003

BEFORE **EDGAR R. HOLMES**, ALJ:

STATEMENT OF CASE AND PROCEDURAL HISTORY

The petitioner complains that the respondent BOE, Winslow Township, failed to renew his teaching contract for the 2002-2003 school year in violation of his tenure rights. The BOE denies petitioner acquired tenure rights. The matter was transmitted to the Office of Administrative Law (OAL) to be heard as a contested case pursuant to the Administrative Procedure Act *N.J.S.A.*52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to 13.

Petitioner filed a motion for summary judgment pursuant to *N.J.A.C.* 1:1-12.5(b) and alleged certain facts all of which save one the BOE admitted. The fact denied by the BOE is not material to the ultimate conclusion.

STATEMENT OF THE RELEVANT UNCONTESTED FACTS

Jean Hamilton was the seventh grade Study Skills teacher at Overbrook Jr. High School in the Lower Camden County Regional High School District (LCCRHSD) for the 1997-1998 school year. She was granted a medical leave of absence for the 1998-1999 school year. John Calabria, petitioner, was hired as a replacement teacher for Jean Hamilton on or about September 1, 1998. He was continuously employed by the district and its successor Winslow Township BOE, until June of 2002.

During the 4 year period described above, the following events occurred:

1. On March 23, 1999, Jean Hamilton returned from her leave of absence and was assigned to a position as a secondary school English teacher at Overbrook Senior High School. She resigned at the end of the school year.

2. Petitioner applied for, interviewed for and was chosen to fill the position of seventh grade Study Skills teacher at the Junior High School, effective March 23, 1999.

3. Petitioner described his status on May 19, 1999, in a letter to the District as "a leave replacement in a non-tenured position."

4. On June 30, 2001, the Winslow Township BOE succeeded LCCRHSD which dissolved. Petitioner's rights and status continued pursuant to *N.J.S.A.* 18A:13-64.

5. On April 25, 2002, petitioner was notified by the Superintendent that he would not be recommended for renewal for the 2002-2003 school year.

6. Petitioner completed the 2001-2002 school year and was not reemployed.

7. At all times mentioned petitioner held the required teaching certificates; Elementary Education, Physical Education and Driver's Education.

ISSUES RAISED

Petitioner contends that he acquired tenure on March 24, 2002, more than three years after he filled the vacancy created by Jean Hamilton on March 23, 1999. *N.J.S.A.* 18A:28.5

The BOE contends that petitioner remained in the status of "substitute teacher" during the entire 1998-1999 school year and thus did not acquire tenure. *N.J.S.A.* 18A:16-1.1.

In addition, the BOE contends that no vacancy existed in 1998-1999 because it was filled by a substitute teacher, the petitioner, which fact he acknowledged on May 19, 1999.

LEGAL DISCUSSION

Our Supreme Court determined in *Spiewak v. Rutherford Board of Education*, 90 *N.J.* 63 (1982) that tenure is a statutory rather than a contractual matter. Therefore, every "teaching staff member" who is employed in a position for which a certificate is required and who holds the certificate required for the position is eligible for tenure *unless they come within an explicit statutory exception. Id.*at 90 *N.J.* at 81; *see also Weigand v. Marlboro Township Board of Education,* 84 *S.L.D.* 534, 541, (Duncan, A.L.J., Feb. 23, 1984), *adopted* 84 *S.L.D.* 549 (Comm. Ed., April 9, 1984) *aff'd* 84 *S.L.D.* 549 (S.B.E., Sept. 9, 1984), *aff'd* 85 *S.L.D.* 2033 (App. Div. Nov. 19, 1985).

The Education Laws at *N.J.S.A.* 18A:1-1 define a "teaching staff member" as any professional employed in a position that requires the possession of a certificate issued by the Board of Examiners. It is uncontested that Mr. Calabria was a teaching staff member from the time he was first employed by the LCCRHSD and possessed the required certificates. The only question is whether he fell within some statutory exception, and if so, for how long.

As in *Spiewak*, the only exception possibly relevant here is that applicable to substitutes set forth in *N.J.S.A.* 18A:16-1.1. The case law makes it clear, however, that *N.J.S.A.* 18A:16-1.1 renders the substitute's service ineligible for tenure *only* during the time spent filling a position *temporarily* vacated by another existing teaching staff member whose return is contemplated. In *Spiewak* itself the Court observed that the exception to tenure accrual provided by *N.J.S.A.* 18A:16-1.1 ". . . is limited to employees hired to take the place of an absent teacher. The courts are not free to expand that exception by judicial fiat." *Id.* 90 *N.J.* at 77.

The Appellate Division spoke directly to the point in *Sayreville Education Ass'n v. Sayreville Board of Education*, 193 *N.J. Super.* 424 (App. Div. 1984) The court held that if a regularly appointed teacher has resigned, retired or otherwise terminated his or her employment, then the place which the appointee is filling for the remainder of the year is not the place of the other but rather a vacant place and the statutory exclusion from accrual does not apply. The Court's interpretation of *N.J.S.A.* 18A:16-1.1 is directly applicable to the instant case:

> We construe the authorization of this provision as applying when the services of a substitute teacher are required because of the *temporary absence,* even if protracted, of a regular teacher whose return to duty is *contemplated*. . . . The phrase 'to act in place of any officer or employee during the absence, disability or disqualification of any such officer or employee,' clearly implies a temporary arrangement. That is, the 'place' which is the intended subject of the statute is the place of another which that other will reclaim when his period of absence is over. The substitute is appointed to act for the other *during that period.* (emphasis supplied) *Id.*, 193 *N.J. Super.* At 428.

The issue in the instant case is whether petitioner could properly be excluded from accruing time toward tenure once the teacher he was hired to replace returned to the district in another position and the position from which she departed became vacant.

DISCUSSION AND CONCLUSIONS

On March 23, 1999 Jean Hamilton vacated her position as the seventh grade study skills teacher at Overbrook Junior High School when she accepted a position as a Secondary School English teacher at Overbrook Senior High School.

Petitioner applied for, interviewed for and was chosen to fill the position of seventh grade study skills teacher at Overbrook Junior High School, a position in which he had substituted for Jean Hamilton.

No one could continue to contemplate Jean Hamilton's return to the seventh grade position once she assumed the position of High School English Teacher. Her former position

was then vacant, it was not "filled" by petitioner as a substitute teacher, it was filled by petitioner as a regular teacher despite the fact that no ceremony attached to his new status.

I therefore **FIND** and **CONCLUDE** that petitioner acquired tenure on March 24, 2002.

I further **FIND** and **CONCLUDE** that the BOE's failure to retain petitioner for the 2002-2003 year was in violation of his tenure rights.

I **ORDER** the BOE to reinstate petitioner to the full time teaching position he held in the Winslow Township School District or equivalent teaching position within the scope of his teaching certifications effective immediately, and

I **FURTHER ORDER** that respondent BOE pay and provide petitioner with all lost salary, benefits and emoluments due and owed to him as a result of its failure to reemploy him in a full time teaching position for the 2002-2003 school year with interest thereon as provided by law.

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

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

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

2-4-03
DATE

Edgar R Holmes
EDGAR R. HOLMES, ALJ

Receipt Acknowledged:

February 10, 2003
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 11 2003
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

WSS

WITNESSES

None

EXHIBITS

For Petitioner:

None

For Respondent:

None

Briefs Attached

OAL DKT. NO. EDU 6403-02
AGENCY DKT. NO. 210-7/02

JOHN CALABRIA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WINSLOW, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner concurs with the Administrative Law Judge that petitioner acquired tenure on March 24, 2002, and that the Board's failure to employ him for the 2002-03 school year was a violation of his tenure rights.

Accordingly, the Initial Decision of the OAL is adopted, for the reasons expressed therein, as the final decision in this matter.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 3/14/03

Date of Mailing: 3/14/03

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

116-03R

ROBERT RICHARDSON,

PETITIONER,

V.

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

RESPONDENT.

AND

IN THE MATTER OF THE TENURE HEARING OF ROBERT RICHARDSON, SCHOOL DISTRICT OF THE CITY OF TRENTON, MERCER COUNTY.

COMMISSIONER OF EDUCATION

DECISION ON REMAND

March 18, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 4160-02
(ON REMAND OAL DKT NOS.
EDU 6181-01 & EDU 870-02)
AGENCY DKT. NO. 317-8/01 & 511-12/01

ROBERT RICHARDSON,
Petitioner,
v.
BOARD OF THE CITY OF TRENTON, MERCER COUNTY,
Respondent.
AND
IN THE MATTER OF THE TENURE CHARGES OF ROBERT RICHARDSON, SCHOOL DISTRICT OF THE CITY OF TRENTON, MERCER COUNTY.

Robert M. Schwartz, Esq., for petitioner-respondent Robert Richardson

Thomas W. Sumners, Esq., for respondent-petitioner Board of Education (Sumners, George & Dortch, attorneys)

Record Closed: January 31, 2003 Decided: February 3, 2003

BEFORE **JOSEPH LAVERY**, ALJ:

In these consolidated matters, the Board certified tenure charges of unbecoming conduct and insubordination against petitioner-respondent, Robert Richardson, Coordinator of Custodial and Grounds.

PROCEDURAL HISTORY

Petitioner-Respondent Richardson appealed his termination asserting violation of his tenure rights. The matters were transmitted to the Office of Administrative Law for determination on September 18, 2001, with the filing of the first appeal, (*Robert Richardson v. Board of Education of the City of Trenton*, Mercer *County*, OAL Dkt. No. EDU 6181-01) and on March 14, 2002 with the filing of the second appeal (*In the Matter of the Tenure Charges Against Robert Richardson, School District of the City of Trenton*, OAL Dkt. No. EDU 870-02). On March 18, 2002, an Order of Consolidation issued. An Initial Decision issued on March 22, 2002, denying the petition of Richardson and dismissing the consolidated case contesting tenure charges. By decision of the Commissioner of Education, dated May 7, 2002 (OAL Dkt. No. EDU 4160-02) these consolidated matters were remanded to the Office of Administrative Law (OAL) for further fact-finding and expansion of the record to determine whether Richardson was eligible for tenure under the janitor tenure statute, *N.J.S.A.* 18A:71-3 and/or the Veterans Tenure Act, *N.J.S.A.* 18A:38-16.1, to establish his employment rights, if any.

A telephone prehearing conference was scheduled with counsel on June 20, 2002, and as a result of that conference an Order was issued directing the matter proceed to plenary hearing on September 5, 2002. On that date, the hearing was converted to a settlement conference in which there was a potential for resolution of the issues. The matter was adjourned to permit consultation with the Board of Education, which was scheduled to meet on September 17, 2002.

By letter dated October 7, 2002, counsel for the Board advised the undersigned that the Board had agreed in principle with the settlement agreement, and it was anticipated that the matter would be resolved at the Board's next meeting of October 21, 2002.

When no executed settlement agreement was filed, a hearing was scheduled for January 13, 2003, but adjourned since the parties stipulated that the matter had been settled.

THE SETTLEMENT

A Stipulation of Settlement has been prepared by the parties indicating the terms thereof, which is attached and fully incorporated herein.

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

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

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

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

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

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

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

February 3, 2003
DATE

JOSEPH LAVERY, ALJ t/a

Receipt Acknowledged:

February 5, 2003
DATE

M. Kathleen Duncan (ta)
DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

FEB 5 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

mph

ROBERT M. SCHWARTZ
ATTORNEY AT LAW
MONROE CENTRE AT FORSGATE
12 CENTRE DRIVE
MONROE, NEW JERSEY 08831
(609) 860-9100

ROBERT RICHARDSON	
v.	OAL DOCKET NO.: EDU6181-01
	AGENCY DOCKET NO.: 317-8/01
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY	CONSOLIDATED WITH
	OAL DOCKET NO.: EDU870-02
	AGENCY DOCKET NO.: 511-12-01
	STIPULATION OF SETTLEMENT

The Trenton Board of Education (hereinafter referred to as "Board") with offices located at 108 North Clinton Avenue, Trenton, New Jersey 08609, represented by Thomas W. Sumners, Jr. Esq., of the law firm of Sumners George, and Robert Richardson, whose residence is located at 35 Hampton Court East, Robbinsville, New Jersey 08691, represented by Robert M. Schwartz, Esq., by way of this stipulation of agreement say:

WHEREAS, on or about September 18, 2001, Mr. Richardson initiated a contested case in the Office of Administrative Law with the filing of a Petition of Appeal challenging his summary termination which took effect on July 1, 2001, the matter having OAL Docket # EDU6181-01, and

WHEREAS, the Board initiated the filing of tenure charges against Mr. Richardson having filed the charges with the Commissioner of Education on or about December 21, 2001, with the matter having been filed with the Office of

Administrative Law on or about March 14, 2002, and having OAL Docket # EDU870-02, and

WHEREAS, Mr. Richardson filed a Motion for Summary Judgment seeking to dismiss the tenure charges having OAL Docket Number EDU 870-02; and

WHEREAS, the Commissioner denied Mr. Richardson's Motion for Summary Judgment and determined that any decision with regard to the tenure charges should await the outcome of Mr. Richardson's initial challenge of his dismissal, referencing the matter having OAL Docket Number EDU 6181-01; and

WHEREAS, the Administrative Law Judge denied Mr. Richardson's Motion for Summary Judgment filed in the matter having OAL Docket Number EDU 6181-01; and

WHEREAS, the Commissioner reversed the Administrative Law Judge's decision with respect to the Summary Judgment Motion in the matter having OAL Docket Number EDU 6181-01 and remanded the matter for further hearings before the Office of Administrative Law; and

WHEREAS, both parties appeared before the Administrative Law Judge Joseph Lavery on September 5, 2002 to commence the hearing in this matter; and

WHEREAS, both parties expected the necessity of further hearing dates in this matter, and

WHEREAS, the outcome of this matter was uncertain, and

WHEREAS, both parties were expected to incur further extensive litigation costs, and

WHEREAS, after extensive discussion the parties were able to reach an amicable resolution of the issues in dispute; and

WHEREAS the Board has reviewed the Stipulation of Settlement (hereinafter referred to as "Stipulation") and finds that it is in the best interest of the Board and the taxpayers of Trenton.

NOW THEREFORE, in consideration of the agreements and covenants and conditions contained herein the adequacy and sufficiency which is hereby expressly acknowledged by the parties hereto, the parties agree as follows:

1. The Board shall not reimburse Mr. Richardson for any back pay from the effective date of his contract non-renewal to the date of this agreement.

2. The Board agrees to compensate Mr. Richardson in the amount of $65,416.68, equaling ten months of employment at Mr. Richardson's rate of pay during the 2001 – 2002-school term representing the loss of future wages.

3. In consideration for such payment Mr. Richardson, personally and for his estate and/or his heirs, waives, releases and gives up any and all claims, demands, obligations, damages, liabilities, causes of action, and rights to be employed by the Board and in law or in equity known and unknown that he has or may have against the Board in any and all of its officers, directors, agents, represents, and employees (present and former), and their respective successors and assigns, heirs, executors and personal or legal representatives (collectively "releasees"), based upon any act, event, or omission occurring before the execution of this Stipulation, including, but not limited to, any events related to, arising from, or in connection with, Mr. Richardson's employment and/or

association with releasees. Mr. Richardson specifically waives, releases and gives up any and all claims, demand, obligations, damages, liabilities, causes of action and rights, in law or in equity, known and unknown, that were asserted or could have been asserted under any Federal and/or State statutes, rules, regulations, common-law, and/or contract, expressly including, but not limited to, any claims (including individual and class action claims) relating to:

- Title VII of the Civil Rights Act of 1964, as amended;
- Sections 1981 through 1982 of Title 42 of the United States Code, as amended;
- The Employee and Retirement Income Security Act of 1974, as amended;
- The Americans With Disabilities Act of 1990, as amended;
- The Age Discrimination in Employment Act of 1967, as amended and the Older Workers Benefit Protection Act, 29 U.S.C. Section 621 –634;
- The Fair Labor Standards Act, as amended;
- The Occupational Safety and Health Act; as amended;
- The Family and Medical Leave Act of 1993;
- The Equal Pay Act, as amended;
- The New Jersey Law Against Discrimination, as amended;
- The New Jersey Minimum Wage Law, as amended;
- The New Wage and Hour Law, as amended;

- Equal Pay Law for New Jersey, as amended;
- The New Jersey Worker Health and Safety Act, as amended;
- The New Jersey Family Leave Act, as amended;
- The New Jersey Conscientious Employee Protection Act, as amended;
- Title 34 of the New Jersey Statutes, Labor and Workers' Compensation;
- Any end to the retaliation provision of any statute or law including common-law;
- Any other federal, state or local civil or human rights law or any other local, state or federal law, regulation or ordinance, or any provision of any state or federal constitution;
- Any public policy, contract, tort or common-law;
- Any losses, injuries or damages (including back pay, front pay, liquidated, compensatory or punitive damages); and
- Attorneys fees, litigation costs, all medical bills for physical or psychological treatment (paid or outstanding), and any liens of any nature, all medical bills, for psychological or physical treatment for any injuries arising out of Mr. Richardson's employment with the Board.

4. Mr. Richardson agrees, to the fullest extent permitted by law, not to commence, encourage, facilitate or participate in any action or proceeding for

damages, reinstatement, injunctive or any other type of relief, in any state, federal or local court, or before any administrative agency relating to his employment, based upon any act, event or omission occurring before the effective date of this Stipulation. Nothing in this Stipulation is intended to prevent Mr. Richardson from an action to enforce the Board's obligation as set forth herein. Nothing in this Stipulation is intended to prevent Mr. Richardson from contacting the Equal Employment Opportunity Commission (EEOC); however, if Mr. Richardson signs this stipulation, he will not be able to obtain any relief or recovery in connection with any charge filed with the EEOC.

5. It is expressly understood that neither the execution of this stipulation, nor any other action taken by releasees in connection with this Settlement, constitutes an admission by releasees.

6. This stipulation contains the sole and entire agreement among the parties hereto, and fully supersedes any and all prior agreements and understandings pertaining to the subject matter hereof. No other promises or agreements shall be binding unless in writing, signed by the parties hereto, and expressly stated to represent an amendment to this Stipulation.

7. This Stipulation shall be governed by and construed in accordance with the laws of the State of New Jersey.

8. This Stipulation may be executed in counter parts. The parties agree that any action to enforce or interpret this Stipulation shall only be brought in a court of competent jurisdiction in the State of New Jersey, which the parties

hereby acknowledge and agree to be the Superior Court of New Jersey, venued in Mercer County.

9. Mr. Richardson shall have twenty-one (21) days within in which to consider this agreement and decide whether to agree to its terms, but may voluntarily agree to the terms of this agreement before twenty-one (21) days have elapsed. This agreement shall become binding and be in full force and effect seven (7) days after Mr. Richardson signs it. Mr. Richardson may revoke this agreement for a period of seven (7) days following the day he signs it. Any revocation within this period must be submitted in writing to Thomas W. Sumners, Esq. of Sumners, George & Dortch, PC, 849 West 8th Street, P.O. Box 630, Trenton, N.J. 08604 and must state, "I hereby revoke my acceptance of this Agreement." The revocation must be personally delivered to Mr. Sumners, or mailed to Mr. Sumners, and postmarked within seven (7) days of execution of the Agreement. This Agreement shall not become effective or enforceable until after the revocation period has expired. If the last time of the revocation period is a Saturday, Sunday or legal holiday in New Jersey, then the revocation period shall not expire until the next following day which is not a Saturday, Sunday or legal holiday.

10. Mr. Richardson acknowledges that he has been represented by and has consulted with his attorney throughout the negotiations of this Stipulation and that he has reviewed this Stipulation in detail with his attorney and that he fully understands its requirements and limitations. Mr. Richardson fully expressly states that he is fully satisfied with the representation provided by his attorney.

11. Mr. Richardson hereby states that he is signing this Stipulation voluntarily of his own free will and not under duress or coercion of any kind.

12. This Stipulation shall be construed fairly and according to the plain language of its terms and not for or any party against hereto.

13. If its determined that a specific clause(s) of this Stipulation is/are illegal under Federal or State Law, then the remainder of the Stipulation not affected by such a ruling shall remain in full force and effect.

14. This Stipulation and each of its provision binds the parties to this Stipulation. Anyone who succeeds to their rights and responsibilities, such as their successors and assigns also are bound. This Stipulation is made for the benefit of all parties hereto and all who succeed to their rights and responsibilities, and expressly includes their officials, representatives, employees, agents, attorneys, successors and assigns.

15. This Stipulation must be approved by the Board by resolution prior to being effective or final.

16. This Stipulation is subject to the approval of the Commissioner of Education prior to be effective or final.

IN WITNESS WHEREOF, the parties hereto set their hands to the Stipulation as follows:

Robert B Richardson 1-20-03
ROBERT RICHARDSON

Joyce M. Kersey
BOARD OF EDUCATION

The below signed attorneys of record hereby Stipulate and Agree to the Settlement of the above matter without attorney's fees or costs.

ROBERT M. SCHWARTZ

THOMAS W. SUMNERS JR.,

4j

MAR 1 3 2003

TRENTON BOARD OF EDUCATION
RESOLUTION

WHEREAS, Robert Richardson, Petitioner, has filed a Petition of Appeal with the Commissioner of Education, Agency Docket Nos. 317-8/01 and 511-12/01, OAL Docket No. EDU 4160-02 (On Remand OAL Docket Nos. EDU 6181-01 and EDU 870-02), against the Trenton Board of Education, Respondent; and

WHEREAS, the parties agree it is in their best interests to amicably resolve the Petition of Appeal as set forth in the settlement agreement, attached hereto as Exhibit A;

THEREFORE, BE IT RESOLVED on this 21st day of October, 2002, that the Trenton Board of Education agrees to settle the above-mentioned Petition of Appeal as set forth in Exhibit A.

Melvin L. Wyns, Secretary
Trenton Board of Education

Joyce M. Kersey, President
Trenton Board of Education

4K

TRENTON BOARD OF EDUCATION
EXECUTIVE SESSION
BOARD CONFERENCE MINUTES – October 21, 2002

25. [redacted] – Tenure Charges

Attorney Sumners advised that the tenure charges will be considered in executive session at the Board's Public Meeting on 10/28/02.

A motion to adjourn the Executive Session at 10:50 p.m... It was moved by Ms. Eure, seconded by Ms. Slaughter.

A motion was made to open the Public Session at 10:50. It moved by Mr. Shelton, seconded by Ms. Slaughter.

A motion was made to accept the Retirement Agreement. It was moved by Ms. Slaughter, seconded by Ms. Ramos.

ROLL CALL	YES	NO	ABSTAIN
Abdul-Malik Ali	Absent		
Geraldine Eure	x		
Garry R. Feltus	x		
Bernard McMullan	x		
Noriel Peña	Absent		
Abigail Ramos	x		
Donald O. Shelton	x		
Sunnetta Slaughter	x		
Joyce M. Kersey	x		

The Board reviewed the revisions and agreed to vote on the Agreement regarding Robert Richardson. A motion was made to approve the Agreement. It was moved by Ms. Eure, seconded by Dr. McMullan to approve the acceptance of the Agreement.

ROLL CALL	YES	NO	ABSTAIN
Abdul-Malik Ali	Absent		
Geraldine Eure	x		
Garry R. Feltus	x		
Bernard McMullan	x		
Noriel Peña	Absent		
Abigail Ramos	x		
Donald O. Shelton	x		
Sunnetta Slaughter	x		
Joyce M. Kersey	x		

AL

ROBERT RICHARDSON,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	COMMISSIONER OF EDUCATION
RESPONDENT.	:	DECISION ON REMAND
AND	:	
IN THE MATTER OF THE TENURE HEARING OF ROBERT RICHARDSON, SCHOOL DISTRICT OF THE CITY OF TRENTON, MERCER COUNTY.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 3/18/03
Date of Mailing: 3/18/03

* At issue in this consolidated matter was whether petitioner/respondent had achieved tenure under the janitor tenure statute, *N.J.S.A.* 18A:71-3, and/or the Veterans Tenure Act, *N.J.S.A.* 18A:38-16.1. Although settlement of this matter leaves the tenure issue unresolved, the filing of tenure charges by the Board dictates that the settlement terms be reviewed under the standards set forth in *Cardonick*.

148-03E

BOARD OF EDUCATION OF THE BOROUGH OF LINCOLN PARK, MORRIS COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF BOONTON, MORRIS COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

March 21, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

EMERGENT RELIEF

OAL DKT. NO. EDU 3066-03

AGENCY DKT. NO. 93-3/03

BOARD OF EDUCATION OF THE BOROUGH OF LINCOLN PARK, MORRIS COUNTY

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWN OF BOONTON, MORRIS COUNTY

Respondent.

Raymond W. Fisher, Esq., for petitioner
(Schwartz, Simon, Edelstein, Celso & Kessler, LLP, attorneys)

Dennis A. Collins, Esq., for respondent

No appearance by or for William L. Librera, Commissioner of Education, or State Board of Education in regard to the motion for Emergent Relief

BEFORE **LESLIE Z. CELENTANO,** ALJ:

This proceeding was initiated by the Board of Education of the Borough of Lincoln Park (petitioner) which has a Send-Receive relationship with the Town of Boonton Board of Education (respondent), to resolve the issue of whether the work performed at respondent's high school parking lot constitutes a capital expenditure and,

therefore not includible in tuition costs under the Send-Receive Agreement between the parties, or whether it constituted maintenance and is therefore includible in the cost of tuition. Petitioner seeks an Order determining that the work performed be deemed a capital expenditure under Agreement, and that in the absence of express written consent by petitioner, as required by the agreement, no portion of the expense is attributable to petitioner.

The matter was transmitted to the Office of Administrative Law on March 18, 2003, for determination as a contested case. Oral argument was conducted via telephone conference at the request of the parties on March 19, 2003.

The agreement between the parties dated April 14, 1999 covers a term of seven years and includes a partial list of what constitutes capital expenditures which may not be included in the calculation of tuition without the express consent of petitioner. The listing of capital expenditures does not include repairs to the parking lot. Respondent determined to have work performed on the high school parking lot, the cost of which was approximately $82,000. Petitioner's share, if authorized, would approximate $43,000. Respondent to have sought to include what it deemed to be petitioner's share of the parking lot work included in petitioner's 2003-2004 Annual District Budget Statement. This would mean an adjustment amount in the budget of $320,042. If the parking lot charges were excluded the tuition adjustment would be in the amount of $276.806.

Pursuant to *N.J.A.C.* 6A:23-3.1(f)5, the dispute was submitted to the county superintendent as a mediator. The county superintendent responded by opining that the work was "required maintenance" and that respondent was correct in assessing the charges against petitioner. Petitioner was directed to submit a revised budget, at the higher amount. Petitioner objects to the superintendent's determination, asserting that there is no statute or regulation permitting the inclusion of the cost, which it deems to be capital improvement, into the calculation of tuition, and further, that the agreement between the parties prohibits inclusion of capital expenditures without petitioner's express written consent. Respondent concurs with the superintendent's determination that the work constituted repairs, and asserts that no statute or code categorizes the

repairs as a capital expenditure. The parties agreed that the determination of this issue requires an interpretation of the contract between the parties.

As set forth in *N.J.A.C.* 6A:3-1.6(b), an application for Emergent Relief will be granted only of it meets the following four requirements, pursuant to *Crowe* v. *DeGioia*, 90 N.J. 126 (1986):

(1) The petitioner will suffer irreparable harm if the requested relief is not granted;

(2) The legal right underlying petitioner's claim is settled;

(3) The petitioner has a likelihood of prevailing on the merits of the underlying claim; and

(4) When the equities and interest of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

The first requirement is that a denial of the requested relief will cause irreparable harm. Harm is generally considered irreparable if it cannot be redressed adequately by money damages. *Id.*, at 132-133. Petitioner concedes that "the matter at issue is primarily a matter of dollars...". Petitioner asserts that it will suffer irreparable harm because an increase in the budget could mean a budget defeat, and that if the budget were to be defeated, depending on the magnitude of the vote, the municipality could well cut the budget further, resulting in programs being cut.

With regard to the approximately $43,000 in costs which respondent is seeking to assess petitioner for, the issue in dispute here is a liquidated sum of money. If, after full hearing, it was determined that, based upon the agreement between the parties, a portion of the cost for the work performed at respondents' high school parking lot is not, in fact, chargeable to petitioner, then that amount could be adjusted between the

parties[1]. With regard to the prospect that the budget might be voted down if this amount were to be as included this year is speculative at best, and no evidence whatsoever was presented to suggest that the budget at either level, with or without the inclusion of the approximately $43,000 in costs would be approved by the voters. Under the circumstances, petitioner has not demonstrated that it would suffer irreparable harm without the requested relief.

The second consideration is whether the legal right underlying petitioners claim is settled. Petitioner articulates that the school law is not instructive and that the controlling language is that of the agreement between the parties, but asserts that from a practical view and an application of common sense principles, the work constituted a capital expenditure rather than a repair. As support for this view, petitioner cites the five year guaranty issued by the contractor as indicative that the work was not a repair, and also cites the substantial cost of the project. Petitioner further asserts that based upon these factors, its auditor Mr. Gallo in his revised report of February 19, 2003, found the work to be a capital expenditure[2]. Mr. Gallo had, in his original report dated December 6, 2002, designated the repair as "properly allocated or to be allowable per the agreement[3]." In his affidavit of March 18, 2003, Mr. Gallo addresses the discrepancy by indicating that prior to rendering his initial report he had believed petitioner had given express written consent for the work. While in theory repairs are expensed and improvements are capitalized, is entirely unclear here, and no testimony was offered, relative to the work actually performed. Petitioner urges that common sense dictates what is a repair and what is a capital expenditure. Whether the work constituted repair or maintenance, or something more, is the issue in controversy, and neither the facts nor the law are well settled. Additional testimony is required. The fact that the parking lot may not require repair on an annual basis does not render the repair a capital expense. Petitioner therefore has not satisfied the requirement that the legal right underlying its claim be "settled". *Crowe*, at 133.

[1] Adjustments are made annually.
[2] There is no foundation for Mr. Gallo's opinion that the cost of the project renders it a capital expense.
[3] Referencing the agreement between the parties.

The third consideration is whether petitioner has a likelihood of prevailing on the merits of the underlying claim. Petitioner asserts that the listing of what constitutes capital expenditures contained within the agreement between the parties on p. 7, is only a partial list, and that it is clear that capital expenditures chargeable to petitioner require prior written approval. Petitioner agrees that resolution of this matter requires interpretation of the agreement between the parties, and asserts that the accountant Mr. Gallo is the best person make this determination. Petitioner concedes that the agreement is not clear on its face. Respondent cites to the Gallo report of December 16, 2002, and the subsequent report of February 13, 2003, and questions the complete about-face in Gallo's view relative to the work done on the parking lot. Respondent asserts that Gallo had full access to all records of respondent and a close working relationship with the business administrator, such that a copy of any such authorization believed to exist could have been sought and would have been provided. Furthermore, the matter was submitted to the county superintendent who concluded that petitioner should pay its share of the repairs to the high school parking lot and directed petitioner to amend its budget statement to reflect inclusion of its share of this cost. Under the circumstances, including the opposing views on the issue provided by the accountant and the lack of testimony relative to those issues, as well as the county superintendents determination, petitioner has not demonstrated a likelihood of prevailing on the merits of the underlying claim.

With regard to the equities and interests of the parties, petitioner asserts that its is unable to certify its budget until this matter is resolved, and that process needs to be concluded no later than March 20, 2003, to meet deadlines for publication and advertising for the March 25, 2003 public budget hearing. Petitioner asserts that when the equities and interests are balance it will suffer greater harm than respondent if the relief sought is not granted. The emergency asserted however, is the alleged inability of petitioner to certify its budget. Petitioner has, in a sense, created this emergency, by declining to follow the directive of the superintendent and include the parking lot project in its annual budget statement. Petitioner can simply forward an amended budget statement to the superintendent for approval and certification. If a credit is determined to be due after a full hearing, the matter can be adjusted at another time. While it may

not wish to submit a budget at the higher amount, petitioner is not unable to certify its budget. Petitioner has brought this emergency on itself.

Accordingly, it is **ORDERED** that petitioner's application for emergency relief is denied.

This order on application for emergency relief may be adopted, modified or rejected by the Commissioner of Education, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the Commissioner of Education does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 20:14B-10.

March 20, 2003
DATE

LESLIE Z. CELENTANO, ALJ

BOARD OF EDUCATION OF THE BOROUGH OF LINCOLN PARK, MORRIS COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF BOONTON, MORRIS COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

The Motion for Emergent Relief, the audiotape of the hearing conducted via telephone conference by the Administrative Law Judge (ALJ) of the Office of Administrative Law (OAL) on March 19, 2003, and the Initial Decision and Order of the ALJ denying emergent relief have been reviewed.[1]

Upon such review, the Commissioner concurs that petitioner has failed to satisfy the four-pronged standard set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982) for obtaining emergent relief. In accordance with *N.J.A.C.* 6A:3-1.6, a grant of emergent relief is considered an extraordinary remedy which may only be issued where petitioner has demonstrated that the relief is necessary to prevent irreparable harm, where the legal right underlying petitioner's claim is settled, where there is a likelihood of success on the merits and where the relative hardship to the moving party favors granting such relief. *Crowe* at 132-34.

[1] Neither respondent nor the OAL forwarded a copy of respondent's Answer to this motion to the Commissioner for his review. However, arguments presented by respondent in the telephone hearing conference were considered in reaching the determination herein.

Accordingly, the recommended Order of the ALJ denying petitioner's Motion for Emergent Relief is affirmed for the reasons expressed therein. This matter is being returned to the OAL for such further proceedings as may be necessary to bring it to conclusion.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 3|21|03

Date of Mailing: 3|21|03

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*

152-03E

K.C. AND C.C., on behalf of minor child, J.C.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD, OCEAN COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

March 26, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INTERLOCUTORY ORDER
DENYING EMERGENT RELIEF
OAL DKT. NO. EDU 00739-03S
AGENCY DKT. 75-3/03

K.C. and C.C., ON BEHALF OF
MINOR CHILD, J.C.,
v.
Petitioner,
v.
BOARD OF EDUCATION
OF THE TOWNSHIP OF
LAKEWOOD, OCEAN COUNTY,
Respondent.

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

In this application for emergent relief filed with the Department of Education on March 6, 2003, the parents of a student in the Lakewood School District ("Lakewood") seek a determination that the student's rights were violated when he was first suspended for ten days and then transferred from Lakewood High School to an alternative school placement in the District, known as the Project Opportunity Program, or "POP." At the time of the initial suspension on November 13, 2002, the Assistant Principal of the High School wrote to the parents to advise that their son had been placed on an out-of-school suspension for ten days from 11/12/02 through 11/25/02 because of his alleged involvement in "possession of a weapon" and "assault on a student." The parents were advised in the letter that they could arrange for classroom work and could discuss the matter with Assistant Principal Suarez by calling a listed telephone number.

On November 20, 2002, Principal Anderson wrote to the parents and advised that the Superintendent of Schools would "hold a discipline hearing" on November 25, 2002. The letter continued, "Because of the serious nature of the hearing and because the hearing may have an impact on M's status at Lakewood High School, it is important that you and Stuart attend the hearing."

It does not appear to be in dispute that whatever actually occurred on November 25 before the Superintendent, no formal hearing, with witnesses and examination and cross-examination, occurred. Principal Anderson wrote to the parents on November 25, advising them that "[A]t the superintendent's review hearing on Tuesday, November 25, 2002, it was agreed that J. would enroll in POP for the remainder of the school year;" he could reapply to Lakewood High School in September 2003, and his readmission thereto would be based upon his academic performance, attendance and behavior in the alternate program. In addition, he was forbidden to be on the property of the High School during regular school hours. Since sometime after November 25, J. has attended POP, a school that his parents contend is not sufficiently challenging and offers a limited educational experience for their son.

In their petition for emergent relief, the petitioners argue that the District's Board of Education violated their son's due process rights and seek to overturn the ten-day suspension and the "expulsion of J.C. from Lakewood High School through the end of the 2002-2003 school year." They also seek to have the Board expunge and destroy all records of his suspension and return him to the regular education program at the High School. In support of their claim, they argue that the suspension for ten days was invalid because J. did not receive an informal hearing with the Assistant Principal or the School Principal before that suspension and, "more importantly, his due process rights were egregiously violated when the Superintendent, not the Board of Education, expelled him from school for one year and directed that he attend POP." Further, they contend that even the Superintendent failed to provide the necessary due process as they did not receive in advance of the November 25 hearing a specification of the charges against J., a list of witnesses and a report of what each witness would testify to, and advice that he could either defend himself or bring an attorney with him to the hearing. They claim that at the Superintendent's "hearing," J. was not permitted to defend himself by explaining his side of the story, the opportunity to present witnesses to testify on his behalf, or the opportunity to face and

question the witnesses who made allegations against him. They allege that the Superintendent told J. that he could not know the identity of the witnesses who alleged that he had been involved in an assault.

In response, the Board argues that the initial suspension was not in excess of ten days and further, J. was not "expelled," from the District. At most he was transferred to an alternative placement within the District, to a program run under District contract by an outside contractor, Sylvan Learning Center. Students therein are district students, receive a Lakewood diploma and even are able to take courses at the High School which are not offered at POP, although there is no claim that J. either could or does take any such course(s) at the High School. At hearing, the District's counsel asserted that the student's rights under *Goss v. Lopez*, 419 *U.S.* 565, 95 *S.Ct.* 729, 42 *L.Ed.*2d 725 (1975) were honored, albeit he conceded that at no time was the student presented in advance of any hearing with the names of witnesses and information as to the what they would testify to.

Despite the determination on November 25, 2002, excluding J. from the High School and directing that he attend POP, the petitioners herein did not file any challenge to the initial suspension or the subsequent exclusion from the High School for the remainder of the school year until early March 2003. The clear focus of their concern at this late date is the continuing exclusion of J. from the High School and his attendance at POP. That situation did not result from an expulsion, as they sometimes assert in their argument. J. was never "expelled" from the District, he was instead ordered transferred to another alternative educational unit within the District program, albeit one run under a contract for the District. Thus the case does not implicate the legal standards that govern an expulsion.

Additionally, after questioning the attorneys it appears that while the charges against the student were assault and possession of a weapon (a sharpened screwdriver), there was never a contention that the assault that purportedly occurred involved either the open display of or the use of the weapon. Under these circumstances, *N.J.S.A.* 18A:37-2.2, which addresses the case of a pupil who commits an assault on another student "with a weapon, on any school property," does not seem to apply, at least as written. That statute and the corollary regulations contained at *N.J.A.C.* 6A:16-5.6, dictate a procedure that involves removal of the student "immediately" from

the school's regular education program and placement in an alternative education program, and then, a hearing before the board of education no later than thirty days following the day the pupil is removed from the regular education program, a hearing at which the student's guilt of the charges is to be determined, and which results, if the finding is not guilty, with a return to the regular education program. If the student is found guilty, the removal to the alternative program can continue, but not for more than one calendar year. *N.J.A.C.* 6A:16-5.6. The chief school administrator is empowered to determine when the pupil is prepared to return to the regular education program "in accordance with regulations established by the Commissioner of Education." See *N.J.A.C.* 6A:16-5.6 (g). Importantly, an appeal of the district's determination must be made to the Commissioner within 90 days of the board's decision. *N.J.A.C.* 6A:16-5.6 (e) 4.

In determining whether emergency relief can be provided, the standards established in the seminal case of *Crowe v. DeGioia*, 90 *N.J.* 126 (1982) are applied. The petitioner must establish that (1) there is a show that irreparable harm will result if the injunction requested is not granted; (2) there is a demonstration that there is a reasonable probability of success on the merits; and (3) the relative hardship to the moving party outweighs the hardship to the other side. The Commissioner has the authority to overturn a local school board's decision if it is arbitrary and capricious.

In this case, the moving party has not demonstrated that it has a reasonable likelihood of success on the merits. Initially, although no party raised the issue in their papers or at argument, it must be noted that the petition for emergent relief was filed more than 90 days after the November 25 letter that incorporated the "agreement" that J. would attend POP and be excluded from the High School. *N.J.A.C.* 6A:3-1.3 (d) requires that any petition for relief filed with the Commissioner "shall" be filed "no later than the 90th day from the receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing." While at oral argument counsel for the petitioners contended that they did not immediately appeal their son's transfer to either the Board or, (although not addressed specifically, but nevertheless more significantly, as regards the 90-day rule), to the Commissioner, because they were not aware of their rights, such reason is not generally sufficient to overcome the extremely strong policy that requires that appeals of local

action to the Commissioner must be filed no later than ninety days after the appealing party is aware or should have been aware of the action appealed from. As noted, the same 90-day requirement is incorporated in the regulations governing appeals of local board action in the case of a student removed from general education for an assault with a weapon. I see no reason to think that the rule is not likewise applicable to a case such as this, where the removal from general education is for an assault committed on school property, one that occurred when the student also happened to have in his possession a weapon, albeit one that he did not display or use during the assault. The parents surely knew as of November 25 that he was to be transferred. As such, as the 90-day requirement is jurisdictional, any chance for relief in this appeal is unlikely at best. Indeed, it could be argued that the emergent relief petition could, or indeed should, be dismissed on this ground alone, without any consideration of the merits of the case. Nevertheless, as the parties have not addressed that concern and there are other reasons for concluding that the standards for emergency relief have not been satisfied, I will resolve the emergent relief petition without reliance upon the 90-day rule. However, the issue is noted for the parties in regard to any further proceedings that might occur.

While the petitioners have repeatedly characterized their son's transfer from Lakewood High School to POP as an "expulsion," in fact, no expulsion occurred. After serving the ten-day suspension, the student was allowed to continue to receive his education in a school maintained by the Lakewood School District. He was not denied an education, although in his parents' opinion the course of study at POP does not measure up to that which their son received at the district's high school. An in-district transfer accomplished for disciplinary reasons does not implicate the Federal constitutional concerns that a suspension or expulsion do. There is no federal constitutional issue presented by a transfer within district from one facility to another. *Nevares v. San Marcos Consolidated Independent School District,* 111 *F.*3d 25 (5th Cir. 1997); *Zamora v. Pomeroy*, 639 *F.*2d 662 (10th Cir. 1981). To the extent that the New Jersey Constitution guarantees that student receive a thorough and efficient education, there has been no preliminary showing that the education offered at POP, even if, as petitioners' advance, not as good as the high school's, fails the State's constitutional test. While the circumstances that surround the initial suspension might cause some concern, to the extent the parents seek an emergency order restoring their son to the high school, they have not demonstrated that his removal there from and transfer to POP violated constitutional protections. Further, they have

not made a preliminary case that his placement in POP has caused him any irreparable harm, or that his continued placement there will work such harm pending a determination of the merits of this matter in a plenary hearing.

In addition to the above, it must be noted that since the time of the initial transfer to POP, the student has been adjudicated by the Family Court. He came before the Court in response to two dockets, one resulting from the assault and weapons charge that arose from the incident that sparked his suspension and tranfer; the other from an assault with a knife upon his brother which apparently occurred shortly after these events and did not occur on school property. The Family Court adjudication led to pleas of guilt on charges related to each assault. Importantly, the Court ordered that the petitioner's son was to have "no contact with the victim." (The petitioners agree that the reference in the Disclosure of Juvenile Information to School form introduced in evidence is to the victim of the assault on school property, not to the student's sibling.) As the parents want their child returned to Lakewood High School, which the victim also attends, it is at best questionable that the Commissioner would overturn the local determination that effectively limits the likelihood of contact between this now adjudicated student and the victim, at least on school property. Thus again, the likelihood of success on the merits is not significant. Indeed, even if it were more likely than not that the Commissioner would return the child to the High School, at least as regards this emergency petition that seeks his return prior to a plenary hearing on the case, the balancing required by the third prong of *Crowe* weighs more in favor of denying emergent relief than in favor of granting it.

For the reasons noted, I **CONCLUDE** that the petitioners have failed to satisfy the standards established for obtaining emergent relief. Their petition is therefore **DENIED**. If the petitioners nevertheless seek to have a plenary hearing, the parties will be expected to address the 90-day issue. Counsel for the petitioners shall notify counsel for the Board and myself within five days as to whether the petitioners intend to proceed. If they do, he shall file a response as to the effect of the 90-day rule on the continued validity of the petition within ten days of his letter. Counsel for the Board may then reply within five days. A ruling on the issue will be presented shortly thereafter.

This order on application for emergency relief may be adopted, modified or rejected by **THE COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the Commissioner of the Department of Education does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

March 17 2003
DATE

JEFF S. MASIN, ACTING CHIEF, ALJ

mjm

OAL DKT. NO. EDU 00739-03S
AGENCY DKT. NO. 75-3/03

K.C. AND C.C., on behalf of minor child, J.C.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD, OCEAN COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

The record of this emergent matter, which included the audiotape of the hearing conducted at the Office of Administrative Law (OAL) on March 14, 2003, and the Initial Order of the Administrative Law Judge (ALJ) have been reviewed.

Upon such review, the Commissioner adopts the Order denying emergent relief, as he concurs with the ALJ's determination that petitioners have not satisfied the requirements necessary for the granting of such extraordinary relief as set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982).

Accordingly, the within application for emergent relief is hereby denied. This matter is being returned to the OAL for such further proceedings as may be necessary to bring it to conclusion.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 3|26|03

Date of Mailing: 3|28|03

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

153-03

153-03

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

March 31, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 7405-00
AGENCY DKT. NO. 216-6/00

THERESA PIATKOWSKI,

Petitioner,

v.

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

Respondent.

Alan S. Porwich, Esq., for petitioner

Charlotte Kitler, Esq., for respondent

Record Closed: February 10, 2003 Decided: February 11, 2003

BEFORE **THOMAS E. CLANCY,** ALAJ:

This matter was transmitted to the Office of Administrative Law (OAL) on August 10, 2000 for resolution as a contested case pursuant to *N.J.S.A.* 52:14B-1 *et seq.* and *N.J.A.C.* 52:14F-1 *et seq.*

During the pendency of the case at the OAL, the parties settled their differences as provided in the attached Stipulation of Settlement.

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

Accordingly, I **CONCLUDE** that the attached Stipulation of Settlement meets the requirements of *N.J.A.C.* 1:1-19.1.1 and I hereby **APPROVE** same. In conjunction therewith, I **ORDER** that the parties comply with its contents and that these proceedings be (and are hereby) **TERMINATED**.

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

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

2/11/03
DATE

Thomas E. Clancy
THOMAS E. CLANCY, ALAJ

Receipt Acknowledged:

February 14, 2003
DATE

M. Kathleen Duncan (ta)
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 20 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cml

FEINTUCH, PORWICH & FEINTUCH
26 Journal Square
Jersey City, New Jersey 07306
(201) 656-8600
Attorneys for Petitioner

THERESA PIATKOWSKI, Petitioner vs. STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, COUNTY OF HUDSON, Respondent	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY OAL DKT. NO. EDU 07405-00 Agency Ref No. 216-6/00 STIPULATION OF SETTLEMENT

THIS MATTER having been brought before the office of Administrative Law by Feintuch, Porwich & Feintuch, attorneys for petitioner, with Charlotte Kitler, Esq., appearing for respondent, and the parties having adjusted the differences between them as a result of the Division of Workers' Compensation ruling on the length of petitioner's temporary disability in Theresa Piatkowski vs. Jersey City Board of Education, C.P. No. 2000-41511, and for good cause being shown,

IT IS on this 10th day of February, 2003,

corrections by
Thomas E. Clancy ALAJ

STIPULATED AND AGREED that Respondent shall restore all Petitioner's sick days deducted from Petitioner's sick leave bank from March 2, 2000 through March 1, 2001.

WE HEREBY CONSENT TO THE FORM AND ENTRY OF THE ABOVE STIPULATION.

FEINTUCH, PORWICH & FEINTUCH
Attorneys for Petitioner

By: _____
ALAN S. PORWICH
DATED: ~~December , 2002~~ 2/6/03

_____
CHARLOTTE KITLER, ESQ.
Attorney for Respondent
DATED: ~~December~~ 1/28/03, 2002

OAL DKT. NO. EDU 7405-00
AGENCY DKT. NO. 219-6/00

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

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 3|31|03

Date of Mailing: 3|31|03

154-03

154-03 SEC

IN THE MATTER OF ABDI GASS, :

CHESILHURST BOARD OF EDUCATION, :

CAMDEN COUNTY. :

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

The School Ethics Commission determined that respondent Board member violated *N.J.S.A.* 18A:12-24(c) and (e) of the School Ethics Act by serving as "borough consultant" to the Borough of Chesilhurst, but functioning as the Borough's financial officer while he was a member of the Board and by continuing employment with the Borough while remaining on the Board. Moreover, respondent flagrantly ignored the Commission's prior decision cautioning him that participation in budget matters would violate the Act. After considering the nature of the charges and recognizing that respondent resigned from the Board, the Commission recommended the most severe available penalty, censure.

Upon review of the record, the Commissioner, whose decision was restricted solely to a review of the Commission's recommended penalty, concurred with the Commission's recommendation and, thus, ordered respondent censured as a school official found to have violated the School Ethics Act.

March 31, 2003

IN THE MATTER	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
OF	:	
	:	**Docket No.: C10-02**
ABDI GASS,	:	
CHESILHURST TOWNSHIP	:	
BOARD OF EDUCATION,	:	**DECISION ON VIOLATION**
CAMDEN COUNTY	:	
	:	

PROCEDURAL HISTORY

The above-captioned matter arises from a complaint that was filed on May 13, 2002 by Chesilhurst Board of Education (Board) member Wadia Alwan. Therein, she alleged that Abdi Gass violated N.J.S.A. 18A:12-24(c), by serving as "borough consultant" to the Borough of Chesilhurst, but functioning as the Borough's financial officer while he was a member of the Board. She also alleged that Mr. Gass violated N.J.S.A. 18A:12-24(d) by continuing employment with the Borough while remaining on the Board. Third, she alleged that Mr. Gass violated N.J.S.A. 18A:12-24(g) by representing the Chesilhurst Borough Council's position in the defeated budget negotiations process contrary to the Board's budget presented by the Chief School Administrator (CSA). Last, she alleged that he violated two Board policies by not supporting the adopted budget and supporting budget cuts that were not prepared by the CSA and the Business Administrator.

At its meeting of September 24, 2002, the School Ethics Commission found probable cause to credit the allegations that Mr. Gass violated N.J.S.A. 18A:12-24(c) of the School Ethics Act when, as a member of the Chesilhurst Board of Education (Board), he voted in favor of the budget and participated in the defeated budget negotiations process while he was employed by the Borough of Chesilhurst as a consultant and N.J.S.A. 18A:12-24(g) when he presented the budget cuts advocated by Borough Council to the CSA and the Board. The Commission did not find probable cause to credit the allegations that he had an inherent conflict of interest in violation of N.J.S.A. 18A:12-24(d) by serving on the board and being employed by the Borough or that his violation of board policies violated the Act.[1] The Commission found the material facts to be undisputed regarding the conduct on which it found probable cause and invited Mr. Gass to submit a written statement to the Commission by January 6, 2003, setting forth why he should not be found in violation of N.J.S.A. 18A:12-24(c) and (g) of the Act.

Mr. Gass submitted a timely written statement to the Commission arguing that it was not a violation for him to vote on the budget before it was defeated and that there was no direct evidence that he participated in discussions on the budget after it was defeated.

[1] In its probable cause decision, the Commission found that it did not have the authority to enforce Board policies, but said that the policies supported the charges upon which it found probable cause.

At its meeting of January 28, 2003, the Commission disagreed and found Mr. Gass in violation of the Act and recommended a penalty of censure since it was the highest penalty that it could recommend against a former board member. [2]

FACTS

Based on the pleadings, the documents submitted and the testimony presented, the Commission found the following facts to be undisputed.

At all times relevant to the allegations in this complaint, Abdi Gass was a member of the Chesilhurst Board of Education. Also, at all times relevant to the allegations in this complaint, Abdi Gass was an appointed consultant to the Borough of Chesilhurst. As Borough Consultant, he has received up to $18,000 per year. Mr. Gass has served in this capacity for approximately nine years. The minutes of the January 5, 2002 meeting of the Chesilhurst Borough Council show that he was to be appointed as Financial Consultant, but the resolution to do so was tabled. He was appointed as Borough Consultant on January 10, 2002. Mr. Gass holds a Municipal Finance Officer (MFO) certificate. No employees in the Borough hold such a certificate, including the Chief Financial Officer (CFO). The CFO's resume shows that her background up until 2001 was in banking, not municipal finance. Mr. Gass assists her in the performance of her duties since she is new to the position.

Mr. Gass set forth that his role with the Borough "has been primarily to ensure that computer systems, data processing, and the backing up of data are properly maintained and effectively managed so that the operation of the Borough will not be undermined." He also assists the CFO in running annual sewer bills and the bill list from the computer system and helps her to ensure the proper posting of transactions to the system. Mr. Gass stated that one of the primary responsibilities of the CFO is to assist the Mayor and the governing body in the annual budget development process. However, the CFO's resume showed that she had no prior experience with the preparation of a municipal budget. Mr. Gass testified that the independent auditor has accomplished this task, as well as the preparation of the annual financial statements and the supplemental debt statement. Mr. Gass denied being the Borough's financial consultant.

At the March 12, 2002 meeting of the Board, Mr. Gass voted to approve the proposed 2002-2003 School District Budget in the amount of $3,178,167.50 (local tax levy $979,763.00) and to submit it to the county office for approval. The motion passed by a vote of five to zero. On March 25, 2002, the Board held a budget meeting. At that meeting, after the CSA presented the budget as approved on March 12, 2002, Mr. Gass proposed a resolution to reduce the local tax share to $849,763.00. Mr. Gass voted in favor of his motion, but his motion failed by a vote of three in favor and four against. A second resolution to adopt the budget as approved on March 12th with a general fund tax

[2] The Commission was advised that Mr. Gass resigned from his position on the Board at the Board's October 8, 2002 meeting.

levy of $976,581.00 succeeded with a vote of four in favor and three against. Mr. Gass voted against the motion.

The April election resulted in the defeat of two incumbents who were supported by Wadia Alwan. It also resulted in the defeat of the budget. Specifically, the budget was defeated by a vote of 47 in favor and 186 against. On April 11, 2002, the county office distributed a defeated budget packet to the District. Mr. Gass became Board Vice President at the April 23, 2002 reorganization meeting. By memorandum dated April 26, 2002, the CSA set forth $100,000 in proposed cuts from the defeated 2002-03 budget. He noted that the cuts would take the District below the Thorough and Efficient range (T&E) so the budget would be automatically reviewed by the Commissioner of Education. The staff reductions that the CSA proposed were only $12,000 of the $100,000 in cuts.

On April 29, 2002, at the request of the newly elected Board President Mary Ellen Tillmon, Mr. Gass attended a meeting with Ms. Tillmon and the CSA. The CSA informed the Board by memorandum of April 29, 2002 that the purpose of the meeting was to review the budget cuts proposed by Mr. Gass and Mrs. Tillmon. In Mr. Gass' proposed budget cuts, he set forth a total of $150,000.00 in budgetary reductions in personnel including elimination of the basic skills teacher position, elimination of the administrative secretary position, elimination of music, art and physical education and the elimination of two teacher aides and one cafeteria aide. These were in addition to almost $100,000 in non-personnel budgetary reductions for a total of $250,000 in cuts.

On April 30, 2002, the Board held a special meeting to discuss the budget. The minutes of that meeting provided by Ms. Alwan set forth:

> The Board voted to submit the $250,000.00 budget cuts Mr. Gass and Mrs. Tillmon submitted to the CSA on Monday, April 29th. Most Board members stated they did not get a chance to review said cuts and discussion was not permitted.

The Commission learned that these were not the official minutes approved by the Board, but the official minutes also do not reflect that the Board discussed the proposed cuts at that meeting. The Board voted to forward Mr. Gass' budget cuts in the amount of $250,000 to the Borough Council for their approval. Mr. Gass abstained and the motion passed by a vote of four in favor and two against.

Also on April 30, 2002, the Board met with the Borough Council regarding the budget. On May 9, 2002, the Borough Council held a meeting and adopted a resolution to certify the taxes to the County Board of Taxation in the amount of $726,581.00, which it said reflected the $250,000 budgetary reductions proposed by the Board and approved by the Council. Attached to the resolution was the line item memorandum prepared and presented to the CSA by Mr. Gass and Mrs. Tillmon.

Interestingly, on April 22, 2002, the Borough Council President had sent to the Board's CSA a letter setting forth a proposed schedule of meetings with the Board to

discuss the defeated school budget. Therein, he proposed a meeting of May 2, 2002, the purpose of which was stated to be:

> [F]or the Governing Body to consider the budget reductions proposed by the school board. The Council would like to see a budget reduction of at least $250,000. of which the school board had already identified in its last board meeting a reduction of $150,000. which did not have any negative impact on the educational program. The council is suggesting that the board undertake a comprehensive examination of its 2001-2002 budget to determine the amount of projected fund balance as of June 30, 2002 – (The latest financial reports indicate an appropriation balance of $145,000. and that all salaries are encumbered.) The board should consider eliminating non-mandated programs such as music, physical education, and art. The Board should also consider leasing one small bus to transport some of its own special edu. students to reduce cost.

A prior ethics complaint against Mr. Gass in 1998 charged him with violating the School Ethics Act in connection with his serving on the Chesilhurst Board of Education and holding a position as consultant with the Borough. The Commission issued a decision on November 24, 1998 finding no probable cause and dismissing the complaint, *In the Matter of Abdi Gass*, C13-98 (November 24, 1998). Although the Commission found no probable cause, it set forth that, because of his role as Borough Consultant, he would have a conflict of interest regarding budget matters. Therefore, the Commission advised Mr. Gass to abstain from discussions on the Board's budget and to recuse himself from participating in matters involving the Borough to the extent that the interests of the Board and the Borough may diverge. The Commission stated that "Failure to adhere to this restriction may result in further proceedings consistent with this opinion."

Mr. Gass provided many facts concerning the factions on the Board and the fact that Ms. Alwan's faction became the minority as a result of the April 22, 2002 election. The Commission considered these facts in rendering its determination.

ANALYSIS

The Commission first found probable cause to credit the allegation that Mr. Gass violated N.J.S.A. 18A:12-24(c), which provides:

> No school official shall act in his official capacity in any matter in which he, a member of his immediate family, or a business organization in which he holds an interest, has a direct or indirect financial involvement that might reasonably be expected to impair his objectivity or independence of judgment. No school official shall act in his official capacity in any matter where he or a member of his immediate family has a personal involvement that is or creates some benefit to the school official or member of his immediate family.

In its prior opinion, *In the Matter of Abdi Gass, supra*, the Commission specifically advised Mr. Gass that he had an indirect financial involvement with the Borough due to his position as Borough Consultant and therefore he would violate the Act if he were to participate as a Board member in budget discussions. Based on the undisputed facts set forth above, Mr. Gass voted on the budget on March 12, 2002. He made a motion to lower the budget and voted against the budget that he had previously supported on March 25, 2002. In addition, he submitted proposed budget cuts to the CSA, attended a meeting with the CSA and Mrs. Tillmon. Further, according to Mr. Gass' own witness, he presented the revised budget with the cuts to the Borough Council at the April 30, 2002 meeting. The Commission finds that, not only did Mr. Gass act in clear contravention of its prior decision regarding Mr. Gass, but it concludes that he acted in his official capacity in a matter in which he had an indirect financial involvement that might reasonably be expected to impair his objectivity in violation of N.J.S.A. 18A:12-24(c).

The Commission also found probable cause that he represented the Chesilhurst Borough Council's position in a matter pending before the Board in violation of N.J.S.A. 18A:12-24(g). The Council's position was contrary to the budget presented by the CSA, which was initially adopted as the Board's budget as reflected in the Board minutes of March 12 and 25, 2002, and later revised by the CSA's memorandum of April 26, 2002 after the defeat of the budget in the election. N.J.S.A. 18A:12-24(g) provides:

> No school official...shall represent any person or party other than the school board or school district in connection with any cause, proceeding, application or other matter pending before the district in which he serves or in any proceeding involving the school district in which he serves or, for officers and employees of the New Jersey School Boards Association, any school district. This provision shall not be deemed to prohibit representation within the context of official labor union or similar representational responsibilities.

After the Board's budget was defeated in the April election, the CSA should have proposed cuts for the Board to consider. Chesilhurst Board Policy F3113 sets forth that the CSA and business administrator are responsible for formulating the annual budget. If the cuts that the CSA proposes are favorable to the Board, then the cuts would be presented to the Borough Council for consideration. Instead, the Borough Council President's letter of April 22, 2002 to the CSA sets forth the Borough's proposed cuts of $250,000 including cuts to what he calls "non-mandated" programs such as music, physical education and art. In the same letter, the Council suggested that the Board undertake a comprehensive examination of its 2001-2002 budget and stated that the amount of projected fund balance as of June 30, 2002 was $145,000 and that all salaries were encumbered, according to the latest financial reports. This information regarding the projected fund balance, which the Council set forth, had not even been discussed or delivered to the Council as of that date. Prior to the April 22, 2002 letter, the CSA had not set forth any cuts that he proposed to make in response to the defeat of the school budget. He did not do so until April 26, 2002 when he set forth $100,000 in cuts that did not include any cuts to the programs that the

Borough proposed. Mr. Gass and Mrs. Tillmon then met with the CSA, and, amazingly, the cuts of $250,000 that the Borough proposed in its April 22, 2002 letter, eliminating music, physical education and art programs, became the resulting budget from that meeting. Mr. Gass presented those cuts to the Board at its April 30, 2002 meeting, where the Board approved them without discussion. Chesilhurst Board Policy F3100 requires that the Board support the adopted budget, after the legally required budget hearing is held and after the county superintendent approves it. The Board did not support the adopted budget as required by F3100 by approving $250,000.00 in cuts. Mr. Gass then presented the cuts to the Council at the April 30, 2002 Borough Council meeting with the Board. The Council then approved the cuts that went way beyond what the CSA was willing to make. Based on the foregoing, the Commission concludes that Mr. Gass represented the Borough Council in a matter pending before the Board in violation of N.J.S.A. 18A:12-24(g).

DECISION

For the foregoing reasons, the Commission concludes that Mr. Gass violated N.J.S.A. 18A:12-24(c) and (g).

PENALTY

The Commission has found that Mr. Gass flagrantly ignored the Commission's prior decision cautioning him that participation in budget matters would violate the Act. He fully participated in the approval of the budget both before and after its defeat by the voters. Therefore, the Commission would have recommended that the Commissioner of Education remove Mr. Gass from his position on the Chesilhurst Board of Education. However, because he abruptly resigned from the Board after the Commission's finding of probable cause at its meeting of September 24, 2002, the highest penalty that the Commission can impose is a censure. The Commission therefore recommends that the Commissioner of Education impose a penalty of censure.

This decision, having been adopted by the Commission, shall now be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction only, pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, the respondent may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Paul C. Garbarini, Chairperson

Resolution Adopting Decision – C10-02

Whereas, the School Ethics Commission has considered the pleadings filed by the parties and the documents submitted in support thereof and the testimony of the parties; and

Whereas, the Commission found probable cause to credit the allegations that Mr. Gass violated N.J.S.A. 18A:12-24(c) and (g) of the School Ethics Act; and

Whereas, the Commission reviewed the written submission of Mr. Gass in response to the finding of probable cause; and

Whereas, the Commission now concludes that respondent violated the School Ethics Act and believes that removal would be the appropriate penalty for the reasons set forth, but cannot impose removal because Mr. Gass resigned from the Board;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter finding Abdi Gass in violation of the Act and recommending that the Commissioner of Education impose a penalty of censure.

Paul C. Garbarini, Chairperson

I hereby certify that the School
Ethics Commission adopted this decision
at its public meeting on January 28, 2003.

Lisa James-Beavers
Executive Director

AGENCY DKT. NO. 54-2/03

IN THE MATTER OF ABDI GASS,	:	COMMISSIONER OF EDUCATION
CHESILHURST BOARD OF EDUCATION,	:	DECISION
CAMDEN COUNTY.	:	

The record of this matter and the decision of the School Ethics Commission ("Commission"), finding that Abdi Gass, former member of the Chesilhurst Board of Education, violated *N.J.S.A.* 18A:12-24(c) and (g) of the School Ethics Act, and recommending a penalty of censure have been reviewed. Upon issuance of the decision of the Commission, respondent was provided 13 days from the mailing date of the decision to file written comments on the recommended penalty for the Commissioner's consideration.

Respondent submitted no comments.

Initially, it must be emphasized that, pursuant to *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6A:3-9.1, the determination of the Commission as to violation of the School Ethics Act is **not reviewable by the Commissioner** herein. Only the Commission may determine whether a violation of the School Ethics Act occurred. The Commissioner's jurisdiction is limited to reviewing the sanction to be imposed based upon a finding of a violation by the Commission. Therefore, this decision is restricted solely to a review of the Commission's recommended penalty.

Upon a thorough review of the record, the Commissioner concurs with the Commission that the appropriate sanction for respondent's flagrant violations would have been removal; however, in light of respondent's abrupt resignation from the Board, the Commissioner agrees that censure is the appropriate penalty for respondent in this matter. In so ruling, the Commissioner is satisfied from the record before him that, in recommending a penalty for the violations it found, the Commission fully considered the nature of the offenses and weighed the effects of aggravating and mitigating circumstances. Therefore, the Commission's recommended penalty in this matter will not be disturbed.

Accordingly, IT IS hereby ORDERED that Abdi Gass be censured as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 3|31|03

Date of Mailing: 4|01|03

* This decision, as the Commissioner's final determination regarding penalty in this matter may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

155-03

RICHARD POLNY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

April 2, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 4422-02

AGENCY DKT. NO. 180-6/02

RICHARD POLNY,

Petitioner,

v.

CITY OF NEW BRUNSWICK,

BOARD OF EDUCATION,

MIDDLESEX COUNTY,

Respondent.

Nancy I. Oxfeld, Esq., for petitioner (Oxfeld Cohen, LLC, attorneys)

George F. Hendricks, Esq., for respondent (Hendricks and Hendricks, attorneys)

Record Closed: February 11, 2003 Decided: February 18, 2003

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

This matter was transmitted to the Office of Administrative Law on July 8, 2002, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

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

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

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

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

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

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

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

2/18/03
DATE

STEVEN C. REBACK, ALJ

Receipt Acknowledged:

2/20/03
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 21 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

cmo

OXFELD COHEN, PC
50 Commerce Street
Newark, New Jersey 07102
(973) 642-0161
Attorneys for Petitioner

BEFORE THE COMMISSIONER OF EDUCATION
OF THE STATE OF NEW JERSEY
OAL DKT. NO. EDUOR 04422-02S
Agency Ref. No. 180-6/02

RICHARD POLNY,

Petitioner,

-vs-

BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK,

Respondent.

STIPULATION OF SETTLEMENT

The within matter having been amicably resolved between the parties, it is hereby agreed as follows:

1. The Petitioner and the Respondent agree that Petitioner's appropriate placement on the salary guide is at a position two steps above his current placement;

2. Upon approval of this agreement by the Commissioner of Education, the Petitioner will be immediately moved two steps up on the salary guide from his placement on the salary guide at the time of said approval;

3. Immediately upon the Respondent placing the Petitioner at a place two steps up on the salary guide from his placement at the time of the approval of this agreement by the Commissioner of Education, the Petitioner will be paid at his new step;

4. The Petitioner hereby withdraws his petition in this matter with prejudice, contingent upon approval of the stipulation of settlement by the Commissioner of Education and compliance by the Respondent with the terms set forth in Paragraph Nos. 2 and 3 of this agreement;

5. This Agreement constitutes the entire agreement of the parties with respect to the matters dealt with herein.

OXFELD COHEN, PC
Attorneys for Petitioner
By:

NANCY I. OXFELD, ESQ.

Dated: 2/19/03

HENDRICKS & HENDRICKS
Attorneys for Respondent
By:

GEORGE F. HENDRICKS, ESQ.

Dated:

OAL DKT. NO. EDU 4422-02
AGENCY DKT. NO. 180-6/02

RICHARD POLNY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 4|02|03

Date of Mailing: 4|02|03

156-03

GEORGE ANN CARMICHAEL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

April 2, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 4021-01

AGENCY DKT. NO. 139-5/01

GEORGEANN CARMICHAEL,

Petitioner,

v.

BOARD OF EDUCATION OF TRENTON,

MERCER COUNTY,

Respondent.

Michael C. Damm, Esq., for petitioner (Selikoff & Cohen, PA, attorneys)

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

Record Closed: February 11, 2003 Decided: February 11, 2003

BEFORE **KATHRYN A. CLARK**, ALJ:

This matter was transmitted to the Office of Administrative Law on June 12, 2001, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

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

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

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

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

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

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

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

Feb. 11, 2003
DATE

Kathryn A. Clark
KATHRYN A. CLARK, ALJ

Receipt Acknowledged:

February 19, 2003
DATE

M. Kathleen Duncan (by)
DEPARTMENT OF EDUCATION

Mailed to Parties:
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

FEB 20 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

cmo

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

GEORGE ANN CARMICHAEL,

Petitioner,

v.

TRENTON BOARD OF EDUCATION,

Respondent.

BEFORE THE COMMISSIONER
OF EDUCATION OF THE STATE OF
NEW JERSEY
OAL Docket No. EDU 4021-01
Agency Docket No. 139-5/01

SETTLEMENT AGREEMENT

This Settlement Agreement is entered into by and between the Petitioner GeorgeAnn Carmichael ("Carmichael") and the Respondent Trenton Board of Education ("Board").

WHEREAS, on or about May 1, 2001, Carmichael filed a Petition of Appeal captioned *GeorgeAnn Carmichael v. Trenton Board of Education*, Docket No. 139-5/01, seeking the return of certain sick days over the period of October 4, 2000 through February 14, 2001 pursuant to *N.J.S.A.* 18A:30-2.1 in connection with a work injury occurring on July 24, 2000; and

WHEREAS, the Board filed an Answer to the Petition dated May 24, 2001, denying the allegations; and

WHEREAS, the parties having conducted a full and complete investigation of all the evidence, and the parties having had an opportunity to explore a means of resolving this dispute in a manner consonant with the public interest; and

WHEREAS, this Agreement is the end product of the investigation conducted and discussions with the parties and is intended to dispose of the issues in controversy based upon the mutual understandings set forth below;

NOW THEREFORE, it is agreed as follows:

1. The Petitioner Carmichael hereby agrees to dismiss with prejudice the Petition of Appeal, OAL Docket No. EDU 4021-01, Agency Docket No. 139-5/01, seeking the return of sick days for the period of October 4, 2000 through February 14, 2001 arising out of a work injury occurring on or about July 24, 2000 and hereby fully and completely releases the Board from any and all claims pertaining to that return of sick leave issue;

2. The Board agrees to restore to Carmichael's sick leave bank the number of sick days utilized by her during the period of October 4, 2000 through February 14, 2001 inclusive. Salary payments made to her during that time shall be considered as having been made pursuant to N.J.S.A. 18A:30-2.1;

3. This Agreement shall be final and binding upon Carmichael and the Board on final approval of the Commissioner of Education;

4. Both parties have read the terms of this Agreement and have had the opportunity to discuss it with counsel, and acknowledge that they are executing this Agreement of their own volition, with the full understanding of its terms, and without coercion. By signing this Agreement, each signatory represents that she or he is a party to or has been duly authorized by a party to sign on the party's behalf. The parties agree that this Agreement may be signed in counterparts and that facsimiles of signatures will have the same force and effect as original signatures;

5. The parties hereto agree that they and their officers, agents, and administrators are bound by a covenant of good faith and fair dealing with respect to this Agreement;

6. The parties recognize the right to a trial before the Office of Administrative Law and independent consideration of the case by the Commissioner of Education. The parties are waiving their right to a trial and agree to the proposed settlement as set forth above. Carmichael recognizes that the dismissal of the Petition of Appeal through settlement is final and that the case cannot be litigated. The parties have made the decision to resolve this case knowingly and voluntarily in recognition that this proposed settlement is subject to the approval of the Commissioner of Education.

Intending to be legally bound hereby, Carmichael and the Board through its authorized representative execute the foregoing Agreement on the date(s) indicated below.

WITNESS:

Michael C. Damm

GEORGE ANN CARMICHAEL
DATED: 12/12/02

WITNESS:

Thomas W. Sumners Jr

TRENTON BOARD OF EDUCATION

BOARD SECRETARY
DATED: 1/23/03

OAL DKT. NO. EDU 4021-01
AGENCY DKT. NO. 139-5/01

GEORGE ANN CARMICHAEL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 4|02|03

Date of Mailing: 4|02|03

* The proposed agreement was approved by the respondent Board of Education, as indicated by a resolution submitted to the record at the request of the Director of Controversies and Disputes.

157-03

157-03

IN MATTER OF THE TENURE HEARING :
OF JOHN E. BENNETT, SCHOOL DISTRICT :
OF THE CITY OF ASBURY PARK, :
MONMOUTH COUNTY. :
_____ :

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

The Board certified tenure charges of unbecoming conduct and other just cause against respondent elementary school teacher and sought his dismissal.

The ALJ concluded the matter was moot and ordered the petition dismissed since respondent voluntarily resigned.

In the course of the tenure proceedings, respondent admitted to engaging in a sexual relationship with minor A.C., the conduct underlying one of the charges. Thus, the Commissioner could not consent to dismissing the charges as moot, notwithstanding that respondent resigned. The Commissioner rejected the Initial Decision and remanded the matter to the OAL for further proceedings. The Commissioner directed that a copy of this decision be forwarded to the State Board of Examiners.

April 3, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NO. EDU 6139-01

AGENCY DKT. NO. 328-8/01

IN THE MATTER OF THE TENURE HEARING OF JOHN E. BENNETT, SCHOOL DISTRICT OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY, AGENCY DKT. NO. 328-8/01,

---

Nicholas Celso, Esq., for petitioner (Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Marcie L. Mackolin, Esq., for respondent (Chamlin, Rosen, Uliano & Witherington, attorneys)

Record Closed: February 6, 2003 Decided: February 18, 2003

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

On or about August 20, 2001, tenure charges against the respondent John E. Bennett were filed with the Commissioner of Education alleging that Bennett should be dismissed from his tenured position as an elementary school teacher employed by the Asbury Park Board of Education, pursuant to *N.J.S.A.* 18A:6-10. The charges are essentially couched in an assertion that Bennett was guilty of conduct unbecoming and other just cause. Thereafter, on or about September 6, 2001, Bennett responded to the tenure charges and, thereafter, on or about

September 14, 2001, the matter was transmitted to the Office of Administrative Law as a contested case, pursuant to *N.J.S.A.* 52: 14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. On or about February 6, 2003, it was brought to my attention that a motion to render this matter moot had been made by counsel for Bennett and, for obvious reasons, no response was ever forthcoming. The essence of the motion is that Bennett, pursuant to his own attorney's affidavit, voluntarily resigned from his teaching position with Asbury Park effective November 27, 2001.

Based on the foregoing, it is my conclusion that petitioner no longer wishes to proceed and it is **ORDERED** that this Petition be **DISMISSED.**

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

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

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

2/18/03
DATE

Steven C. Reback
STEVEN C. REBACK, ALJ

Receipt Acknowledged:

2/20/03
DATE

M Kathleen Jameson
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 21 2003

J. J. Mazzi
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

cmo

CHAMLIN, ROSEN, ULIANO & WITHERINGTON
268 NORWOOD AVENUE
PO BOX 38
WEST LONG BRANCH, NEW JERSEY 07764
732-229-3200
ATTORNEYS FOR JOHN BENNETT

	:	STATE OF NJ
IN THE MATTER OF	:	OFFICE OF ADMINISTRATIVE LAW
JOHN BENNETT	:	OAL DKT: EDUTH-06139-015
	:	AGENCY REF: 328-8/01
	:	
	:	ORDER
	:	

THIS MATTER having been brought before the Court on Motion of Chamlin, Rosen, Uliano & Witherington, attorneys for defendant, and the Court having read the papers filed on behalf of the defendant and opposition thereto, and for good cause shown:

IT IS on this 6th day of Feb , ~~2002;~~ 2003

ORDERED that the issues of the within matter are deemed moot, for the reason that the Asbury Park Board of Education is seeking dismissal of John Bennett from his teaching position, wherein John Bennett resigned from his teaching position effective November 27, 2001; and it is further

ORDERED that a copy of the within Order be served upon all parties within 30 days.

[signature] ALJ

OAL DKT. NO. EDU 6139-01
AGENCY DKT. NO. 328-8/01

IN MATTER OF THE TENURE HEARING	:	
OF JOHN E. BENNETT, SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE CITY OF ASBURY PARK,	:	DECISION
MONMOUTH COUNTY.	:	
	:	

The record of this matter and Initial Decision of the Office of Administrative Law (OAL) have been reviewed. For the reasons set forth below, the Initial Decision of the Administrative Law Judge (ALJ) is rejected and this matter is remanded to the OAL for further proceedings.

This matter was brought before the Commissioner by way of tenure charges certified by the Board on August 21, 2001. Those charges, brought by the Superintendent of Schools, allege that John E. Bennett, a second grade teacher, committed various acts which constitute unbecoming conduct and/or other just cause for dismissal. Specifically, it is averred that on or about June 9, 2001, respondent was arrested by the Asbury Park Police for: possession of a controlled dangerous substance (CDS), namely marijuana, pursuant to *N.J.S.A.* 2C:35-5(b)(11); possession of a CDS with intent to distribute, pursuant to *N.J.S.A.* 2C:35-5(b)(11); possession of a CDS with the intent to distribute and/or sell such substance within 500 feet of a public housing project, pursuant to *N.J.S.A.* 2C:35-7.1(a); and possession of a CDS with intent

to distribute and/or sell such substance within 1000 feet of a public school, pursuant to *N.J.S.A.* 2C:35-7.[1]

Additionally, respondent was charged with engaging in a course of conduct of fraternizing with minor females outside the scope of his official duties, constituting unbecoming conduct and other just cause for dismissal. Specifically, the Superintendent attests that in or about September 2000, and other times thereafter, respondent engaged in sexual contact, including, but not limited to, sexual intercourse, with A.C., a 16-year-old female student attending public high school within the Asbury Park School District; brought A.C. to his private residence for purposes unrelated to his official duties; accompanied A.C. to a motel for purposes unrelated to his official duties; met A.C. at the home of R.C., 14-year-old female high school student, for purposes unrelated to his teaching duties; and accompanied A.C. and three other female high school students to a movie for purposes unrelated to his official duties. (Sworn Tenure Charges of Unbecoming Conduct and/or Other Just Cause Against John E. Bennett, at 1-7)

Following transmittal of this matter to the OAL, respondent resigned from his teaching position, effective November 27, 2001. After respondent's motion for dismissal, the ALJ issued an Initial Decision recommending that the matter be dismissed as moot.

Upon careful examination of the record, the Commissioner notes with concern a Petition for Order to Show Cause filed by the Board of Education of the City of Asbury Park before the State Board of Examiners pursuant to *N.J.A.C.* 6:11-3.6(a)(3).[2] The Superintendent therein attests that Mr. Bennett was arrested for the sexual assault of A.C., a 16-year-old female

[1] The record does not indicate the outcome of the criminal proceedings associated with these drug charges.

[2] There is no indication in this record what action the State Board of Examiners has taken relative to the petition.

student at that Asbury Park High School, on December 22, 2000, after which he was suspended with pay from his teaching position, pending final disposition of the sexual assault charge. The Superintendent also avers,

> Although the criminal charge for sexual assault was ultimately dismissed, ***Mr. Bennett admitted, in his discovery responses in connection with tenure charges brought against him, to engaging in a sexual relationship with A.C. which has continued to date.*** (Petition for Order to Show Cause, December 10, 2001 at 3) (emphasis added)

Under these circumstances, where there is compelling evidence of an admission, obtained in the course of tenure proceedings,[3] of the very conduct underlying one of the charges, the Commissioner cannot consent to dismissing the charges as moot, notwithstanding that the teaching staff member has unilaterally resigned.[4]

Accordingly, the Initial Decision is rejected for the reasons expressed herein. The

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[3] The Commissioner notes that tenure proceedings are expedited by law and, indeed, the discovery process must begin immediately upon the referral of a tenure case to the OAL, which, in this instance, was on or about September 14, 2001. (*See N.J.S.A.* 52:14B-10.1a; Initial Decision at 2.)

[4] *Cf., In the Matter of the Tenure Hearing of Irvin Kotkin*, 95 *N.J.A.R.*2d (EDU) 431, wherein respondent's retirement from his position *after* his hearing at OAL, but *prior* to the issuance of an Initial Decision by the ALJ, did not render the *charges* moot, thereby requiring their dismissal. The Commissioner therein recognized the serious nature of the charges which must be viewed in light of his concern and obligation regarding the safety and integrity of the schools statewide "and the fact that an individual's retirement from one district does not necessarily preclude subsequent employment in other school districts of the state." The Commissioner, therefore, found that "in matters of this nature, [he] cannot permit an individual's retirement to effectively allow him to sidestep adjudication of such charges on their merits.***" *Kotkin, supra,* at 438; *see, also, In the Matter of the Tenure Hearing of Jerry Barshatky, School District of the Freehold Regional High School District, Monmouth County*, State Board decision May 1, 1996, wherein the State Board determined that tenure charges, already certified and litigated against the respondent, should not be dismissed as moot following respondent's retirement. Rather, the State Board found that although the matter did not involve a settlement or withdrawal of the tenure charges, respondent's motion to dismiss the charges as moot, based upon his unilateral retiring following the completion of the tenure hearing, should be subjected to no less scrutiny than a proposed settlement or withdrawal of tenure charges, which may be granted by the Commissioner only upon a finding that the settlement or withdrawal is in the public's interest. *Barshatky, supra,* slip. op. at 4.

Commissioner hereby remands this matter to the OAL for adjudication of the charges on the merits. A copy of this decision shall be forwarded to the State Board of Examiners.

IT IS SO ORDERED.[5]

COMMISSIONER OF EDUCATION

Date of Decision: 4|03|03

Date of Mailing: 4|03|03

[5] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

158-03

158-03E

SEMAN-TOV, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
MONMOUTH COUNTY SUPERINTENDENT OF SCHOOLS AND BOARD OF EDUCATION OF THE CITY OF LONG BRANCH, MONMOUTH COUNTY,	:	DECISION ON MOTION
RESPONDENTS.	:	

April 3, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING
MOTION FOR
EMERGENT RELIEF
OAL DKT. NO. EDU 844-03
AGENCY DKT. NO. 84-3/03

SEMAN-TOV, INC.,
Petitioner,
v.
MONMOUTH COUNTY
SUPERINTENDENT OF SCHOOLS
& CITY OF LONG BRANCH
BOARD OF EDUCATION,
Respondents.

Lawrence H. Shapiro, Esq., for petitioner (Ansell, Zaro, Grimm & Aaron, attorneys)

Allison Colsey Eck, Deputy Attorney General, for respondent Monmouth County Superintendent of Schools (Peter C. Harvey, Acting Attorney General of New Jersey, attorney)

Peter Sokol, Esq., for respondent Long Branch Board of Education (McOmber & McOmber, attorneys)

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

STATEMENT OF THE CASE

This case involves transportation services for the 2002-03 school year provided by petitioner Seman-Tov, Inc., to respondent City of Long Branch Board of Education (BOE). Bidding and contracts for transportation services between boards of education and providers are subject to school laws, including Department of Education regulations; such contracts are subject to approval by the county superintendents of schools; and the regulations state that a contract that fails to meet the requirements of the regulations "shall be set aside." See N.J.S.A. 18A:39-2; N.J.A.C. 6A:27-9.1 to -13.5; see particularly N.J.A.C. 6A:27-9.1(b). In this case, respondent Monmouth County Superintendent determined that the bidding process for the BOE's and petitioner's "contract" for transportation services failed to comply with the regulations and he directed the BOE to repeat the process of bidding and contracting.

Petitioner alleges that it planned its business in reliance on the "contract" with the BOE, that loss of the contract would devastate it financially, and that a change of provider so late in the school year would be disruptive to the pre-kindergarten (pre-K) children it transports. Petitioner points out that the Superintendent provided to it no notice and no opportunity to participate in his determination and direction. Petitioner claims that the Superintendent's determination should be reversed and vacated and that its "contract" with the BOE should be deemed effective. Petitioner submits that (if the bidding and contracting process failed to comply with the school laws) it would agree to a contract amended to include lawful requirements. In the alternative, petitioner alleges that all of the BOE's contracts for transportation services for the 2002-03 school year failed to comply with the school laws and it claims that all of the BOE's transportation services contracts should be ordered subject to rebidding. However, the Superintendent submits that, since the bidding process relating to petitioner's services failed to comply with the school laws, the BOE must repeat the process.

This decision is on petitioner's motion for emergent relief, restraining the Superintendent from requiring the rebidding and restraining the BOE from repeating the rebidding. The respondent BOE consents to the restraint. The Superintendent submits that the petitioner has failed to satisfy the usual requirements for emergent relief, so that the motion must be denied.

PROCEDURAL HISTORY

The subject matter of this case was part of superior court litigation, J & M Keelen Transportation Corp. v. Seman-Tov and Seman-Tov v. James Keelen, No. Mon C 361-02 (Ch. Div.), wherein the petitioner's third-party complaint named the Superintendent as a third-party defendant. Since this case involves a controversy and/or dispute arising under the school laws (over which the Commissioner of Education has jurisdiction), the Hon. Clarkson S. Fisher, Jr., J.S.C., decided that this subject matter should be transferred to the Commissioner. See N.J.S.A. 18A:6-9. Consistent with Judge Fisher's decision, on March 12, 2003, petitioner filed its petition, verification, exhibits, etc., with the Department of Education. N.J.S.A. 18A:6-9. The Department transmitted the contested case to the Office of Administrative Law (OAL), where it was filed on March 17, 2003. N.J.S.A. 52:14B-2(b). On March 24, 2003, the Superintendent's papers in opposition to the motion were filed in the OAL. On March 25, 2003, the motion was argued in the OAL, Trenton.

FINDINGS OF FACT

The record to date is summarized below.

Prior to the 2002-03 school year, the BOE advertised for bids for contracts to provide transportation services for most of its routes. Pursuant to the "bulk bids" method, the low bidder was awarded all of the bids, subject to the bid specifications. During this period, J & M Keelen Transportation Corp. (Keelen) was often the successful low bulk bidder and the BOE and Keelen entered into contracts for most of the transportation routes. P-H.

The BOE alleges that during the 2001-02 school year there were substantial problems involving Keelen's service, e.g., on two occasions, a child was left on a bus and later found wandering in an apartment complex, resulting in litigation against the BOE; on another occasion a child was left on a bus in Keelen's bus yard; on other occasions, buses arrived late at their prescribed locations. Consequently, for the 2002-03 school year, the BOE advertised for bids for transportation services by individual bus routes. P-H.

Petitioner and Keelen were competitors in the 2002-03 school year bidding process and among the transportation services for which the BOE advertised for bids were those for transportation of pre-K children relative to the Joseph M. Ferraina Early Childhood Learning Center (Ferraina Center).

On or about April 8, 2002, the BOE opened the bids for transportation services for the 2002-03 school year. Keelen alleged that petitioner's bid bond relative to the Ferraina Center transportation services was less than the amount required. The BOE did not disqualify petitioner and, instead, it advertised for another set of bids. Since then, Keelen and petitioner have had further conflict, as detailed below. P-1; P-D; P-G; P-H.

On April 29, 2002, the BOE opened the second set of bids. James Keelen, president of Keelen, alleges that he notified Peter Genovese, the BOE's business administrator and Archie Greenwood, the BOE's assistant superintendent of schools, that he objected to the award of the Ferraina Center transportation services contract to petitioner because petitioner had failed to include a certification that its employees would undergo drug and alcohol screening. The BOE responded that, because petitioner had less than 100 employees, it was exempt from that requirement. Keelen also alleged that petitioner had submitted a certificate showing only $1,000,000 in insurance coverage, instead of the required $3,000,000. The BOE later notified Keelen that petitioner did have the $3,000,000 coverage. In letters to the BOE, Keelen's attorney objected to the award to petitioner, alleging that, in violation of laws governing drivers and aides, the petitioner's employees included "convicted felons." P-H. The BOE notified Keelen that it would award the contract to petitioner and (later, by letter dated September 12, 2002) the BOE advised Keelen's attorney that, if he believed that petitioner had violated the law, he should report his belief to the county prosecutor. P-G; P-H.

Since the start of the 2002-03 school year, petitioner has provided the Ferraina Center transportation services. Petitioner's buses stop at the children's houses (instead of at street corners) and petitioner's drivers and aides have become familiar with the children's appearances and names, where they live and the schools to which they are to be transported. Morris Swed, petitioner's manager, alleges that petitioner, having allocated its resources to provide the services for the Ferraina Center routes, refrained from submitting bids in response to advertisements for

bids for transportation services for other routes and that the petitioner hired employees and maintained equipment for the Ferraina Center routes. P-1; P-D; P-G; P-M.

On or about November 20, 2002, Keelen filed a Superior Court complaint naming as defendants the petitioner, Avi Nagar, petitioner's president, and the BOE. In Count I, Keelen alleged that, beginning in or about the spring of 2002, petitioner illegally offered cash without deductions for withholding taxes, etc., to solicit Keelen's employees, including long-term drivers, constituting tortious interference with its business and damaging it irreparably, for which it demanded an injunction. In Count II, Keelen alleged that the BOE has given "special benefits" to petitioner relative to its competition for contracts with the BOE (P-A):

(a) Keelen alleged that the BOE has allowed the petitioner to operate buses without aides, despite bid requirements for same.

(b) Keelen alleged that the BOE has allowed petitioner to provide services with defective equipment.

(c) Keelen alleged that the BOE has allowed petitioner to ignore bid requirements relative to sizes of buses.

(d) Keelen alleged that the BOE has required bus companies other than petitioner to maintain off-street locations in the City of Long Branch, which has an ordinance prohibiting parking school buses on the street overnight, but allowed petitioner, which has no such off-street locations, to park its buses overnight with no consequences.

(e) Keelen alleged that, in September and October 2002, the BOE awarded petitioner busing contracts despite its improper completion of bid documents and despite Keelen's protest.

(f) Keelen alleged that, consistent with bid documents, the BOE required other bidders to set up their own runs, but that it excused petitioner from the requirement and that it set up runs for petitioner.

(g) Keelen alleged that, in October 2002, the BOE improperly requested quotes on an emergency basis for transportation services without formal bid compliance (and thereafter awarded a contract to petitioner although Keelen had provided the lowest quote).

(h) Keelen alleged that the BOE has required school bus service providers, including petitioner, to maintain $3,000,000 in insurance coverage, and despite its request for a copy of petitioner's certificate of insurance, the BOE has refused to provide it.

(i) Keelen alleged that, during or about October 2002, without obtaining the required quotes from competitor bus companies, the BOE granted direct contracts on an emergency basis to petitioner.

On November 20, 2002, in the Superior Court litigation, Judge Fisher issued an Order to Show Cause requiring the petitioner to show why the above-described contract should not be declared null and void. P-B.

Until December 2002, the BOE did not provide contracts to successful transportation services bidders. Consistent with law, the contracts (including that sent to petitioner) included as a standard paragraph, "It is understood and agreed by the parties hereto that this agreement shall be without force or effect until it shall have been approved as to form by the County Superintendent of Schools." RS-2. Mr. Keelen alleges that, because the contracts were incomplete with numerous blank spaces, he returned those sent to him to the BOE unsigned and he requested that the Monmouth County Superintendent of Schools review all the contracts to confirm that they comply with relevant school laws. P-G; see, e.g., RS-2; see also N.J.S.A. 18A:39-2.

In December 2002, the BOE submitted the contract for the Ferraina Center transportation services for the 2002-03 school year to the Superintendent, Michael Maddaluna. RS-1. The Superintendent determined that the BOE's bid documents, including the bid specifications, failed to comply with the school laws (RS-1):

(a) Consistent with N.J.A.C. 6A:27-9.3(d)(2), bid specifications shall provide for any adjustment to the contract price due to a change in routes and, consistent with N.J.A.C. 6A:27-9.3(e)(1)(i), the bid sheet shall include a separate cost for adjusting the contract. However, the BOE's bid sheet stipulated that no charge for changes to the contract would be made and did not provide for adjustment of price based on changes to the contract contained on the bid sheet.

(b) Consistent with N.J.A.C. 6A:27-1.1, relative to insurance, bid specifications should include "combined single limit per occurrence," but the BOE's bid specifications did not include that phrase.

(c) N.J.A.C. 6A:27-9.5(b) provides that the amount of the bidder's guarantee shall be a minimum of 5 percent of the bid, not to exceed $50,000, but the BOE requested a bid guarantee of 10 percent of the contract amount, not to exceed $100,000.

(d) Contrary to N.J.A.C. 6A:27-9.3, the BOE's specifications appear to request bids on a per vehicle basis, its bid sheet did not contain route numbers or a provision for individual route costs, and its bid sheet did not describe routes by specification or language which would require the successful bidder to provide transportation along the safest, most direct route to the destination.

Consequently, by letter dated December 17, 2002, the Superintendent directed the BOE to repeat the bidding process (relating to the Ferraina Center transportation services). P-H.

On December 23, 2002, in the superior court litigation, Judge Fisher entered a Consent Order, ordering the following: 1. Keelen's (amended) complaint's Count V (relating to the BOE's September 2002 request for quotes on an emergency basis for a preschool bus route to begin October 7, 2002) was dismissed; 2. the BOE awarded to Keelen a contract for "JFB2," a new route established after the start of the 2002-03 school year for Ferraina Center transportation services (not the route in issue here); 3. the Order to Show Cause was dismissed as resolved; 4. the agreements set forth in paragraphs 1, 2 and 3, being in aid of settlement, were not to be

admitted in any forum for any purpose; and 5. the dismissal did not dispose of the balance of Keelen's complaint. P-A; P-C.

On or about January 2 or 3, 2003, the BOE notified the petitioner that, as a result of Keelen's objection and complaints to the form of contracts Keelen had been awarded, it would repeat the bidding process for a contract for the above-described transportation services for the Ferraina Center, and, on January 7, 2003, the BOE's advertisement appeared for bids to be submitted and opened on January 21, 2003. P-1; P-D.

In January 2003 the petitioner learned of the Superintendent's directive that the bidding process relating to the Ferraina Center transportation services should be repeated and, in the superior court litigation, petitioner filed a counterclaim and third-party complaint against Keelen. Petitioner alleged that Keelen's "prodding and complaints" had caused the Superintendent to direct that the process be repeated, Keelen had tortiously interfered with its business interests, its equipment had been vandalized, and Keelen had harassed its principals and officers. P-J. Mr. Swed alleges that the same allegedly "deficient" bidding preceded contracts that were awarded to Keelen and/or others for other transportation services, but the BOE had not been directed to repeat the rebidding for those contracts. Mr. Swed certified that, given petitioner's planning its operations, hiring employees, etc., based on the Ferraina Center transportation services contracts, the loss of contracts would probably cause the layoffs of its employees and would be devastating to its financial condition and petitioner requested an order to show cause, temporarily restraining the BOE from accepting bids for the Ferraina Center transportation services, or orders requiring rebidding for all of the BOE's 2002-03 transportation services contracts. P-1; P-D; P-J.

On January 17, 2003, Judge Fisher issued an order that enjoined the BOE from accepting or approving any bid for Ferraina Center transportation services; allowed the BOE to extend time for receiving bids to February 14, 2003; and enjoined the BOE from canceling or otherwise terminating the contract with petitioner for such services. P-E.

The BOE submitted bid specifications dated January 31, 2003, for the Ferraina Center transportation services and for the elementary school routes for the 2002-03 school year and, by

letter dated February 3, 2003, the Superintendent notified the BOE that he had found all documentation in order and that the specifications meet lawful requirements. P-N.

On February 6, 2003, Judge Fisher heard argument relative to the petitioner's third-party complaint, request for injunctive relief, etc. Hearing of the involvement of the Superintendent of Schools, Judge Fisher deferred a decision on the petitioner's requests for relief to allow the Superintendent to be brought into the case. Petitioner named the Superintendent as an additional third-party defendant, alleging that the Superintendent's directive resulted from selective enforcement and claiming that he wrongfully failed to afford petitioner due process in the directing of rebidding. Petitioner demanded an injunction, requiring the Superintendent to approve the Ferraina Center transportation services contract, damages, etc. P-J.

Contrary to the Superintendent's above-described February 3, 2003, letter, in his February 27, 2003, certification filed in the superior court, he wrote that, in several respects, the Ferraina Center transportation bid specifications (for bids to be opened March 7, 2003) failed to comply with regulations governing the bidding process. P-K.

In Mr. Greenwood's March 5, 2003, certification filed in the superior court, he certified that the BOE is reviewing and reformulating the specifications to comply with school laws; if such rebidding goes forward, the date for opening bids must be extended (from March 7, 2003); and, if the BOE holds a special meeting for this purpose, it would not award contracts until April 2003 and the services pursuant to the contracts would not begin until approximately April 15, 2003, i.e., only two months before the end of the period of the subject contracts for the 2002-03 school year. The BOE has, by way of its February 24, 2003, resolution, expressed its concern about the effect of a new provider's employees not familiar with pre-K children, their stops and schedules substituting for the petitioner, whose employees are familiar with the children, etc., and stated further that it opposes rebidding so late in the school year. P-N.

Judge Fisher has referred to the Commissioner of Education issues raised in petitioner's third-party complaint against the Superintendent, i.e., whether the Ferraina Center transportation services bids complied with school laws and whether, as the Superintendent directed, there must be rebidding, whether the rebidding should be enjoined, etc. See N.J.S.A. 18A:6-9; N.J.S.A.

18A:39-1, -2; N.J.A.C. 6A:27-9.1. Consequently, the Superintendent has demanded dismissal of the superior court third-party complaint as against him and the petitioner does not oppose this, so long as it is without prejudice.

The BOE is now in the process of preparing specifications, etc., relative to bids for contracts for transportation services for the 2003-04 school year.

Relative to Keelen's allegation that the Ferraina Center transportation services bids and contracts did not, as required, provide for expansion and/or reduction of routes as circumstances may require, Mr. Swed represents that petitioner would agree to a contract amended to include such a provision. P-1; P-D.

CONCLUSIONS OF LAW

Public contracts laws are intended to encourage competition, guard against favoritism, improvidence, extravagance or corruption and obtain the best economic result for taxpayers. See Pucillo v. Mayor of New Milford, 73 N.J. 349, 356 (1977); Terminal Constr. Corp. v. Atlantic County Sewerage Auth., 67 N.J. 403, 409-10 (1975); In re On-Line Games Contract, 279 N.J. Super. 566, 589 (App. Div. 1995); A & S Transp. Co. v. Bergen County Sewer Auth., 133 N.J. Super. 266, 276 (Law Div.), aff'd, 135 N.J. Super. 117 (App. Div. 1975); Pied Piper Ice Cream v. Essex County Park Comm'n, 132 N.J. Super. 480 (App. Div. 1975); In re DBC Project No. A0716-00, 303 N.J. Super. 384 (App. Div. 1997).

Consistent with N.J.S.A. 18A:1-1, N.J.S.A. 18A:4-15, N.J.S.A. 18A:39-1, -21, and N.J.S.A. 18A:70-18, the Department of Education has promulgated regulations governing student transportation, including contracting for transportation services and regulations, duly promulgated within an agency's power, have the force and effect of law. N.J. Const. art. V, § 4, ¶ 6; State v. Atlantic City Elec. Co., 23 N.J. 259, 270 (1957); see N.J.A.C. 6A:27-1.1 to -13.5.

The regulations provide that bid specifications are drawn for purposes of competitive bidding and that any contract that fails to meet the regulations "shall be set aside." N.J.A.C.

6A:27-9.1(b), emphasis added. And boards of educations' contracts for transportation services are subject to approval by the county superintendent of schools. N.J.S.A. 18A:39-2.

To succeed in a motion for a temporary restraint and interlocutory injunction, the movant must show, among other things, that, when the case is fully heard, it will probably prevail in its claim and that, if the relief is not granted, it will suffer immediate and irreparable harm, i.e., that money damages would not be adequate compensation. See, e.g., N.J.A.C. 1:1-12.6; R. 4:52-1; Crowe v. DeGoia, 90 N.J. 126, 132-34 (1982).

The Superintendent has cited specific regulations that he has determined that the BOE's bidding process has failed to comply with. In the record to date, I do not see that the petitioner has proven that the bidding process has satisfied the regulations, so that the Superintendent's determination can be found to be incorrect and his direction to the BOE restrained. The petitioner alleges that all of the BOE's other transportation contracts also fail the regulations, but this does not exempt its "contract" from the requirement that it "shall be set aside." N.J.A.C. 6A:27-9.1(b).

Relative to the petitioner's allegation that it has been subject to selective enforcement, it has alleged no invidious discrimination as a basis for same. The general rule is that a public entity is not precluded or estopped from enforcing a law merely because certain persons have been permitted to violate it without prosecution, and a defendant who alleges invidious selective enforcement in support of an estoppel defense bears the burden of proof of such allegation. Abrahams v. Civil Serv. Comm'n, 65 N.J. 61, 75 (1974); see also Byron-Marasek v. Department of Envtl. Protection, EFG 4386-99, Initial Decision (April 26, 2000), adopted, Comm'r (June 8, 2000) <http://lawlibrary.rutgers.edu/oal/search.html>, aff'd, No. A-6065-99T3 (App. Div. June 28, 2001) (where the applicant for a permit to keep tigers contended that the Division of Fish & Wildlife applied regulatory standards more strictly to her than to other applicants and where, since there was no evidence of invidious or arbitrary discrimination, the administrative law judge, citing State v. Boncelet, 107 N.J. Super. 444, 453 (App. Div. 1969), rejected the contention, writing that the fact that a law was not fully enforced against others does not give a defendant a right to violate it. The Commissioner, citing Oyler v. Boles, 368 U.S. 448, 456, 82 S. Ct. 501, 7 L. Ed. 2d 446 (1962), affirmed, noting that the applicant had proven no

impermissible classification based on race, religion, sex, etc.) I also do not see a basis for application of N.J.A.C. 6A:3-1.3(d) (requiring that a petition to initiate a contested case for the Commissioner's determination be filed no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by a district board of education, individual party or agency which is the subject of the requested contested case hearing) to bar or restrain a superintendent from enforcing school laws.

Relative to the petitioner's allegation that it will suffer immediate and irreparable financial harm, I do not see that it has provided sufficient detail and, in any event, financial losses are normally not acceptable as irreparable, given the claim for damages that can be brought in such circumstances. (The petitioner has claimed damages in its petition, but has cited no authority for such an award in this administrative case and I know of no such authority. This case is limited to a determination of whether there was compliance or noncompliance with school laws and orders that may be entered to require compliance with those laws.)

Given these circumstances, I do not see that the petitioner has met its burden relative to the allegation that when the case is fully heard it will probably prevail, and I do not see that it has met its burden relative to the allegation that if the restraint is not ordered, it will suffer immediate and irreparable harm.

ORDER

Consistent with the above, I **DENY** the motion for emergent relief.

The parties may serve discovery requests, and a telephone conference to discuss the progress of the case and a hearing date will be set.

This order on application for emergency relief may be adopted, modified or rejected by **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

November 26, 2003
DATE

JOHN R. TASSINI, ALJ

EXHIBITS

For Petitioner:

P-1 Petition & Verification of Morris Swed

P-A J & M Keelen Trans. Corp. v. Seman-Tov et al., No. Mon. C 361-02 (Ch. Div.), Amended Verified Complaint, filed November 20, 2002

P-B J & M Keelen Trans. Corp. v. Seman-Tov et al., Order to Show Cause, November 20, 2002

P-C J & M Keelen Trans. Corp. v. Seman-Tov et al., Consent Order, December 23, 2002

P-D J & M Keelen Trans. Corp. v. Seman-Tov et al. and Seman-Tov et al. v. James Keelen, No. Mon C 361-02 (Ch. Div.), Certification of Swed

P-E J & M Keelen Trans. Corp. v. Seman-Tov et al. and Seman-Tov et al. v. James Keelen, Order to Show Cause with Temporary Restraints, January 17, 2003

P-F J & M Keelen Trans. Corp. v. Seman-Tov et al. and Seman-Tov et al. v. James Keelen, Seman-Tov's letter brief, January 14, 2003

P-G J & M Keelen Trans. Corp. v. Seman-Tov et al. and Seman-Tov et al. v. James Keelen, Certification of Keelen

P-H J & M Keelen Trans. Corp. v. Seman-Tov et al. and Seman-Tov et al. v. James Keelen, BOE's Certification of Greenwood with exhibits

P-I J & M Keelen Trans. Corp. v. Seman-Tov et al. and Seman-Tov et al. v. James Keelen, Letter order of Hon. Clarkson S. Fisher, Jr., J.S.C., February 6, 2003

P-J J & M Keelen Trans. Corp. v. Seman-Tov et al. and Seman-Tov et al. v. James Keelen, Defendants' (Seman-Tov's & Nagar's) Amended Answer, Affirmative Defenses and Counterclaim/Third-Party Complaint, February 12, 2003

P-K J & M Keelen Trans. Corp. v. Seman-Tov et al. and Seman-Tov et al. v. James Keelen, DAG's Transmittal letter, February 28, 2003; Letter brief in response to order to show cause, February 28, 2003; Certification of Maddaluna, February 27, 2003; etc.

P-L J & M Keelen Trans. Corp. v. Seman-Tov et al. and Seman-Tov et al. v. James Keelen, Seman-Tov's letter brief, March 5, 2003

P-M J & M Keelen Trans. Corp. v. Seman-Tov et al. and Seman-Tov et al. v. James Keelen, Supplemental Certification by Greenwood, February 24, 2003

P-N J & M Keelen Trans. Corp. v. Seman-Tov et al. and Seman-Tov et al. v. James Keelen, Certification of Greenwood, March 5, 2003 with exhibit

P-O J & M Keelen Trans. Corp. v. Seman-Tov and Seman-Tov et al. v. James Keelen, Order (unexecuted, undated)

For Respondent Monmouth County Superintendent of Schools:

RS-1 Certification of Maddaluna, February 27, 2003 (same as in "P-K" above)

RS-2 State of New Jersey Department of Education, Bureau of Pupil Transportation, Pupil Transportation Contract, BOE and Seman-Tov, September 1, 2002, to June 30, 2003, unexecuted; State of New Jersey Department of Education, Office of Pupil Transportation, Personal Surety Bond for Pupil Transportation Contracts, dated December 13, 2002

For Respondent Board of Education:

None

OAL DKT. NO. EDU. 844-03
AGENCY DKT. NO. 84-3/03

SEMAN-TOV, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
MONMOUTH COUNTY SUPERINTENDENT OF SCHOOLS AND BOARD OF EDUCATION OF THE CITY OF LONG BRANCH, MONMOUTH COUNTY,	:	DECISION ON MOTION
RESPONDENTS.	:	

The Order of the Administrative Law Judge (ALJ) in this emergent matter has been reviewed. Upon such review, the Commissioner adopts the Order denying emergent relief, as he concurs with the ALJ's determination that petitioner has not satisfied the requirements necessary for the granting of such extraordinary relief pursuant to *Crowe v. DeGioia*, 90 *N.J.* 126 (1982).

Accordingly, the within application for emergent relief is hereby denied. As contemplated by the ALJ, this matter shall proceed to hearing on its merits.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 4|03|03

Date of Mailing: 4|03|03

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

160-03

I.P., on behalf of minor child, N.B.Z.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

April 7, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 1597-02
AGENCY DKT. NO. 443-10/01

I.P. ON BEHALF OF N.B.Z.,

Petitioner,

v.

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

Respondent.

I.P., petitioner *pro se*

Anthony D'Elia, Esq., for respondent

Record Closed: February 19, 2003 Decided: February 19, 2003

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter involves an appeal by petitioner I.P. on behalf of N.B.Z. from a residency determination by respondent Board of Education of the City of Clifton (the "Board"). On January 16, 2002, the Board filed an Answer to Petition (with Counterclaim). The Department of Education, Bureau of Controversies and Disputes, subsequently transmitted the matter to the Office of Administrative Law (OAL) where, on February 5, 2002, it was filed for a hearing and determination as a contested case. Following petitioner's failure to appear at the hearings scheduled for April 23, May 31, and August 21, 2002, and the Board's submission of an affidavit in support of its counterclaim, petitioner contacted the undersigned's office. A telephone conference with petitioner and the Board's attorney was held on November 8, 2002, during which the matter was

rescheduled to be heard on February 10, 2003. Petitioner and counsel for the Board appeared at the OAL on February 10, 2003 and engaged in discussions toward an amicable resolution of the matter. The undersigned was advised that a settlement had been reached and the parties submitted an agreement indicating the terms of the settlement, subject to approval by the Board. Counsel for the Board subsequently forwarded a resolution adopted by the Board approving the settlement terms, which the undersigned received on February 19, 2003. The aforesaid agreement and resolution are attached hereto and incorporated herein by reference.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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

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

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

February 19, 2003
DATE

Margaret M. Monaco
MARGARET M. MONACO, ALJ

Receipt Acknowledged:

2/21/03
DATE

Kathleen Duncan /ps
DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

FEB 24 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

pb

I.P. o/b/o NB & V. CBoE
OAL DKT# GDU 1597-02

Both parties appearing and Petitioner waiving representation, the parties agree as follows:

Idalia Pina SS# 155-86-4815

1. Petitioner recognizes she has a right to a hearing in this matter and hereby waives that and agrees to settle as follows:

(a) Petitioner shall pay the Clifton Board of Ed $30/month for 60 months, payable to the Clifton Board of Education c/o Karen Perkins, B.A., Clifton Bd., 745 Clifton Ave, Clifton N.J. 07011;

(b) Payments are due on 1st of each month beginning March 1, 2003;

(c) Should Petitioner Breach this Agreement, Board of Education may obtain a Judgment, ex parte, with notice to Petitioner via ordinary mail at her address Currently: 553 Summer Ave. Newark

N.J. 07104) in the amount of $4,600.00* (less credits for payments received) plus reasonable attorney's fees and costs of suit incurred in obtaining and executing upon this judgment; and J.P. and

(d) This Agreement is contingent upon the Board of Education approving this agreement at the meeting of February 12, 2003.

All other claims/counterclaims shall be dismissed

Idalia Pino
IDALIA PINO
2/10/03

2/10/03

*Plus interest allowed by law retroactive to date of settlement and J.P.

JANE MORE

I JANE MORE ACCURATELY TRANSLATED TO MRS IDALIA PINO EVERYTHING ~~TO~~ THAT OCCURRED TODAY AND SHE FULLY UNDERSTANDS.

BOARD OF EDUCATION

CLIFTON, NEW JERSEY

SECTION
RESOLUTION

WHEREAS the Board of Education has determined that it is in the best interests of the Board to settle the pending appeal captioned I.P. on behalf of N.B. Z.vs. C.B.O.E.

NOW THEREFORE BE IT RESOLVED that this Board of Education agree to the terms of the settlement as follows:

1. Petitioner shall pay the Board $ 30.00 per month, payable on the 1st day of each month beginning March 1, 2003 for 60 months.

2. Should Petitioner breach this agreement, the Board may obtain a Judgment, ex parte, with notice to Petitioner via ordinary mail in the amount of $4,600.00 (less credits for payments received) plus reasonable attorney's fees and costs of suit incurred in obtaining and executing upon the Judgment along with interest allowable under law retroactive to the date of settlement.

3. All claims/counterclaims shall be dismissed.

Introduced by John M. Traier

Seconded by James E. Daclock

3C

BOARD OF EDUCATION
CLIFTON, NEW JERSEY 07013 03 MAR 24 PM 1:54
RESOLUTION #2/12/03 - D

APPROVAL TO SETTLE PENDING APPEAL
"IP ON BEHALF OF NBZ VS. THE CLIFTON BOARD OF EDUCATION"

WHEREAS, the Clifton Board of Education has determined that it is in their best interest to settle the pending appeal "IP on Behalf of NBZ vs. the Clifton Board of Education";

NOW, THEREFORE, BE IT RESOLVED, that the Board of Education agrees to the terms of settlement as follows:

Petitioner will pay the Board thirty dollars ($30.00) per month, payable on the first day of each month beginning March 1, 2003 for sixty (60) months. Should petitioner breach this agreement, the Board may obtain a civil judgement in the Superior Court of New Jersey ex-parte with notice to petitioner via ordinary mail in the amount of four thousand six hundred dollars ($4,600.00), less credit for payments received, plus reasonable attorney's fees and cost of suit incurred in obtaining and executing upon the judgement along with interest allowable under law retroactive to the date of settlement. All other claims and counterclaims shall be dismissed.

Introduced by Joan M. Traier

Second by James A. Leeshock

DATE: February 12, 2003

VOTE: YES: Bernstein,Demikoff,Hakim,Kolakowsky,Kolodziej,Leeshock,Smith & Traier
ABSENT: Kurnath

ATTEST:

Karen L Perkins
Secretary/Business Administrator

PRESIDENT Marie L. Hakim

Certified to be true copy.

Karen L Perkins

Secretary, Clifton Board of Education

3d

OAL DKT. NO. EDU 1597-02
AGENCY DKT. NO. 443-10/01

I.P., on behalf of minor child, N.B.Z.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner approves the settlement terms and adopts the Settlement Agreement as the final decision in this matter. In so holding, however, the Commissioner observes that the settlement included with the Initial Decision sets forth terms that were to be effectuated prior to approval of the settlement terms by the Commissioner pursuant to *N.J.A.C.* 1:1-19.1. The ALJ and the parties are cautioned against effectuating terms of a settlement agreement presented to the Commissioner for his review prior to receiving approval from the Commissioner.

The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 4|07|03

Date of Mailing: 4|07|03

160-03

161-03

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

April 7, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 01530-98

AGENCY DKT. NO. 3-1/98

JOANNE ALESSIO,

Petitioner,

v.

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

Respondent.

Alan S. Porwich, Esq., for petitioner (Feintuch, Porwich & Feintuch

Charlotte Kitler, General Counsel, for respondent

Record Closed: February 10, 2003 Decided: February 20, 2003

BEFORE **THOMAS E. CLANCY**, ALAJ:

This matter was transmitted to the Office of Administrative Law (OAL) on February 4, 1998, for resolution as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F1 to -13.

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

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

Accordingly, I **CONCLUDE** that the attached Consent Order meets the requirements of *N.J.A.C.* 1:1-19.1(d) and I hereby **APPROVE** same. In conjunction therewith, I **ORDER** that the parties comply with its contents and that these proceedings be (and are hereby) **TERMINATED**.

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

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

2/20/03
DATE

Thomas E. Clancy
THOMAS E. CLANCY, ALJ

Receipt Acknowledged:

February 25, 2003
DATE

M. Kathleen Duncan (tr)
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 27 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

da

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

JOANNE ALESIO, Petitioner, v. STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY, COUNTY OF HUDSON, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY Agency Dkt. No. 3-1/98 OAL Dkt. No. EDU 1530-98 CONSENT ORDER FOR ADDED SICK DAYS

WHEREAS, a petition was timely filed before the Commissioner of Education, seeking benefits pursuant to N.J.S.A. 18A:30-2.1 for petitioner's absences from work from November 20, 1997 which were alleged to be due to injuries from an accident at work on that day; and

WHEREAS, the petitioner also filed a petition with the New Jersey Division of Workers' Compensation(C.P. No. 97-044111) for benefits pursuant to the Workers' Compensation Law, N.J.S.A. 34:15-7 et seq. for the accident at work on November 20, 1997; and

WHEREAS, the petition filed with the Commissioner of Education was placed on inactive status, in accordance with the direction of the State Board of Education in *Tompkins v. Hamilton Bd. of Educ.*, 11 N.J.A.R. 520, 534 (State Bd. 1987), until the Judge

of Compensation rendered a decision on whether the petitioner was temporarily disabled from the accident at work on November 20, 1997, and the duration of any such period of temporary disability; and

WHEREAS, the Judge of Compensation has ruled that the petitioner was entitled to temporary disability for the period from November 24, 1997 through December 19, 1997;

NOW, THEREFORE, consistent with the ruling of the Judge of Compensation,

IT IS, on this 14th day of February 2003,

ORDERED that respondent Jersey City School District shall add seventeen (17) sick days to the petitioner's sick bank for the 17 days of absence during the period from November 24, 1997 through December 19, 1997 which the Judge of Compensation found were due to temporary disability from injury from an accident at work on November 20, 1997.

Thomas E. Clancy
Administrative Law Judge

WE HEREBY CONSENT TO THE FORM AND ENTRY OF THE ABOVE ORDER

FEINTUCH, PORWICH & FEINTUCH
Attorneys for Petitioner
By: ALAN S. PORWICH

DATED: 2/3/03

CHARLOTTE KITLER, Esq.
Attorney for Respondent

DATED: 2/10/03

OAL DKT. NO. EDU 01530-98
AGENCY DKT. NO. 3-1/98

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

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 4|07|03

Date of Mailing: 4|07|03

#164-03E

NEW JERSEY LUCKY TOURS *ET AL.*,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
ESSEX COUNTY EDUCATIONAL SERVICES COMMISSION, ESSEX COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

April 9, 2003

JOHN H. WATSON, JR.
ATTORNEY AT LAW
63 WASHINGTON STREET
EAST ORANGE, NEW JERSEY 07017
(973) 674-8717
ATTORNEY FOR RESPONDENT
ESSEX COUNTY EDUCATIONAL SERVICES COMMISSION

NEW JERSEY LUCK TOURS; ET. AL.	BEFORE THE COMMISSIONER
	STATE OF NEW JERSEY
PETITIONERS	DEPARTMENT OF EDUCATION
vs.	AGENCY Docket No:96-3/03
	OAL DOCKET NO: EDU3247-03
ESSEX COUNTY EDUCATIONAL SERVICES COMMISSION	
	ORDER DENYING STAY
RESPONDENT	

The matter being opened to the Court by Dennis Cummins, Jr., Esq., attorney of the petitioners, Lucky Tours et. al. in the presence of John H. Watson, Jr., attorney of the Respondents, Essex County Educational Services Commission, on March 31, 2003 before the Honorable Elinor R. Reiner, Judge Administrative Law, and the Court having considered the petition for emergent relief and the certifications attached thereto and the answer to the petition for emergent relief and certifications filed on behalf of the defendant, and having heard the arguments of the respective counsel, and consider the applicable law, and it appearing that the

petitioners failed to prove that they would suffer irreparable harm, and that the petitioner failed to prove that they would be successful on the merits, and that the petitioners failed to prove a violation of the Open Public Meeting Act and that money damages was the appropriate remedy, if any, and for good cause shown; And for the reasons expressed on the record, and there being no objection to the form of this order

It is on this 2ND day of April 2003, Ordered that the petitioner's application for emergent relief and the temporary restraints therein is hereby denied as of March 31, 2003.

Elinor R. Reiner

ELINOR R. REINER, ALJ

Dated:

OAL DKT. NO. EDU 3247-03
AGENCY DKT. NO. 96-3/03

NEW JERSEY LUCKY TOURS *ET AL.*,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
ESSEX COUNTY EDUCATIONAL SERVICES COMMISSION, ESSEX COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

The record of this emergent matter, along with the audiotape of the hearing conducted at the Office of Administrative Law (OAL), and the Order denying emergent relief signed by Administrative Law Judge (ALJ) Elinor R. Reiner have been reviewed.

Upon such review, the Commissioner affirms the recommended Order as he concurs with the ALJ's hearing determination that petitioners have not satisfied the requirements necessary for the granting of such extraordinary relief as set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982).

On April 7, 2003, petitioners submitted what they purport to be "a fresh application for restraints on a different subject area [from] that [which] is now presently before the Commissioner's office." Such application is based on a performance bond, retroactive to September 2002, covering all of the routes of the petitioners, having just been issued. The Commissioner determines that the petitioners' *new* application does nothing to alter the result in this matter as it remains true, as found by the ALJ, that, at the important times in this matter, petitioners did not have a performance bond as required by respondent.

Accordingly, the within applications for emergent relief are denied and the temporary restraints granted by me by letter order dated March 20, 2003 are hereby lifted. This matter is being returned to the OAL for such further proceedings as may be necessary to bring it to conclusion.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 4/09/03

Date of Mailing: 4/09/03

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

166-03

RICHARD E. VINCENTI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

April 11, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 5137-02

AGENCY DKT. NO.: 2002-200

RICHARD E. VINCENTI,

Petitioner,

v.

STATE OPERATED SCHOOL DISTRICT OF PATERSON,

Respondent.

Sanford R. Oxfeld, Esq., for petitioner

Jack Gillman, Esq., for respondent
(Hanly & Ryglicki, attorneys)

Record Closed: February 21, 2003 Decided: February 21, 2003

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

On May 24, 2002, this matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F1 to -13. The matter was scheduled for hearing on February 4, 2003 but was adjourned because the parties agreed to settle the matter. On January 21, 2003, the parties submitted a letter indicating the terms of settlement. A copy is attached hereto.

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

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

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

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

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

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

2/23/03
DATE

JEFFREY A. GERSON, ALJ

Receipt Acknowledged:

February 25 2003
DATE

M. Kathleen Gemeau (tw)
DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

FEB 27 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

sej

IT IS HEREBY AGREED by and between Richard E. Vincenti, the

FEB 21 P 13 AM '03

Petitioner, and the Paterson State-Operated School District, in full settlement of EDUOR 05137-02N as follows:

1. The District shall reinstate eleven (11) sick days to Vincenti's accumulated sick days, i.e. his sick bank, representing eleven days between and including February 14 through and including March 5, 2002.

2. Upon approval of this settlement by the Administrative Law Judge and the Commissioner of Education, this Petition of Appeal shall be deemed dismissed with prejudice.

3. This settlement shall not impact Vincenti's claim for additional sick days to which he claims entitlement pursuant to the school laws in a matter to be determined by the Workers' Compensation Courts.

4. The terms of the settlement in Agency Docket No.: 257-8/99 shall remain in full force and effect.

Dated: February 4, 2003

/S/ Lynden Smith
Lynden Smith

/S/ Richard E. Vincenti
Richard E. Vincenti

3. This settlement shall not impact Vincent's claim for additional sick days to which he ~~is~~ entitlement claimed pursuant to the school laws in a matter to be determined by the Workers' Compensation Courts.

4. The terms of the settlement in Agency Dkt. No. 257-8/99 shall remain in full force and effect.

Lyndon Smith

Dated: Feb. 4, 2003

Lyndon Smith

Richard Vincent

LAW OFFICES
OXFELD COHEN, P.C.
50 COMMERCE STREET
NEWARK, NEW JERSEY 07102-4003

SANFORD R. OXFELD *
ARNOLD SHEP COHEN *
NANCY I. OXFELD *
DENZIL R. DUNKLEY **
GAIL OXFELD KANEF *

* MEMBER OF NJ & NY BARS
** MEMBER OF NJ, PA & FL BARS

(973) 642-0161
FAX (973) 802-1055
OXFELDCOHEN.COM

FEB 21 0 13 AM '03

February 14, 2003

Hon. Jeffrey A. Gerson, A.L.J.
Office of Administrative Law
33 Washington Street
Newark, NJ 07102

RE: Richard E. Vincenti vs. State-Operated School District of Paterson
OAL Docket No.: EDUOR 05137-02N
Our File No.: 2002-200

Dear Judge Gerson:

I enclose herein an executed settlement agreement in this matter. If it meets with your approval, will you kindly forward it to the Commissioner of Education.

Respectfully yours,
OXFELD COHEN, LLC
By:

Sanford R. Oxfeld

SRO:stw
Enclosure
cc: Jack Gillman, Esq.
Richard E. Vincenti
Bob Arzt, NJEA
(All w/encl.)

2c

OAL DKT. NO. EDU 5137-02
AGENCY DKT. NO. 85-3/02

RICHARD E. VINCENTI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the Stipulation of Settlement proposed by the parties, and Initial Decision of the Office of Administrative Law recommending approval of that settlement pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 4|11|03

Date of Mailing: 4|11|03

* The proposed agreement was approved by the State District Superintendent, as indicated by a conformed signature page subsequently submitted to the record at the request of the Director of Controversies and Disputes.

167-03

J.A. AND M.C., on behalf of minor child, M.A.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BELLEVILLE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning relatives challenged the Board's residency determination that M.A. did not reside in the District for a portion of the school year. The Board, recognizing the family's financial situation, sought tuition reimbursement for only 41 school days from November 2002 to February 2001.

The ALJ found that M.A., the daughter of J.A. and niece of M.C., was not a legal resident of the District during a portion of the time she was in attendance at Belleville High School. M.C. and M.A. admitted that M.A. did not reside in Belleville for a time but as of February 2002, M.A. became a legal resident of Belleville when custody was granted to her aunt, M.C. She remained a resident when legal custody was transferred to her grandmother. The ALJ ordered petitioners to pay the District $1,999.98, the tuition owed for only 41 school days of the nonresident attendance.

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

April 11, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 5138-02

Agency Dkt. No. 99-4/02

J.A. and M.C. o/b/o minor child, M.A.,

Petitioners,

v.

BOARD OF EDUCATION OF BELLEVILLE,

ESSEX COUNTY,

Respondent.

No appearances by or on behalf of Petitioners

Joseph A. DeFuria, Esq., for Respondent
(Gaccione, Pomaco & Beck, attorneys)

Record Closed: January 21, 2003 Decided: February 21, 2003

BEFORE **STEPHEN G. WEISS**, ALJ:

STATEMENT OF THE CASE

This school residence case was transmitted to the Office of Administrative Law (OAL) by the Department of Education on May 24, 2002 at the request of the petitioners who challenged the determination by the respondent, Belleville Board of Education, that the minor child, M.A., daughter of J.A. and niece of M.C., was not a legal resident of the school district during a portion of the time she was in attendance at Belleville High

School. Hearings scheduled to take place in November 2002 were adjourned and rescheduled for January 21, 2003. On that date counsel for the Board appeared, together with the Superintendent of Schools. No appearance was made by or on behalf of J.A. or M.C. and the undersigned waited until 11:00 a.m. before convening the hearing. Notices of the time and place of hearing were sent to both J.A. and M.C., together with letters both from the undersigned and from counsel for the Board reiterating the date, time and place of the hearing. Nonetheless, as noted, no appearances were made by either petitioner. Thus, their petition will be dismissed.

Testimony with respect to a counterclaim by the Board for tuition owed was offered by the Superintendent of Schools, Joseph Ciccone. He is familiar with the background circumstances as follows. At the end of the 2000-2001 school year, report cards were sent to the address given by M.A. in Belleville where she purportedly resided. However, her report card was returned to the school district as "undelivered." Thereafter, Board employees reached M.A.'s aunt, petitioner M.C., who admitted the student lived with her father (J.A.) in Newark, not in Belleville. When Ciccone then met with the student, a 16-year-old sophomore at Belleville High School, she confirmed she did not reside in Belleville. Thus, he determined she should be removed from the school district and directed to attend Barringer High School in Newark where she then lived. Soon thereafter, the instant petition was filed and M.A. continued to attend school in Belleville.

According to Ciccone, although the student was not a legal resident of Belleville at the beginning of the 2001-2002 school year in September 2001, he determined in light of the family's financial situation not to request tuition reimbursement for any period prior to the end of November 2001 when the district first learned M.R. was not living in Belleville. Thus, tuition reimbursement is sought for 41 days only, five (5) school days in November, fifteen (15) school days in December, and twenty-one (21) school days in January 2002. As of February 2002, the child became a legal resident of Belleville when custody was granted to M.C., her aunt (Exhibit R-2). Subsequently, at the end of July 2002, legal custody was transferred from M.C. to the child's paternal grandmother, Z.S. (Exhibit R-1). That change did not impact upon the residence issue.

Thus, the Board seeks tuition reimbursement for the forty-one (41) school days between the latter part of November 2000 and the beginning of February 2001, during which time the student was not a resident of Belleville. According to Ciccone, since the daily rate for nonresident attendance was $48.78 per day, the total tuition reimbursement sought is $48.78 x 41 days, or $1,999.98. Again, although the pupil was a nonresident while attending Belleville High School in September, October and most of November 2000 as well, the Board has chosen not to pursue tuition reimbursement for that additional time period.

It is undisputed that between the beginning of school in September 2000 and the beginning of February 2001, M.A. was not a legal resident of Belleville since it was not until early February 2001 that legal custody was given to M.C., the student's aunt. Prior to that time, she lived with her father, J.A., who resided in Newark. Since the Board has chosen to assess tuition for only 41 school days of the nonresident attendance, the total due and owing because of the nonresident attendance is, as indicated, $1,999.98. Thus, it is **ORDERED** that tuition reimbursement in that amount be paid to the school district in such manner and as a result of an order of whatever forum appropriately may require the same.

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

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

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

February 21, 2003
DATE

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

February 25 2003
DATE

M. Kathleen Duncan (for)
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 27 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cb

APPENDIX

WITNESSES:

For Respondent
Joseph Ciccone

Exhibits:

R-1 Superior Court of New Jersey, Chancery Division, Family Part Civil Action Order in Docket No. FD-07-4066-02, July 31, 2002

R-2 Superior Court of New Jersey, Chancery Division, Family Part Civil Action Order in Docket. No. FD-07-4066-02V, February 5, 2002

OAL DKT. NO. EDU 5138-02
AGENCY DKT. NO. 99-4/02

J.A. AND M.C., on behalf of minor child, M.A.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BELLEVILLE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon careful and independent review of the record in this matter, the Commissioner concurs with the Administrative Law Judge's (ALJ) finding that M.A. was not properly domiciled in the respondent's District until February 2002 and, therefore, was not entitled to a free public education in that District until that time.

Accordingly, the Initial Decision of the ALJ is adopted for the reasons expressed therein and the Commissioner directs that petitioners remit to the Board tuition in the amount of $1,999.98.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 4|11|03

Date of Mailing: 4|11|03

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

IN THE MATTER OF DENISE SCHMIDT, :

BERLIN BOROUGH BOARD OF : COMMISSIONER OF EDUCATION

EDUCATION, CAMDEN COUNTY. : DECISION

:

SYNOPSIS

The School Ethics Commission determined that respondent former Board member violated *N.J.S.A.* 18A:12-24(e) of the School Ethics Act for copying and distributing to certain school staff, using school equipment, a letter that contained false and demeaning information regarding fellow Board members. After considering the nature of the charge, the Commission recommended a penalty of reprimand.

Upon review of the record, the Commissioner, whose decision was restricted solely to a review of the Commission's recommended penalty, concurred with the Commission's recommendation and, thus, ordered respondent reprimanded as a school official found to have violated the School Ethics Act.

April 14, 2003

IN THE MATTER	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
OF	:	
	:	**Docket No.: C01-02**
DENISE SCHMIDT,	:	
BERLIN BOROUGH BD. OF EDUCATION	:	
CAMDEN COUNTY	:	**DECISION**
	:	

PROCEDURAL HISTORY

The above-captioned matter arises from a complaint against former Berlin Borough Board of Education (Board) member Denise Schmidt alleging that Ms. Schmidt violated N.J.S.A. 18A:12-24.1(e), (f) and (g) of the Code of Ethics for School Board Members in the School Ethics Act when she distributed a letter that contained false and demeaning information regarding fellow board members. Ms. Schmidt filed an answer denying that she distributed the letter or committed any violation of the School Ethics Act.

At the Commission's October 29, 2002 meeting, Ms. Schmidt appeared, along with Mark Houck and Donna Heaton for the complainants. All parties appeared pro se. In its public meeting of October 29, 2002, the School Ethics Commission found probable cause to credit the allegation that Ms. Schmidt violated N.J.S.A. 18A:12-24.1(e) and (f) of the School Ethics Act when, as a member of the Board, she copied and distributed to certain school staff, using school equipment, a malicious document regarding four other Board members. The Commission found the material facts to be undisputed regarding the conduct on which it found probable cause and invited Ms. Schmidt to submit a written statement within 30 days setting forth why she should not be found in violation of N.J.S.A. 18A:12-24.1(e) and (f) of the Act.

Ms. Schmidt submitted a timely response and the Commission addressed this matter at its meeting of January 28, 2003. At that time, the Commission found Ms. Schmidt in violation of N.J.S.A. 18A:12-24.1(e) and recommended a penalty of reprimand.

FACTS

Based on the pleadings, the documents submitted and the testimony presented, the Commission believes that the following facts are undisputed. At all times relevant to the allegations in this complaint, Denise Schmidt and the complainants were members of the Berlin Borough Board of Education. Ms. Schmidt's term as a Board member ended in April 2002. . As of the writing of this decision, two additional complainants were no longer members of the Board.

On or before April 21, 2001, a letter was directed to "Residents of Berlin Borough" that contained derogatory remarks about four members of the Board who are complainants in this matter. The letter was copied to Mayor and Council, New Jersey School Boards and the Camden County Superintendent. Ms. Schmidt received the letter at her home. Mark Houck received a copy of the letter at his home as did some of the other complainants. On or about April 25, 2001, Ms. Schmidt went to the Board office in connection with a meeting involving a member of her family. Ms. Schmidt testified that the superintendent asked her to make copies of the letter; however, the complainants produced a statement from the superintendent denying that he asked Ms. Schmidt to make copies of the letter or that he even knew that she was making copies of the letter. Whether Ms. Schmidt was asked to make copies by the superintendent as she states or whether she made copies on her own initiative, she admitted to making at least two copies of the letter and providing them to members of the superintendent's secretarial staff. Ms. Schmidt eventually paid the Board for having made six copies, which equates to three copies of the two-page letter.

ANALYSIS

The Commission dismissed the charge that Ms. Schmidt violated N.J.S.A. 18A:12-24(g), but found probable cause that your conduct violated N.J.S.A. 18A:12-24.1(e) and (f) of the Code of Ethics. N.J.S.A. 18A:12-24.1(e) provides:

> I will recognize that authority rests with the board of education and will make no personal promises nor take any private action that may compromise the board.

Ms. Schmidt set forth in her response to the finding of probable cause that she does not believe that her copying of the letter in the Board office compromised the board. She argues that she followed board policy and did not give her personal opinion or discuss the letter with any person other than the superintendent. Thus, she urges the Commission to find that her conduct was not such that it may have compromised the Board. The Commission finds that the letter was so disparaging of the Board members that to give it to staff members who may not have received it by other means that it could compromise the Board in decreasing its credibility among the staff and the public that it serves. By copying the letter and distributing it, Ms. Schmidt had the potential to compromise the Board by spreading the letter to staff such that Ms. Schmidt violated N.J.S.A. 18A:12-24.1(e) of the School Ethics Act.

The Commission next found probable cause that Ms. Schmidt's conduct violated N.J.S.A. 18A:12-24.1(f) of the Act. It provides:

> I will refuse to surrender my independent judgment to special interest or partisan political groups or to use the schools for personal gain or the gain of friends.

In its probable cause decision, the Commission did not find the first part of N.J.S.A. 18A:12-24.1(f) to be applicable to the present matter, but found the provision that a board

member must refuse to use the schools for personal gain or the gain of friends to apply to these facts. The Commission found probable cause to credit the allegation that Ms. Schmidt used the schools for personal gain by making copies of the letter in question on school equipment and distributing it to members of the school district staff during school hours. The Commission found the fact that Ms. Schmidt paid to have three copies of the letter made to be an admission that Ms. Schmidt used school equipment to make three copies of the letter. The Commission also found that Ms. Schmidt distributed the letter among members of the staff who would not necessarily have received it otherwise, since it was addressed to the residents of Berlin Borough. However, Ms. Schmidt disputes that what she did could be viewed as using the schools for personal gain. She denies any knowledge of the identity of the authors of the letter and therefore denies that she did anything to gain personally or financially. After reviewing the written submission of Ms. Schmidt, the Commission finds that there is insufficient evidence of personal gain to find her in violation of N.J.S.A. 18A:12-24.1(f). She paid for the copies that she made and the Commission is unsure what she gained by distributing the letter to members of the staff. Therefore, the Commission now dismisses the charge that Ms. Schmidt violated N.J.S.A. 18A:12-24.1(f). .

DECISION

For the foregoing reasons, the Commission concludes that Ms. Schmidt took private action that may compromise the Board in violation of N.J.S.A. 18A:12-24.1(e) of the Code of Ethics for School Board members. The Commission does not find that she used the schools for personal gain or the gain of friends and dismissed the charge that she violated N.J.S.A. 18A:12-24.1(f). Because it was never alleged that Ms. Schmidt had any involvement with the writing or mailing of the disparaging letter, but rather that she made and distributed copies in the board office, the Commission recommends that the Commissioner of Education impose a sanction of reprimand.

This decision has been adopted by a formal resolution of the School Ethics Commission. This matter shall now be transmitted to the Commissioner of Education for action on the Commission's recommendation **for sanction only**, pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, Ms. Schmidt may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Paul C. Garbarini /c
Paul C. Garbarini, Chairperson

Resolution Adopting Decision – C01-02

Whereas, the School Ethics Commission has considered the pleadings filed by the parties, the documents submitted in support thereof and the information obtained from its investigation; and

Whereas, at its meeting of January 28, 2003, the Commission found that Denise Schmidt violated N.J.S.A. 18A:12-24.1(e) of the Act and recommended that the Commissioner of Education impose a sanction of reprimand; and

Whereas, the Commission requested that its staff prepare a decision consistent with the aforementioned conclusion; and

Whereas, at its meeting of February 25, 2003, the Commission reviewed the draft decision and agrees with the decision;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter and directs its staff to notify all parties to this action of the Commission's decision herein.

Paul C. Garbarini, Chairperson

I hereby certify that this Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on February 25, 2003.

Lisa James-Beavers
Executive Director

IN THE MATTER OF DENISE SCHMIDT, :

BERLIN BOROUGH BOARD OF : COMMISSIONER OF EDUCATION

EDUCATION, CAMDEN COUNTY. : DECISION

:

The record of this matter and the decision of the School Ethics Commission ("Commission"), finding that Denise Schmidt, former member of the Berlin Borough Board of Education, violated *N.J.S.A.* 18A:12-24.1(e) of the Code of Ethics for School Board members in the School Ethics Act, and recommending a penalty of reprimand have been reviewed. Upon issuance of the decision of the Commission, respondent was provided 13 days from the mailing date of the decision to file written comments on the recommended penalty for the Commissioner's consideration.

Respondent did not submit any comments.

Initially, it must be emphasized that, pursuant to *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6A:3-9.1, the determination of the Commission as to violation of the School Ethics Act is **not reviewable by the Commissioner** herein. Only the Commission may determine whether a violation of the School Ethics Act occurred. The Commissioner's jurisdiction is limited to reviewing the sanction to be imposed based upon a finding of a violation by the Commission. Therefore, this decision is restricted solely to a review of the Commission's recommended penalty.

Upon a thorough review of the record, the Commissioner determines to accept the Commission's recommendation that reprimand is the appropriate penalty in this matter for the

reasons expressed in the Commission's decision. In so ruling, the Commissioner is satisfied from the record before him that, in recommending a penalty for the violation it found, the Commission fully considered the nature of the offense and weighed the effects of aggravating and mitigating circumstances. Therefore, the Commission's recommended penalty in this matter will not be disturbed.

Accordingly, IT IS hereby ORDERED that Denise Schmidt be reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 4|14|03

Date of Mailing: 4|14|03

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

168-03

PATRICIA HABERTHUR,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF EATONTOWN, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

April 11, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 8085-99

AGENCY DKT.NO. 190-7/99

PATRICIA HABERTHUR,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF EATONTOWN, MONMOUTH COUNTY,

Respondent.

Steven P. Weissman, Esq., for petitioner (Weissman & Mintz, attorneys)

Lane J. Biaviano, Jr., Esq., for respondent

Record Closed: February 18, 2003 Decided: February 21, 2003

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

STATEMENT OF THE CASE

This matter concerns the allegation of the petitioner that she had been improperly terminated from her non-tenured position as Business Administrator and Board Secretary. The petitioner alleges that her termination was in violation of her employment contract, and that the Board's action as to her termination was in violation of the Open Public Meeting Act, the New Jersey School Budget Law, the New Jersey Wage and Hour Law, the Conscientious Employee

Protection Act and other provisions of Title 18A. The matter was transmitted to the Office of Administrative Law on September 13, 1999, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to –13. The parties informed me that they expected a lengthy hearing, the submission of briefs as well as the possibility of the appeal after the final decision, and that in order to avoid this time-consuming litigation, they were able to agree on a monetary settlement as reflected in the written agreement, which is attached and fully incorporated herein. (J-1)

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

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

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

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

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

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

February 21, 2003
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ, t/a

Receipt Acknowledged:

February 25, 2003
DATE

M. Kathleen Deneen (for)
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 26 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/jck

EXHIBITS

Jointly Submitted

J-1 Stipulation of Settlement

OAL DKT. NO. EDU 8085-99
AGENCY DKT. NO. 190-7/99

PATRICIA HABERTHUR,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF EATONTOWN, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, and in consideration of nature and circumstances of this matter, the Commissioner approves the settlement terms and adopts the settlement as his final decision. The Commissioner notes, however, that the settlement sets forth terms that were to be effectuated prior to approval of the settlement by the Commissioner pursuant to *N.J.A.C.* 1:1-19.1.[2] He, therefore, reminds the parties that they acted at their peril in acting without Commissioner approval and cautions them, and other litigants whose controverted matters have been duly transmitted to the OAL, against effectuation of any settlement prior to its submission to, and approval by, the Commissioner.

The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 4|11|03
Date of Mailing: 4|11|03

[1] The proposed agreement was approved by the respondent Board of Education, as indicated by a resolution included within the record of this matter.

[2] Additionally, Term 1 of the Stipulation of Settlement includes a typographical error, providing for payment on January 15, 2002 rather than January 15, 2003, as clearly intended.

170-03

IN THE MATTER OF THE TENURE HEARING OF JOHN KOERNER, SCHOOL DISTRICT OF THE CITY OF UNION CITY, HUDSON COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

April 14, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 9295-02

AGENCY DKT. NO. 314-10/02

IN THE MATTER OF THE TENURE HEARING OF JOHN KOERNER, SCHOOL DISTRICT OF THE CITY OF UNION CITY, HUDSON COUNTY

Mitzy Gales-Menendez, Esq., for petitioner
(Chasan, Leyner, Bariso & Lamparello, attorneys)

Gregory T. Syrek, Esq., for respondent
(Bucceri & Pincus, attorneys)

Record Closed: February 6, 2003 Decided: February 21, 2003

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

On or about October 3, 2002, the Union City Board of Education (petitioner) certified a charge of incapacity to perform his job function due to chronic and excessive absenteeism against John Koerner, a tenured attendance officer employed by petitioner. On October 18, 2002, respondent filed an answer denying the charge and asserting certain affirmative defenses. On October 25, 2002, the Department of Education, Bureau of Controversies and Disputes, transmitted this matter to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13.

The matter was assigned to the undersigned judge on November 8, 2002, and a telephone prehearing conference was held on November 19, 2002. At that time, the issues were isolated, and a hearing scheduled for January 21 and 22, 2003 at the OAL. Prior to the scheduled hearing, the parties advised that a settlement had been reached, and the hearing was adjourned.

The parties have agreed to settle this matter and have filed a Settlement Agreement and Release, letter of resignation and Board of Education Resolution approving the settlement, which are attached and incorporated herein.

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

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

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

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

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

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

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

February 21, 2003
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

2/26/03
DATE

M. Kathleen Dunscomb
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 27 2003
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

al

SETTLEMENT AGREEMENT AND RELEASE

This Agreement is made and entered into as of this 21 day of January, 2003, by and between the Union City Board of Education (hereinafter referred to as "the Board") and John Koerner (hereinafter referred to as "Mr. Koerner").

WHEREAS, Mr. Koerner is a tenured attendance officer in the employ of the Board; and

WHEREAS, the parties wish to enter into an amicable resolution of the tenure charges filed against Mr. Koerner; and

WHEREAS, it is in the best interests of the parties and public to enter into this Agreement;

NOW THEREFORE, in consideration of the mutual promises of the parties,

IT IS on this _____ day of January, 2003, agreed:

1. In return for the Board's compliance with this Agreement, Mr. Koerner agrees to:

(a) Immediately submit to the Board his irrevocable resignation from his tenured position and employment with the Board, effective as of the date of the approval of this Agreement by the Commissioner of Education. The irrevocable letter of resignation shall be in the form annexed hereto as Attachment "A" and shall be held in escrow pending execution of this

Agreement by Mr. Koerner and the Board, and pending approval of this Agreement by the Commissioner of Education.

(b) Permanently and irrevocably waive and relinquish any and all rights to tenure, seniority, recall or employment with the Board, effective the date of the Commissioner of Education's approval of this Agreement.

(c) Pending the Commissioner's approval, the Board does not have to resume salary payments on January 23, 2003, in accordance with *N.J.S.A.* 18A:6-14.

2. In return for Mr. Koerner's compliance with this Agreement, and the Commissioner of Education's approval, the Board agrees:

(a) To dismiss the tenure charges it brought against Mr. Koerner with prejudice. The Board further agrees that it will not initiate any other actions against Mr. Koerner, based on any knowledge or information it has up to now.

(b) That because Mr. Koerner is resigning to settle tenure charges brought against him, which could result in his dismissal from employment, it will not contest or challenge any application for unemployment benefits made by Mr. Koerner.

(c) Pending approval of this Agreement by the Commissioner of Education, Mr. Koerner shall be free to seek other employment of his choice and the Board agrees that it will not interfere with Mr. Koerner's attempts to obtain other employment. Requests from prospective employers to the Union City Board of Education will be released only as permitted by law under the

Open Public Meetings Act and Executive Orders 9 and 11, and any other proscribed law, rule, regulation or executive order.

3. Koerner releases and gives up any and all claims and rights that he may have against the Board including, but not limited to, any claim of liability, damages or attorneys' fees arising out of this matter. This release includes all claims, including those of which the parties to this Agreement are not aware and those not mentioned in this Agreement. This release applies to all claims resulting from anything that has happened up to now.

In addition to releasing any and all claims and rights set forth above, Koerner also specifically releases the following claims:

(a) Any and all claims including those for back pay, back benefits, seniority or attorneys' fees.

(b) Any and all claims which were brought or could have been brought or arising:

i) Under the New Jersey Law Against Discrimination, *N.J.S.A.* 10:5-1 *et seq.*, which, among other things, prohibits discrimination in employment on the basis of an individual's race, creed, color, religion, sex, national origin, ancestry, age, marital status, affectional or sexual orientation, familial status, handicap, atypical hereditary cellular or blood trait or liability for service in the Armed Forces of the United States;

ii) Under the Conscientious Employee Protection Act, *N.J.S.A.* 34:19-1 *et seq.*, which, among other things, prohibits retaliatory action against an employee under certain specified conditions;

iii) Under the New Jersey Employer-Employee Relations Act, *N.J.S.A.* 34:13:13A-1 *et seq.*;

iv) Under Title VII of the Civil Rights Act of 1964, as amended, 42 *U.S.C.* § 2000e *et seq.*, or the Civil Rights Act of 1991, as amended, which, among other things, prohibits discrimination in employment on account of a person's race, color, religion, sex or national origin;

v) Under the Age Discrimination in Employment Act of 1967, as amended, 29 *U.S.C.* § 621 *et seq.* ("ADEA"), which, among other things, prohibits discrimination in employment on account of a person's age;

vi) Under the Americans with Disabilities Act of 1990, as amended, 42 *U.S.C.* § 12101 *et seq.*, which, among other things, prohibits discrimination in employment on account of a person's disability or handicap.

vii) Under the Family and Medical Leave Act of 1993, as amended 29 *U.S.C.* § 2601 *et seq.*, or New Jersey Family Leave Act, *N.J.S.A.* 34:11B-1 *et seq.*, which, among other things, entitles certain employees to take reasonable leave for medical reasons for the birth or adoption of a child, and for the care of a child, spouse or parent who has a serious health condition.

viii) Under the Rehabilitation Act of 1973, as amended, 29 *U.S.C.* § 701 *et seq.*, which, among other things, prohibits discrimination in employment by federal contractors against individuals with disabilities.

ix) Under the Employee Retirement Income Security Act of 1974, as amended, 29 *U.S.C.* § 1001 *et seq.*, which, among other things

regulates pension and welfare plans and prohibits interference with individual rights protected under that statute.

x) Under the Older Workers Benefit Protection Act, 29 *U.S.C.* § 621 *et seq.*, which, among other things amends provisions of ADEA and prohibits discrimination in employment and employment benefits on account of a person's age; and

xi) under any Federal or State statute, rule or regulation or common law or under any employment contract, including the Collective Bargaining Agreement between the Board and the Union City Education Association for back pay, back benefits, seniority, attorneys' fees or any other claim.

Mr. Koerner does not release or waive any rights or claims he may have pursuant to *N.J.S.A.* 18A:16-6 and *N.J.S.A.* 18A:16-6.1. Mr. Koerner warrants and represents that he is not aware of any such claims.

4. Except as specified herein, for his obligations pursuant to this Agreement, the Board hereby releases and discharges Mr. Koerner and any and all of his agents, contractors, representatives, predecessors, successors and assigns, as well as his heirs, executors, and administrators, from liability on or for all claims, demands, cause of action, damages, costs, expenses, accounts, contracts, agreements, promises, compensation and all other liabilities of any kind or nature whatsoever, direct or indirect, presently known, which the Board may have had or now has, for any reason whatsoever on account or arising out of or in consequence of its employment relationship with Mr. Koerner.

5. The parties agree that the resolution of this matter upon the terms set forth herein is both in their interests and in the public interest for the following reasons:

(a) To avoid disruption of the school district by requiring employees to testify in these proceedings, and

(b) To avoid a lengthy, expensive hearing on the charges and any possible appeals.

6. This Agreement shall be interpreted, construed and enforced pursuant to the laws of the State of New Jersey.

7. This Agreement shall not in any way be construed as an admission by the Board or Mr. Koerner of any liability, or of any improper or wrongful acts, whatsoever; and the Board and Mr. Koerner specifically disclaim any liability for any wrongful or unlawful acts whatsoever.

8. Both Mr. Koerner and the Board expressly acknowledge, represent and warrant that the terms and provisions of this Agreement are the only consideration for signing this Agreement; that no other promise or agreement of any kind has been made to or with any person or entity whatsoever to cause the signing of this Agreement; and that in executing this Agreement, Mr. Koerner does not rely and has not relied upon any representation or statement made by any of the Board's agents, representatives or attorneys with regard to the subject matter, basis or effect of this Agreement or otherwise.

9. The undersigned representatives of the Board hereby acknowledge that they agree to the terms and conditions of this Agreement, subject to the final ratification by the Board.

10. All terms of this Agreement are deemed material. This document may not be altered, amended, modified or revoked except by an instrument executed in writing by the parties.

11. Nothing in this Agreement shall be deemed to constitute past practice or precedent as to the rights or liabilities of any Board employee, other than Koerner.

12. Mr. Koerner expressly acknowledges, represents and warrants that he has carefully read this Agreement and has fully reviewed and discussed its terms with his attorneys; that Mr. Koerner fully understands this Agreement's terms, conditions and significance; and that Mr. Koerner has executed this Agreement voluntarily, knowingly and with the advice of his representative.

13. This Agreement sets forth the entire understanding and agreement between the parties and shall be binding upon the parties and their respective successors, heirs and assigns. All prior negotiations, agreements and understandings are superseded hereby.

14. If any term or provision of this Agreement or the application thereof to any person or circumstance shall to any extent be deemed invalid or unenforceable, the remainder of this Agreement or the application of any term or provision to persons or circumstances other than those to which it is held invalid or unenforceable shall not be affected thereby, and each term and

provision of the Agreement shall be valid and enforceable to the fullest extent permitted by law.

15. Both parties acknowledge that their agreement to dismiss the tenure charges is subject to the approval of the Office of Administrative Law and the Commissioner of Education. If such approval is not given, this Agreement and all of the stipulations, releases and acknowledgements, as well s Mr. Koerner's resignation, whether contained herein or attached hereto, shall be rendered null and void and the parties shall be returned to the status quo existing prior to this agreement.

16. The parties to this Agreement understand and agree that all terms herein are confidential and are not to be released to any person not a party to this Agreement, subject to the provisions of the Open Public Records Act.

UNION CITY BOARD OF EDUCATION

By: _____
, President

Attest: _____
, Board Secretary

_____
John Koerner

Dated: 1/21/03

Attest: _____

John Koerner
410 46th Street
Union City, NJ 07087
January , 2003

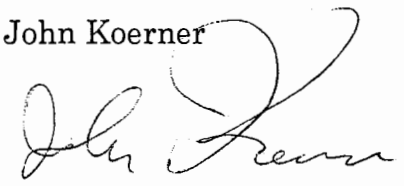
Carl Johnson, Board Secretary
Union City Board of Education
3912 Bergen Turnpike
Union City, NJ 07087

Dear Mr. Johnson:

Pursuant to the terms of the Agreement between the Union City Board of Education and myself, I hereby submit my irrevocable resignation from the position of teaching staff member, effective the date of the approval of such Agreement by the Commissioner of Education. This resignation is expressly conditioned upon the Board approving the Agreement and making payment pursuant thereto and shall be null and void if the terms of that Agreement are not met. This resignation is otherwise irrevocable.

Very truly yours,

John Koerner



/ls

15

RESOLUTION PRESENTED AT A PUBLIC MEETING
OF THE UNION CITY BOARD OFEDUCATION
HELD ON January 30, 2003

UNION CITY BOARD OF EDUCATION
RESOLUTION AUTHORIZING THE SETTLEMENT OF TENURE CHARGES OF CERTAIN EMPLOYEE

WHEREAS, on August 28, 2002, Tenure Charges ("Charges") due to chronic and excessive absenteeism, together with a Statement of Evidence and supporting exhibits were filed against a certain employee; and

WHEREAS, the Board and the employee have amicably resolved the differences between them and have agreed to settle the tenure charges.

NOW, THEREFORE, BE IT RESOLVED by the Board that:

1. The aforesaid recitals are incorporated herein as though fully set forth at length.
2. The Settlement Agreement and Release dated January 21, 2003 is hereby approved.
3. The Board President, Superintendent, and Board Secretary are hereby authorized to execute any and all documents and to take any and all actions necessary to complete and realize the intent and purpose of this Resolution, including the execution of a Settlement Agreement and Release.
4. This Resolution shall be effective immediately.

Certified to be a true and correct copy of a resolution adopted by the Board of Education at its meeting held on January 30, 2003.

CARL JOHNSON

BOARD SECRETARY

SEAL

LAW OFFICES

CHASAN, LEYNER, BARISO & LAMPARELLO
A PROFESSIONAL CORPORATION

300 HARMON MEADOW BOULEVARD
SECAUCUS, NEW JERSEY 07094-3621
(201) 348-6000
(212) 986-1700

TELECOPIER:
(201) 348-6633

OF COUNSEL
HERBERT KLITZNER
FRANCIS J. TARRANT
ANTHONY V. D'ELIA

RAYMOND CHASAN
(1904-1988)

JOEL S. LEYNER△*
ROBERT A. KAYE△
RALPH J. LAMPARELLO△*+
PETER F. BARISO, JR.*
CINDY NAN VOGELMAN
JOHN V. MALLON◇*
STEVEN L. MENAKER+
THOMAS R. KOBIN△

KIM R. ONSDORFF◇
DONNA J. SOVA
JULIEN X. NEALS△
JOHN M. LAGO*
ROBERT A. CAPPUZZO△
WALTER H. SCHNEIDER, JR.
JOHN L. SHAHDANIAN II△
JORDAN S. FRIEDMAN△
MITZY GALIS-MENENDEZ
THOMAS A. MORRONE
WILLIAM B. FOTI
GEORGEA K. TARACHAS□
MICHAEL A. OPPICI
CATHERINE G. GINGELESKIE
TALI R. SADI△

△ N.J. & N.Y. BARS
◇ N.J. & PA. BARS
□ N.J. & MI. BARS

* CERTIFIED CIVIL TRIAL ATTORNEY
+ CERTIFIED CRIMINAL TRIAL ATTORNEY

February 4, 2003

Hon. Elinor R. Reiner
Administrative Law Judge
Office of Administrative Law
33 Washington Street
Newark, New Jersey 07102

Re: In the Matter of the Tenure Hearing of John Koerner,
School District of the City of Union City
OAL Docket No. 314-10/02
Our File No. 06001-0057

Dear Judge Reiner:

Enclosed you will find the following with regard to the above-referenced matter:

1. Settlement Agreement and Release;

2. Copy of letter of resignation;

3. Union City Board of Education Resolution Approving the Settlement of Tenure Charges of Certain Employee.

Thank you for Your Honor's courteous attention to this matter.

Respectfully,

MITZY GALIS-MENENDEZ
For the Firm

MGM:sd
Enc.
c: Gregory T. Syrek, Esq.

3K

OAL DKT. NO. EDU 9295-02
AGENCY DKT. NO. 314-10/02

IN THE MATTER OF THE TENURE HEARING OF JOHN KOERNER, SCHOOL DISTRICT OF THE CITY OF UNION CITY, HUDSON COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The record, Settlement Agreement and Release, and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon review, the Commissioner approves the settlement terms since they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846; *N.J.A.C.* 6A:3-5.6(a). The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 4|14|03

Date of Mailing: 4|14|03

171-03

TOWNSHIP OF EASTAMPTON AND EASTAMPTON TOWNSHIP PLANNING BOARD,	:	COMMISSIONER OF EDUCATION
PETITIONERS,	:	DECISION ON REMAND
V.	:	
BOARD OF EDUCATION OF THE RANCOCAS VALLEY REGIONAL HIGH SCHOOL, BURLINGTON COUNTY AND NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE, OFFICE OF SCHOOL FACILITIES FINANCING,	:	
RESPONDENTS.	:	SYNOPSIS

Petitioning Township and Planning Board sought reversal of respondent Board's and respondent State's approval of a site for the construction of athletic fields, alleging the selected site was inappropriate and contrary to *N.J.S.A.* 40:55D-31. The Commissioner rejected the decision of the ALJ remanding this matter to the Office of School Facilities Financing and, because the Commissioner concluded that the approval at issue had expired rendering the matter moot, he dismissed the petition without prejudice to the Board resubmitting its application for approval for purchase of the land at issue pursuant to *N.J.A.C.* 6A:26-7.1. The Commissioner rejected the ALJ's conclusion that the determination of the Office of School Facilities Financing was procedurally defective for failing to meet judicial and Administrative Procedure Act standards for quasi-judicial determinations of State administrative agencies.

In January 2003, the State Board granted a motion by the Board to supplement the record with exhibits it claimed proved it had complied with the pertinent regulation by acquiring the DAC Farm site within 18 months of approval by the Bureau of Facility Planning Services. The State Board approved a settlement agreement with respect to issues in this appeal and remanded this matter to the Commissioner for the limited purpose of determining whether the approval of the Board's plan to construct athletic fields on the DAC Farm site had expired in light of supplemented documents and, therefore, whether the approval granted to the Board by the Office of School Facilities Financing was still valid.

The Commissioner found that, pursuant to *N.J.A.C.* 6:22-2.1, the approval of the Board's application to construct athletic fields on the DAC Farm site by the Office of School Facilities Financing was still valid.

April 14, 2003

the County would continue with the exchange of the DAC Farm property and the Lumberton property. (*Id.* at 3)

At the time of approval by the Office of School Facilities Financing, the controlling regulation, *N.J.A.C.* 6:22-2.1(f), provided, as follows:

> If a local district board of education does not have authority to acquire the land by bond referendum, an approved lease-purchase agreement or other statutory means within 18 months from the date of approval of a school site by the Division, the local district board of education shall resubmit the information required *** for consideration and approval before any action is taken to conduct a bond referendum, purchase, lease-purchase or otherwise acquire the site.

The exchange of properties was effectuated by the closing, giving title of the DAC Farm property to the Board on May 14, 2002. (Board's Exhibit I) The Board avers that the delay in closing was caused by: 1) petitioners' appeal of the Office of School Facilities Financing approval of the DAC Farm site; 2) the Board's many changes to its athletic field plans in an attempt to satisfy petitioners' concerns; and 3) the requirement, pursuant to *N.J.S.A.* 40A:12-13, that the County hold public hearings on the property exchange. (Board's Brief at 2)

Notwithstanding the delay in the transfer of title of the DAC Farm property, upon a thorough review of the documentation submitted by the Board, the Commissioner is in complete agreement with the parties that the Board's actions were in compliance with *N.J.A.C.* 6:22-2.1(f), noted above. In support thereof, the Commissioner adopts the Office of School Facilities Financing's reasoning that:

> [T]he Agreement evidences the fact that the parties intended to exchange the properties no later than April 1999 which is within eighteen months of the February 11, 1999 approval from the Department. Similarly, although a bond referendum was not required to provide money to acquire the land since there was an

even exchange of property, the referendum does evidence voter approval for expenditures to develop and improve the DAC site for use as athletic fields. Therefore, based upon the evidence provided, Rancocas did acquire the property within eighteen months of the date of the Department's February 11, 1999 approval, and thus the approval is valid. (Office of School Facilities Brief at 5)

Accordingly, pursuant to *N.J.A.C.* 6:22-2.1, the Commissioner finds that the approval of the Board's application to construct athletic fields on the DAC Farm site by the Office of School Facilities Financing is still valid.

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: ~~4/14/03~~

Date of Mailing: 4-16-03

[4] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:2-1.1 *et seq.*

187-03

KENNETH WILLIAMS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

April 8, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 9443-01
AGENCY DKT. NO. 397-9/01

KENNETH WILLIAMS,

Petitioner,

v.

BOARD OF EDUCATION OF THE
TOWNSHIP OF WAYNE, PASSAIC COUNTY,

Respondent.

Robert M. Schwartz, Esq., for petitioner

Stephen R. Fogarty, Esq., for respondent
(Fogarty & Hara, attorneys)

Record Closed: February 10, 2003 Decided: March 7, 2003

BEFORE **RICHARD McGILL,** ALJ:

Kenneth Williams filed a petition with the Commissioner of Education to contest a determination by the Board of Education of the Township of Wayne to withhold his increment for the 2001-02 school year. Respondent filed an answer, and the matter was transmitted to the Office of Administrative Law on November 1, 2001, for determination as a contested case.

Prior to hearing, the parties agreed to an amicable resolution of the matter and subsequently submitted a written Stipulation of Settlement. Having reviewed the record and the settlement terms, I **FIND:**

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

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

Therefore, I **CONCLUDE** that the agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the settlement terms, and it is **FURTHER ORDERED** that the proceedings in this matter be concluded.

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

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

Mar 7, 2003
DATE

Nina McGill
RICHARD MCGILL, ALJ

Receipt Acknowledged:

March 11, 2003
DATE

B. Kathleen Shannon
DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

MAR 13 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

cml

FOGARTY & HARA, ESQS.
16-00 Route 208 South
Fair Lawn, NJ 07410
(201) 791-3340
(201) 791-3432 Telecopier
Attorneys for Respondent
Wayne Township Board of Education
Our File No.: 208

KENNETH WILLIAMS, Petitioner,	:	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW
BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY, Respondent.	:	OAL Docket No.: EDU 9443-01N Agency Ref. No.: 397-9/01 STIPULATION OF SETTLEMENT

THIS STIPULATION OF SETTLEMENT is made by and between the Board of Education of the Township of Wayne, with offices located at 50 Nellis Drive, Wayne, New Jersey 07470 (hereinafter referred to as the "Board")

A N D

Kenneth Williams, residing at 572 Upper Montclair Avenue, Upper Montclair, NJ 07043 (hereinafter referred to as "Williams").

W I T N E S S E T H

WHEREAS, Williams was employed in the Wayne Township School District since in or about July 1989 serving in the capacity of Supervisor of Community Programs with tenure; and

WHEREAS, on or about June 25, 2001, the Board took action by a recorded roll call majority vote of its full membership to withhold Williams' employment and adjustment increments for the 2001-2002 school year, in the amount of $2,697, upon concluding there were serious deficiencies in his leadership and management over the Alternative High School, Extended Day Program and the Adult School; and

WHEREAS, on or about September 26, 2001, Williams filed a Petition of Appeal with the State of New Jersey, Department of Education, Commissioner of Education, pending in the Office of Administrative Law, bearing OAL Docket No. EDU-9443-01N and Agency Ref. No. 397-9/01, alleging that the Board's action to withhold his employment and adjustment increments was arbitrary, capricious and in retaliation to Williams' persistence that the Board recognize the additional duties he was assigned, pay him accordingly, and/or provide him with the required assistance; and

WHEREAS, on or about October 17, 2001, the Board filed an Answer to the Petition of Appeal and Separate Defenses, claiming that the Board's actions were not arbitrary, capricious or unreasonable and were, in all respects, proper and requested that the Petition of Appeal be dismissed with prejudice; and

WHEREAS, on or about July 1, 2002, Williams' annual salary for the 2002-2003 school year was reduced by the prior withheld amount of $2,697; and

WHEREAS, Williams voluntarily resigned from all employment with the Board on or about September 13, 2002; and

WHEREAS, Williams has denied and continues to deny the allegations contained in the Board's reasons for withholding his employment and adjustment increments for the 2001-2002 school year and nothing contained in this Stipulation of Settlement shall be interpreted as an admission of guilt or wrongdoing by Williams for any purpose; and

WHEREAS, the parties having agreed to amicably resolve their differences, it is hereby stipulated and agreed that this matter shall be settled upon the following terms:

1. The Board shall pay Williams, within thirty (30) days of the full execution of this Stipulation of Settlement, Two Thousand Four Hundred Fifty Dollars ($2,450) of the amounts previously withheld from his salary for the 2001-2002 and 2002-2003 school years, less all applicable taxes and deductions at the source of wages. The payment to Williams of Two Thousand Four Hundred Fifty Dollars ($2,450) shall constitute the entire monetary settlement of the matters encompassed by this Stipulation of Settlement.

2. In exchange for the promises and undertakings set forth in Paragraph 1 above, the sufficiency of which is hereby acknowledged, Williams shall execute a General Release in the form

annexed hereto as Exhibit A. Williams expressly acknowledges that this Stipulation of Settlement and the General Release are intended to extinguish and waive all claims which he may have against the Board, its members, officers, employees, administrators, agents, servants and representatives, resulting from anything which has happened up to the date of the execution of the General Release, and which were or could have been asserted, including those claims unknown to Williams.

3. Williams hereby acknowledges that the execution of this Stipulation of Settlement and the General Release which accompanies it shall absolutely bar any claim, action or suit against the Board, its members, officers, employees, administrators, agents, servants and representatives.

4. Nothing in this Stipulation of Settlement or the documents referenced herein shall preclude either party from bringing an action to enforce performance of any term of this Stipulation of Settlement, should there be a default in performance.

5. Williams specifically releases all claims which were or could have been asserted by him in the action entitled Kenneth Williams v. Board of Education of the Township of Wayne, Passaic County, filed with the State of New Jersey, Department of Education, Commissioner of Education, pending in the Office of Administrative Law, bearing OAL Docket No. EDU-9443-01N and Agency Ref. No. 397-9/01 and Williams further stipulates to the dismissal of the within action with prejudice.

6. The undersigned representatives of the Board hereby acknowledge that they have been duly authorized by the Board to sign this Stipulation of Settlement and bind the Board to its terms.

7. All terms of this Stipulation of Settlement are deemed material. This Stipulation of Settlement may not be altered, amended, modified or revoked, except by an instrument executed in writing by the parties.

8. The parties recognize that each has been represented by legal counsel and that they sign this Stipulation of Settlement as their own voluntary act and deed, and that they fully understand the duties and obligations enumerated herein. This Stipulation of Settlement shall be subject to the laws of the State of New Jersey.

The foregoing terms and provisions are hereby agreed to and accepted:

WITNESS:

JAMES P. VERBIST
Board Secretary/Business Administrator

DATED: 1/23/03

BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE

BY: _____
CATHERINE HERMAN
Board President

DATED: 1/23/03

WITNESS:

ROBERT M. SCHWARTZ

DATED: Jan 3, 2003

KENNETH WILLIAMS

DATED: 12/31/02

RELEASE

This Release, dated , 2002, is given

BY the Releasor(s)

KENNETH WILLIAMS

referred to as "I",

TO BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, and its officers, employers, administrators, agents, servants and all other persons, firms or corporations who or which are or might be liable in the premises from any and all claims which I have or might have against them.

referred to as "You".

If more than one person signs this Release, "I" shall mean each person who signs this Release.

1. Release. I release and give up any and all claims and rights which I may have against you. This releases all claims, including those of which I am not aware and those not mentioned in this Release. This Release applies to claims resulting from anything which has happened up to now. I specifically release the following claims:

More particularly any and all claims arising out of the employment relationship between Kenneth Williams and the Wayne Township Board of Education, which are the subject matter of a Petition of Appeal filed with the State of New Jersey, Department of Education, Commissioner of Education, pending in the Office of Administrative Law, bearing OAL Docket No. EDU-09443-01N and Agency Ref. No. 397/9/01, and including, but not limited to, any cause of action pursuable before any state or federal court or agency, any pension claim(s) arising with the New Jersey Division of Pensions and Teachers' Pension and Annuity Fund, or grievance through a collective negotiations agreement, which allege a violation of the Older Workers' Benefits Protection Act, 29 U.S.C. 621, et seq., or any other federal or state statutory provision, administrative regulation or other act that has the force and effect of law.

This Release does not apply to any rights which Kenneth Williams may have under the terms of the Stipulation of Settlement between Kenneth Williams and the Wayne Township Board of Education, pending in the Office of Administrative Law, bearing OAL Docket No. EDU-09443-01N and Agency Ref. No. 397/9/01.

2. Payment. I have been paid a total of $ 2,450.00 and other good and valuable consideration as more specifically set forth under the terms of the Stipulation of Settlement between Kenneth Williams and the Wayne Township Board of Education, pending in the Office of Administrative Law, bearing OAL Docket No. EDU-09443-01N and Agency Ref. No. 397/9/01, in full payment for making this Release. I agree that I will not seek anything further including any other payment from you.

3. Who is Bound. I am bound by this Release. Anyone who succeeds to my rights and responsibilities, such as my heirs or the executor of my estate, is also bound. This Release is made for your benefit and all who succeed to your rights and responsibilities, such as your heirs or the executor of your estate.

4. Signatures. I understand and agree to the terms of this Release. If this Release is made by a corporation its proper corporate officers sign and its corporate seal is affixed.

Witnessed or Attested by:

_____ _____

(Seal) KENNETH WILLIAMS
NOTARY PUBLIC

STATE OF NEW JERSEY)
SS:
COUNTY OF)

BE IT REMEMBERED that on this _____ day of _____ 2002, before me personally appeared Kenneth Williams, who I am satisfied is the person mentioned in and who executed the within Release and who knows the contents thereof and thereupon I acknowledge that he signed, sealed and delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

_____

(Seal)
NOTARY PUBLIC

Prepared By:

Stephen R. Fogarty, Esq.

3F

OAL DKT. NO. EDU 9443-01
AGENCY DKT. NO. 397-9/01

KENNETH WILLIAMS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 4/08/03

Date of Mailing: 4.16.03

* By way of reminder, however, notwithstanding that the within settlement agreement states that the two Board members who signed it did so with the authorization of the Board, the record of settlement agreements should contain a copy of the Board resolution evidencing such authorization. Also, all settlement agreements should be signed by the Board attorney, who is the Board's duly authorized representative in litigation.

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

SYNOPSIS

Petitioning teacher alleged the District failed to pay her full salary without loss of sick time for work-related injury, pursuant to *N.J.S.A.* 18A:30-2.1, notwithstanding a workers' compensation order declaring this time compensable.

The ALJ found that the petition was untimely filed. Petitioner filed her petition September 2001 seeking the return of sick days from September 2000 to November 2000, well beyond the 90 days of receipt of notice of the District's action. Thus, the ALJ concluded that petitioner's appeal was substantially out of time under the 90-day rule.

The Commissioner adopted the findings and determination in the Initial Decision as his own. The Commissioner did note that petitioner's efforts to resolve the claim through negotiation with the District were irrelevant and did not negate the fact of receipt of adequate notice nor did they toll the running of the time limits for filing the petition. The petition was dismissed as untimely filed.

April 14, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 09448-01N

AGENCY DKT. NO. 377-9/01

CHRISTINE GILLESPIE,

Petitioner,

v.

STATE-OPERATED DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,

Respondent.

Joseph M. Gillespie, Esq., for petitioner

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

Record Closed: January 8, 2003 Decided: February 24, 2003

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

Christine Gillespie ("Gillespie"), a teacher employed by the respondent school district ("Newark"), suffered a work-related injury on September 4, 1998, and has been unable to work since that time. This dispute with her employer revolves around the issue of sick days, and the impact of workers compensation benefits and statutory enactments upon accumulated and yearly sick leave allowances. In short, Ms. Gillespie seeks the return of forty-two sick days which she claims were wrongfully taken from her during the period from September 5 through November 2, 2000, a period when she was absent for what has been determined to be the result of temporary disability, as decided by an order entered in the Division of Workers Compensation.

Ms. Gillespie filed her appeal with the Commissioner of Education on September 24, 2001, and amended that filing on September 26, 2001. The Commissioner transferred the case to the Office of Administrative Law on November 1, 2001. On September 19, 2002, the respondent filed a Motion for Summary Decision. Petitioner replied to the motion on October 24, 2002, and the parties then exchanged further written arguments. Oral argument was held by telephone on December 4, 2002. Final written comments were generated by the discussions at oral argument and by subsequent filings the record on the motion closed on January 8, 2003.

It is undisputed that as of September 4, 1998, Ms. Gillespie had accumulated fifty-five sick days. The contract between the district and the Newark Teachers Union provided for a teacher such as petitioner to receive at the beginning of the new school year fifteen (15) sick days, ten (10) non-cumulative sick days and three (3) personal days. Thus, had Ms. Gillespie been able to work during the 1998-99 school year and if she did not need to use any sick days during that school year, she would have entered the next school year in September 1999 with seventy accumulated sick days.

On March 8, 2000, Honorable Fred H. Kumpf, Judge of Workers' Compensation, issued an Order which, among other things, provided that the respondent Newark Public Schools System pay Ms. Gillespie temporary disability from September 4, 1998, less credits for temporary payments made pursuant to contract. A further Order for Temporary Disability was entered by Judge Kumpf on September 13, 2000. On September 22, 2000, Judge Kumpf ordered, "Temporary disability shall continue to be paid until petitioner is seen by Dr. Massingill and pending his determination as to whether additional temporary disability is due."

N.J.S.A. 18A:30-2.1 provides that

> a. Whenever any employee, entitled to sick leave under this chapter, is absent from his post of duty as a result of a personal injury caused by an accident arising out of and in the course of his employment, his employer shall pay to such employee the full salary or wages for the period of such absence for up to one calendar year without having such absence charged to the annual sick leave or the accumulated sick leave provided in N.J.S. 18A:30-2 and 18A:30-3. Salary or wage payments provided in this section shall be made for absence during the waiting period and during the period the employee received or was eligible to receive

> a temporary disability benefit under chapter 15 of Title 34, Labor and Workmen's Compensation, of the Revised Statutes. Any amount of salary or wages paid or payable to the employee pursuant to this section shall be reduced by the amount of any workmen's compensation award made for temporary disability.
>
> b. Leave taken by an employee pursuant to subsection a. of this section shall constitute satisfactory service as provided pursuant to N.J.S. 18A:29-14 and any other provision, statutory or contractual, relating to employment, adjustment or other increments and shall not constitute inefficiency or other good cause for the withholding of an employment or adjustment increment. . . .

In response to the petition, the respondent first argues that the petition must be dismissed for failure of the petitioner to abide by the so-called "90-day rule." *N.J.A.C.* 6a:3-1.3 (D). Alternatively, while agreeing that during her first year of absence from work while on temporary disability, September 1998 through the start of the next school year in September 1999, the effect of subsection a. of this legislation means that Ms. Gillespie was to be paid her full salary less that money she received from Workers' Compensation benefits and that none of Ms. Gillespie's then accumulated fifty-five days of sick time could be charged for her absences during that school year, the respondent argues that once the petitioner remained out of school in September 1999, even if, as Judge Kumpf determined, her absence resulted from a temporary disability, the statute no longer bars the Board from charging Ms. Gillespie's then existing accumulation of sick days while at the same time paying her full salary for those current and accumulated sick days. Since her number of days absent during the 1999-2000 school year substantially exceeded her accumulation of sick days as of September 1999, her available sick days were exhausted during that school year. Additionally, the Board contends that despite her status under Workers' Compensation Law as a temporarily disabled employee, the respondent did not continue to accumulate additional sick days as of the start of school in September 1999, as the protection granted by *N.J.S.A.* 18A:30-2.1 is limited to one year. Thus, the Board argues that Ms. Gillespie's accumulation of sick days existing as of the start of school in September 1999, was the fifty-five days carried forward and fifteen days she was entitled to as of September 1998, a total of seventy. The fate of the sick days that she would receive upon the beginning of the school year in September 1999, at least for purposes herein the annual fifteen (15) sick days that

were permitted to be carried over from year to year (as opposed to the ten (10) non-accumulative sick days) is, to the Board's understanding of the case, not dispositive.

The 90-Day Rule

N.J.A.C. 6A:3-1.3(d) provides that a petitioner filing an appeal from the action or inaction of a board of education must file a petition "no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education . . ." More specifically, subsection 1. of section (d) provides that "[A]ny petitioner claiming benefits under *N.J.S.A.* 18A:30-2.1 must file a petition within 90 days of receipt of the notice of the district board's action, or of the action of the district boards' agent, which has the effect of denying such benefits, notwithstanding that the Commissioner may hold the petition in abeyance pending determination of the Division of Workers' Compensation as to whether the underlying injury is work-related."

The respondent argues that the petition was filed on September 24, 2001, and since the period for which the return of sick days is sought runs from September 4, 2000, through November 2, 2000, Ms. Gillespie is "undoubtedly" out of time. Petitioner counters that timeliness is properly measured from June 26, 2001, the last day of the 2000-2001 school year. September 24, 2001, was the 90th day thereafter and thus the appeal was timely.

The Board contends that Ms. Gillespie knew that she was being charged sick days during the time in question, September through November 2, 2000. In fact, in a letter dated October 16, 2000, she requested that the payroll department complete a report so that she would be charged with sick days on 28 days running from September 5 through October 13, 2000. In her response papers dated December 27, 2002, while apparently questioning the status of the District's Risk Manager to make any binding decision, petitioner appears to acknowledge that she "was well aware that she was being charged sick days during identified period," and that "on October 16, 2000, after six weeks of school, six weeks of being A.W.O.L., six weeks without payments from Allied Risk Services, Inc., [she] submitted medical certificates to be paid for her sick days." Payroll records submitted by the Board show that Ms. Gillespie was charged for sick time starting on September 5 through November 2. Indeed, petitioner has submitted a letter dated

October 26, 2000, addressed to Ms. Valerie Wilson, Executive Director, Office of Operation, Newark Public Schools. In that letter the petitioner referenced Judge Kumpf's September 22, 2000, Order which "explicitly extends my benefit period until I am examined by the Districts's doctor." Ms. Gillespie then refers to her benefits having been terminated by Mr. Hale as of September 1, 2000, and relates that as a result of his actions, she was charged sick days "during a court ordered period of temporary disability." She then requests that Ms. Wilson "[P]lease correct the situation and have my days returned to me." She also noted that "[T]he district has 45 days from September 22, 2000 court order to correct this situation that Mr. Hale was allowed to create and return any sick days that I have been charged during September and October."

Given these facts, the Board claims that as Ms. Gillespie was well aware that her sick days had been charged, the ninety-day period in which she could have challenged that charge began to run from either November 3, 2000, or at the latest, as of the date of the next pay period thereafter. In either case, the ninety days expired long before she filed her petition in September 2001.

Ms. Gillespie retorts that as there was never any Newark school board or board administrator decision or order that notified her that her request to have her sick time reinstated had been denied or directed her that, despite her position that her absences could not be charged against sick days, she had to utilize her sick days. She questions the status and authority of the Risk Manager to make any decisions on these issues or, at a minimum, argues that the Risk Manager's actions in early Fall 2000 are insufficient to serve as the starting date for the 90-day appeal period. She also refers to her letter to the Essex County Superintendent of Schools dated March 27, 2001, in which she advises the Superintendent of her attempt to have her sick days returned by the Newark School District and her letter to Ms. Wilson, dated July 17, 2001, in which she again refers to her repeated requests to have the 42 sick days returned to her and requests that if her request for reinstatement of the sick days cannot be fulfilled that the reason for the denial be placed in writing and provided to her. These letters demonstrate that the School District never did issue any formal order or directive that should properly be deemed the point at which to start the running of the 90-day period. Finally, she provides a letter dated July 27, 2001, received from Roland Armando Alum, Policy and Planning Associate with the Department of Education's Office of State-operated School Districts. In that letter Mr. Alum notes that in

response to petitioner's request of July 19, 2001, regarding her requests to the Newark Public Schools, that the Office had determined that "your concerns are best handled at the district level," and, further, "The New Jersey Department of Education has been assured that officials at the Newark Districts Central Office are processing your requests consistent with district policies." This letter suggests that the local district was still, as late as July 2001, not yet prepared to issue a decision on the long-standing request for the reinstatement of the 42 sick days. Thus, given all of these factors, petitioner argues that the appeal filed in September 2001 was within time under the 90-day rule.

The 90-Day Rule expresses a public policy that favors a measure of repose to school districts, stabilizing the relationship between teachers and administration. It allows for the proper and efficient administration of the school laws. The Rule has been upheld as a "fair and reasonably-necessary requirement for the proper and efficient resolution of disputes under the school laws." *Kaprow v. Bd. Of Ed. Of Berkeley Township*, 131 *N.J.*, 572, 582 (1993). The significant factor used in measuring the start of the 90-day period is "adequate notice." The party presenting a claim must have received some form of notice adequate to alert "the individual of some fact that he or she has a right to know and that the communicating party has a duty to communicate. Moreover, adequate notice under the regulation must be sufficient to further the purpose of the ninety-day limitations period . . . [T]he notice requirement should effectuate concerns for individual justice by not triggering the limitations period until [the petitioner has been alerted to the existence of facts that would be adverse to it]. At the same time, it should further considerations of repose by establishing an objective event to trigger the limitations period in order "to enable the proper and efficient administration of the affairs of government." *Borough of Park Ridge v. Salimone*, 21 *N.J.* 28, 48 (1956). The form of notice deemed adequate to place someone on notice of adverse action can be either formal, such as a letter from the secretary of the Board of Education informing the petitioner that someone else has been given her job, *Kaprow, supra.*, or informal, such as the issuance of a check that does not contain a salary increase (*North Plainfield Ed. Ass'n. v. Bd. of Ed. of North Plainfield Borough*, 96 *N.J.* 587 (1984)). In a case dealing with the treatment of sick days in the context of workers' compensation, *Molinari v. Bd. of Ed. of the Borough of Hopatcong* (EDU 3174-97), (Initial Decision), (November 13,1997), http://lawlibrary.Rutgers.edu/oal/search.html.>*adopted Comm'r.* (December 29, 1997), ALJ Diana Sukovich determined that the petitioner "was

obligated to file his claims with the [Department of Education] within 90 days of the date on which he first became aware that the Board was treating the days in question as sick leave, even if the respondent did not send written notification of such to petitioner." *Ibid.*

While the law does recognize that there are some extremely limited instances where the enforcement of the 90-day rule should be waived in the interests of public policy, such as where important and novel constitutional questions or matters of important public rather than private interests are in need of adjudication or where there are informal or *ex parte* determinations of legal questions by administrative officials, in general, the rule has been strictly enforced. *Brunetti v. Borough of New Milford*, 68 *N.J.* 576, 586 (1975); *Bland-Carter v. State-Operated School District of the City of Newark*, (EDU 1505-00, Initial Decision, (July 21, 2000), http://lawlibrary.Rutgers.edu/oal/search.html., *adopted Comm'r* (September 11, 2000)(refusing to relax the 90-day rule when the petitioner filed outside of the time limitation where genuine personal problems of the petitioner occurred during the first part of the ninety day period and the petitioner returned to work several weeks before the ninetieth day).

Based upon the facts presented herein, I **CONCLUDE** that Mrs. Gillespie was required to appeal any action that charged her sick days within ninety days of her awareness that this charge was being made. Certainly many months before she filed her appeal she knew that, whatever the circumstances or the proprieties that had led to her submitting her October 16 letter and asking that her sick days be charged, the charge had been made. If she disagreed with this action, if she felt that she was being improperly made to seek to utilize sick days in violation of the law, she could and should have requested review of this long before she did. I **CONCLUDE** that her appeal is substantially out of time under the ninety-day rule and must therefore be **DISMISSED**. However, despite this conclusion, it is best to rule on the appeal on its merits as well, so as to fully dispose of the issues before review by the Commissioner.

Ms. Gillespie contends that during a period of disability that has been recognized by an order of a Workers' Compensation Judge, no employee can be charged for any sick leave.

Under Workers' Compensation law, an employee who is granted Temporary Disability may receive such benefits for up to 400 weeks. The maximum benefit awarded under TDI is

well below an employee's full salary. In considering the purpose of *N.J.S.A.* 18A:30-2.1, the Appellate Division has characterized the statute as providing a benefit that is expressly intended to "complement workers' compensation benefits for [a] strictly limited period." *Forgash v. Lower Camden County School District*, 208 *N.J. Super.* 461 (App. Div. 1985). Thus, while the statute does require that a board whose employee is out of work due to a work-related disability for which he or she is receiving workers' compensation benefits pay that employee's *full* salary without charging against any of the employee's annual or accumulated sick leave, the statute expressly limits that requirement to a period of one calendar year. Thereafter, if the employee must remain out of work due to the continuing disability, the statute does not mandate that the board pay the full salary. Instead, once the calendar year has passed, the statutory scheme provides that the employee can continue to receive the workers' compensation payments of less than full salary. However, if after the end of the one year statutory period, the employee is allowed by the Board to receive her full salary, then it appears that the still disabled employee must utilize such time as she may have, such as annual and accumulated sick time, to cover her days of absence, at least to the extent of the percentage of time over and above the percentage of her salary she receives as a TDI benefit. Once the employee has exhausted these sick days, in the absence of any other factors, the employee would then receive only the workers' compensation benefits that he or she was entitled to as a result of the disability. However, the Legislature has provided that if an employee suffers an absence due to illness or injury that exceeds that employee's annual and accumulated sick leave, then the Board, acting pursuant to discretion authorized by *N.J.S.A.* 18A: 30-6, may authorize payment of such employee's salary, less the cost of a substitute if one is employed or the estimated cost of a substitute if one is not employed. In addition, *N.J.S.A.* 18A:30-7 allows the board, again acting pursuant to its discretion, to grant sick leave within limits above the minimum sick leave. Nowhere in the statutes is there any suggestion that if an employee is required by a workers' compensation disability to remain out of work for more than one calendar year, that the employee, who will then have exhausted the salary benefit provided by *N.J.S.A.* 18A:30-2.1, can then avoid utilizing his or her accumulated and annual sick leave to cover absences and thereby receive his or her full salary, until the total of the annual and accumulated sick days are themselves exhausted. A reading of this provision does not suggest that the one year limitation is only intended to limit the scope of the board's responsibility to pay full salary or wages, and not to limit the prohibition against charging an employee's continued absence against his or her sick time, annual and accumulated. Despite the

petitioner's insistence that Judge Kumpf's finding somehow serves as a shield against the Board charging her absences against her sick time even while paying her full salary, she has produced no statute or regulation or case that so holds.

Based upon a reading of the statutes and cases and the briefs presented, I **CONCLUDE** that the Board of Education rightfully charged Ms. Gillespie for her absences and does not owe her any sick days to be credited to her for the period from September 5 through November 2, 2000. In fact, the record reflects that she received full pay for these days. She has no viable complaint for credit for any sick days for this period. Therefore, it is **ORDERED** that the petition be **DISMISSED** on its merits.

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

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

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

February 24, 2003
DATE

JEFF S. MASIN, ACTING CHIEF, ALJ

Receipt Acknowledged:

March 4, 2003
DATE

M. Kathleen Duncan (Ca)
DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

MAR 7 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

mjm

EXHIBIT LIST

FOR THE PETITIONER:
From brief dated 9/19/02:

Exhibit A	Workers' Compensation Orders dated 8/11/99, 3/8/00, 9/13/00, and 9/22/00
Exhibit B	Memo dated 11/16/01 from Dorothy Hatcher to To Whom It May Concern
Exhibit C	Note dated 10/18/00 signed by K. Giffer with attachments
Exhibit D	Paycheck data
Exhibit E	Paycheck data
Exhibit F	Paycheck data
Exhibit G	Earnings Record Report dated 8/14/02

From 11/26/02 response letter:

Exhibit A	*The Sunday Star-Ledger*, 1/23/00 Education article, *The Fifty-Eight Million Dollar Newark Board of Education Deficit*
Exhibit B	Letter dated 3/28/00 from Michelle E. Reevey to Ms.. Christine Gillespie with attachments
Exhibit C	Letter dated 7/26/01 from Salvatore J. Cirigliano to Legretha Wingo with enclosure
Exhibit D	Payroll information and W2 2000 for Christine Gillespie

FOR THE RESPONDENT:
From Brief in Opposition to Summary Judgment Motion:

Exhibit A	Workers' Compensation Orders dated 8/11/99, 3/8/00, 9/13/00, and 9/22/00
Exhibit B	Memo dated 11/16/01 from Dorothy Hatcher to To Whom It May Concern
Exhibit C	Note dated 10/18/00 signed by K. Giffer with attachments
Exhibit D	Paycheck data
Exhibit E	Paycheck data
Exhibit F	Paycheck data
Exhibit G	Earnings Record Report dated 8/14/02
Exhibit H	Payment Detail Screen, Newark Public Schools

From Reply Brief:

Exhibit A	Job Data Screens
Exhibit B	W2 Wage and Tax Statements for 1998, 1999, 2000 & 2001
Exhibit C	Copies of paycheck

From letter brief of 12/27/02:

Exhibit 1	Memo dated 12/1/99 from Christine Gillespie to Ms. Holt
Exhibit 2	Letter dated 10/26/00 from Christine Gillespie to Ms. Valerie Wilson
Exhibit 3	Letter dated 3/27/01 from Christine Gillespie to Mr. Anthony Marino
Exhibit 4	Letter dated 7/17/01 from Christine Gillespie to Ms. Valerie Wilson
Exhibit 5	Certified Receipt dated 7/24/01
Exhibit 6	Letter dated 7/27/01 from Roland Armando Alum to Ms. Christine Gillespie
Exhibit 7	Letter dated 7/30/01 from Christine Gillespie to Ms. Valerie Wilson
Exhibit 8	Department of Personnel Job Specification 07390, Risk Manager

From response to supplemental correspondence:

Exhibit A Copy of *Schwartz v. Dover Public Schools*, 180 *N.J. Super.* 222, 434 *A. 2d* 645 (1981)

Exhibit B Copy of Agreement between the Newark Public Schools & the Newark Teachers Union Local 481, A.F.T./AFL-CIO, Teacher – Clerk, July 1, 2000-June 30, 2003

OAL DKT. NO. EDU 09448-01N
AGENCY DKT. NO. 377-9/01

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

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Petitioner filed exceptions on March 21, 2003. Even assuming, however, that the exceptions were timely filed in accordance with *N.J.A.C.* 1:1-18.4, which they were not,[1] petitioner may not make submissions to the record on her own behalf, having already elected to be represented by counsel, *N.J.A.C.* 1:1-5.1. All submissions in this matter must be accomplished by and through such legal counsel, absent notification to the Bureau of Controversies and Disputes that petitioner is no longer represented by an attorney. Therefore, petitioner's exceptions were not considered by the Commissioner in rendering his decision.

Upon careful and independent review of the record in this matter, the Commissioner concurs with the Administrative Law Judge (ALJ) that the within petition is untimely, pursuant to *N.J.A.C.* 6A:3-1.3(d), since there can be no question on this record that petitioner was, in October of 2000, alerted "to the existence of facts that might equate in law

[1] The Initial Decision was mailed to the parties on March 7, 2003 and the exceptions were filed on March 21, 2003, *via facsimile*, outside the 13-day period prescribed by regulation.

with a cause of action and was sufficient to enable her to pursue a claim, thereby triggering the ninety-day filing period of *N.J.A.C.* [6A:3-1.3(d)]," *Susan Beshaw v. Board of Education of the Borough of Oakland, Bergen County,* State Board decision February 4, 1998, slip. op. at 4, *aff'd* Appellate Division March 23, 1999, A-3985-97T5. Furthermore, as stated by the New Jersey Supreme Court in *Kaprow, supra,* attempts to resolve a claim through negotiation with the local board of education are irrelevant. Such efforts do not negate the fact of receipt of adequate notice nor do they toll the running of the time limits for filing a petition of appeal. Neither does the Commissioner find cause to relax the 90-day rule in this matter.

Accordingly, the Petition of Appeal is dismissed.[2]

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 4/14/03

Date of Mailing: 4/16/03

[2] Since this matter is dismissed on procedural grounds, the Commissioner does not reach to the ALJ's discussion on the merits of petitioner's claims.

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

189-03

C.S., on behalf of minor child, N.S., :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE CITY OF SOMERS POINT, ATLANTIC COUNTY, :

RESPONDENT. :

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning parent appealed the Board's determination to expel her son for a whole year due to an alleged assault on a teaching staff member.

The ALJ found that the Board of Education presented credible evidence that it afforded N.S. his due process rights; that the expulsion was not arbitrary, capricious or unreasonable; and that petitioner was given every opportunity to present evidence in the defense of her son and failed to do so. The ALJ concluded that the Board acted properly in expelling N.S. Moreover, he was afforded Home Instruction. Petition was dismissed.

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

April 15, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 342-03

AGENCY DKT. NO. 32-1/03

C.S., o/b/o, N.S.,

Petitioner,

v.

SOMERS POINT BOARD OF EDUCATION, ATLANTIC COUNTY,

Respondent.

C.S., petitioner, *pro se*

Lewis Greco, Esq., for respondent

Record Closed: February 21,2003 Decided: February 24, 2003

BEFORE **LILLARD E. LAW**, ALJ, t/a

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, C.S., seeks emergency relief from an action by the Somers Point Board of Education (Board) to expel her son, N.S., from its schools as a consequence of Ness's alleged assault against a teaching staff member in the employ of the Board, in violation of *N.J.S.A.* 18A:37-2.1. Petitioner contends she did not understand the nature of the Board's expulsion hearing concerning her son, N.S.

The matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. The emergency hearing was originally scheduled to be held on February 18,2003. Due to a severe snow storm, the Atlantic County Civil Courthouse was closed and the matter was rescheduled to be heard on February 21, 2003.

Oral Argument by the parties was heard on petitioner's application for emergency relief on February 21, 2003.

BACKGROUND FACTS

N.S., petitioner's son, is an eighth grade pupil in the Board's Jordan Road School. The schools under the direction and control of the Board only operate up to grade eight. Thereafter, their pupils move into the ninth grade not under the control of the Board. N.S. and another pupil are alleged to have been engaged in an altercation within the school on Wednesday, December 4, 2002. It is further alleged that when a teaching staff member attempted to intervene in the altercation, N.S. repeatedly kicked the teacher and caused bodily injury to the teacher.

ORAL ARGUMENT OF THE PARTIES

Petitioner's argument:

Petitioner admits N.S. was engaged in the altercation with another pupil in the Board's school. She contends the Jordan Road School Principal advised her of the altercation by way of a telephone call on December 4,2002, and imposed a 20 day suspension from school upon N.S. Subsequently, petitioner arrived at the Jordan Road School and was then advised of the alleged assault and injuries upon the teacher by N.S. Petitioner found the principal's statement unacceptable contending, among other things, that such information should have been addressed during the original telephone call. Petitioner contacted the Superintendent of Schools on December 6, 2002, to express her belief that N.S. should not be suspended from school for a period of 20 days. Petitioner asserts the Superintendent advised her that N.S. would be suspended from school for a period often days, rather than the 20 days imposed by the school's principal.

Petitioner insisted she be granted a hearing on the ten day suspension. Petitioner contends that the other pupil involved in the altercation with N.S. had a history of violation of school rules and was issued only a ten day suspension. Petitioner, who admits she did not witness the altercation, asserts that N.S. engaged in the fight only to defend himself. She further asserts the teacher grabbed N.S. by the neck and that N.S. could not catch his breath. Petitioner asserted that the school's principal pressed charges against N.S. following the assault upon the teaching staff member. Petitioner contends that the Board has treated N.S. harshly and unjustly. She contends that N.S. wants to return to school and graduate with his eighth grade classmates.

Petitioner admits she was advised of an expulsion hearing before the Board and had the right to be represented by legal counsel. She admits she did not retain legal counsel and appeared *pro se*. Nor did petitioner call any witnesses which, she contends, would have rebutted the Board's witnesses. Petitioner asserts she did not understand the scope or nature of the Board's expulsion hearing.

Petitioner did not call any witnesses, nor have them appear, at the herein emergency hearing.

The Board's argument:

The Board offered two exhibits, which were marked R-1 and R-2 in evidence. R-1, a letter, dated December 10, 2002, addressed to petitioner from the Superintendent states, in part, as follows:

> As discussed in our phone conversation today, please be advised that Somers Point Board of Education has scheduled a hearing for Thursday, December 19th at 8:00 p.m. in the Jordan Road School Library to determine if your son [N] should be expelled from the school district or otherwise disciplined. He is not to attend school in the district until after the Board makes a decision in this matter. I have had Mr. Miller arrange to have your child placed on home instruction immediately. The charges against your son are as follows:
>
> On Wednesday, December 4, 2002, your son got into a fight with another student. During the course of the fight 8th grade teacher Mr. Delusion was repeatedly kicked and punched by your son.

> At the time of the hearing you and your son have the right to be represented by legal counsel of your choice, the right to cross-examine witnesses on your son's behalf, the right to present witnesses on your son's behalf and the right to have compulsory process by subpoena to compel attendance of witnesses to testify.
>
> At the time of the hearing the Board will hear the witnesses and consider the anticipated testimony described below (The Board listed its five witnesses and a description of their individual testimony which is not repeated here). At the time of this hearing the Board will also consider your son's academic and discipline records and the results of a Child Study Team screening. If the charges against you son are sustained to the satisfaction of the Board of Education, the Board may recommend that your son be expelled from Jordan Road School. The hearing will be conducted in closed session of the Board.
> (R-l in Evidence)

The Board argues that after petitioner was advised of her and her son's rights; she agreed to proceed with the hearing without legal counsel. The Board heard the evidence of the charge against N.S. Thereafter, the Board deliberated the evidence before it and determined that it was in the best interest of the school to expel N.S. and place him on home instruction for the remainder of the 2002-2003 school year.

Subsequent to the Board's action, the Superintendent addressed a letter to petitioner, dated December 20,2002, which states as follows:

> Please be advised, at the Board of Education meeting last evening, December 19,2002, the Board of Education judged that your son is guilty of assaulting a teaching staff member and has expelled him from school for the rest of the school year. Your son is placed on Home Instruction and will continue in that program. Should you have any questions, please feel free to call me. (R-2 in Evidence).

The Board argues that it honored all of N.S. procedural due process safeguards. It carefully considered all of the evidence before it and its actions were neither arbitrary, capricious or unreasonable. It also argues that petitioner has failed to meet a condition for the award of emergency relief; *i.e.,* the likelihood of successfully prevailing on the merits of the matter.

DISCUSSION

Having considered the arguments of the parties and having reviewed the evidence, the statutes and decisional law, the undersigned spread upon the hearing record the following summary.

The causes for the suspension or expulsion of a pupil from the public schools are found at *N.J.S.A.* 18A:37-2. The statute at *N.J.S.A.* 18A:37-2.1 addresses the issue of an assault by a pupil upon a teaching staff member, and provides, in part, as follows:

> a. Any pupil who commits an assault, as defined pursuant to N.J.S.2C:12-1, upon a teacher... .acting in the performance of his duties and in a situation where his authority to so act is apparent, or as a result of the victim's relationship to an institution of public education of this State, not involving the use of a weapon or firearm, shall be immediately suspended from school consistent with procedural due process pending suspension or expulsion proceeding before the local board of education. Said proceedings shall take place no later than 30 calendar days following the day on which the pupil is suspended. The decision of the board shall be made within five days after the close of the hearing....
> (Emphasis supplied)

I **FIND** and **CONCLUDE** the Board presented credible evidence it afforded N.S. all of his Fourteenth Amendment Due Process Rights, as evidenced by Exhibit R-l, and its subsequent expulsion hearing. *R.R. v. Board of Ed Of Shore Regional High School Dist.* 109 *N.J. Super.* 337 (Chan. Div. 1970). Petitioner offered no credible evidence to the contrary. Petitioner was given every opportunity to present evidence in the defense of her son and failed to do so. Petitioner fully understood the consequences of the board's expulsion proceedings.

In the matter of *K.L. v. Board of Education of Matawan/Aberdeen High School District*, 91 *N.J.A.R.* Id (EDU) 74 (1991), it was determined that the expulsion of a pupil for assaulting a teaching staff member was not arbitrary, capricious or unreasonable. In the matter of *L.B. v. Elizabeth Board of Education,* 95 *N.J.A.R.* 2flf (EDU) 110, pupil's assaultive conduct upon pupils, teachers and administrators in the schoolhouse was ground for his expulsion from the board of education's schools.

I **FIND** and **CONCLUDE** the Board has presented sufficient evidence for it to expel N.S. from its school for his assault upon a teaching staff member. *M.G. v. Monmouth Regional High School*, 91 *N.J.A.R. 2d* (EDU) 38. N.S. has not been deprived of an education as evidenced by the Board having afforded him Home Instruction for the remainder of the 2002-2003 school year. Therefore, no irreparable harm has been visited upon N.S.

ORDER

Accordingly, it is **ORDERED** that the action by the Board is hereby **SUSTAINED**. It is **FURTHER ORDERED** that petitioner's application for Emergency Relief is hereby **DENIED** and **DISMISSED**.

This Initial Decision on application for emergency relief may be adopted, modified or rejected by the Commissioner of the Department of Education who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the Commissioner does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

24 February 2003
DATE

Lillard E. Law
LILLARD E. LAW, ALJ t/a

/lam

OAL DKT. NO. EDU 342-03
AGENCY DKT. NO. 32-1/03

C.S., on behalf of minor child, N.S.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF SOMERS POINT, ATLANTIC COUNTY,	:	
RESPONDENT.	:	

The Initial Decision of the Office of Administrative Law (OAL) on petitioner's application for emergent relief in the above-captioned matter was filed with the Commissioner on February 24, 2003. Upon review of that decision, it appeared that the Administrative Law Judge (ALJ) had made findings and conclusions sufficient to constitute a recommendation on the merits of the underlying appeal, as well as on the application for emergent relief. Therefore, petitioner was requested by the Director of the Bureau of Controversies and Disputes to advise whether she believed further proceedings at the OAL were necessary to resolve her appeal, and was additionally afforded an opportunity to submit exceptions to the Initial Decision pursuant to *N.J.A.C.* 1:1-18.4. No communication of any kind ensued in response to the Director's request, which was acknowledged as received by petitioner via certified mail on February 28, 2003.

Accordingly, the Commissioner deems the Initial Decision in this matter to be the ALJ's recommendation on the merits of petitioner's claim, and, reviewing it on

that basis along with the record of proceedings, the Commissioner fully concurs with the analysis and conclusions of the ALJ.

Accordingly, the Initial Decision of the Office of Administrative Law is adopted for the reasons expressed therein, and the Petition of Appeal dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 4/15/03

Date of Mailing: 4/16/03

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

190-03

J.J., on behalf of minor child, J.J.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

April 15, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NO. EDU 6554-02

AGENCY DKT. NO. 254-8/02

J.J. O/B/O J.J.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,

Respondent.

J.J., petitioner, *pro se*

Jeffrey F. Belz, Esq., for respondent (Reed Smith Shaw & McClay, LLP, attorneys)

Record Closed: November 18, 2002 Decided: March 19, 2003

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

This matter was transmitted to the Office of Administrative Law on September 26, 2002, for a hearing pursuant to *N.J.S.A.* 52:14F-1 to -13.

Respondent, having filed the attached letter withdrawing its answer denying that J.J. resided within the respondent School District and its Counterclaim seeking judgment against

petitioner for tuition expenses, I **CONCLUDE** that the matter is no longer a contested case before the Office of Administrative Law and it is **DISMISSED with PREJUDICE.**

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

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

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

March 18, 2003
DATE

ANTHONY T. BRUNO, ALJ

Receipt Acknowledged:

March 21 2003
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

MAR 24 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

Tmp

JEFFREY F. BELZ

Attorney At Law
605 W. Route 70
Cherry Hill, NJ 08002
856-216-1220
Fax 856-216-1559

Member NJ & PA Bar

November 12, 2002

Office of Administrative Law
Attn: Honorable Anthony T. Bruno, A.L.J.
9 Quakerbridge Plaza
CN 049
Trenton, New Jersey 08625

RE: J.J. o/b/o J.J. v. Board of Education of the Township of Ewing
OAL DKT. NO. EDU 6554-02

Dear Judge Bruno:

Please be advised that the Board of Education of the Township of Ewing withdraws its Answer and Counterclaim in the above referenced matter.

By way of copy of this correspondence to the Petitioner, I am advising her of the Board's action to allow J.J. to continue her education in the Ewing District.

Thank you for your assistance in this matter.

Very truly yours,

JEFFREY F. BELZ

JFB/djg

cc: Ms. Jeanette Johnson
Timothy R. Wade, Ed.D., Superintendent
David Mikalauskas, Attendance Officer

190-03
OAL DKT. NO. EDU 6554-02
AGENCY DKT. NO. 254-8/02

J.J., on behalf of minor child, J.J.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon his full and independent review, the Commissioner concludes that respondent's November 12, 2002 letter to Administrative Law Judge Anthony T. Bruno, withdrawing its Answer and Counterclaim in this matter, evidences its agreement that petitioner's minor child, J.J., is entitled to free attendance in the District's schools and, therefore, this matter is no longer a controversy before the Commissioner of Education.

Accordingly, the recommended decision of the OAL is adopted and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 4/15/03

Date of Mailing: 4.17.03

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

191-03

IN THE MATTER OF THE TENURE	:	
HEARING OF JAMES DI DOMENICO,	:	
SCHOOL DISTRICT OF THE TOWN OF	:	COMMISSIONER OF EDUCATION
HAMMONTON, ATLANTIC COUNTY.	:	DECISION
_____	:	

April 15, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 6797-02S

AGENCY DKT. NO. 305-9/02

IN THE MATTER OF
THE TENURE HEARING OF JAMES DiDOMENICO,
SCHOOL DISTRICT OF THE TOWN OF HAMMONTON,
ATLANTIC COUNTY

Michael C. Damm, Esq., Selikoff & Cohen, PA, for petitioner, James DiDomenico

William S. Donio, Esq., for respondent, Board of Education

Record Closed: March 13, 2003 Decided: March 14, 2003

BEFORE EDGAR R. HOLMES, ALJ:

This matter was transmitted to the Office of Administrative Law on October 17, 2002, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Stipulation of Settlement/Consent Order indicating the terms thereof, which is incorporated herein by reference and attachment.

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

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

2. The settlement fully disposes of all issues in controversy and is consistent with the law including *In Re Cardonick.* 1990 S.L.D. 842 (1983)..

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

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

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

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

3/14/03
DATE

Edgar R Holmes
EDGAR R. HOLMES, ALJ

Receipt Acknowledged:

March 20 2003
DATE

M. Kathleen Duncan Esq
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 24 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

WSS

IN THE MATTER OF THE TENURE HEARING OF JAMES DI DOMENICO,

SCHOOL DISTRICT OF THE TOWN OF HAMMONTON, ATLANTIC COUNTY.

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

OAL DKT. NO. EDU 6797-02

AGENCY REF. NO. 305-9/02

JOINT REQUEST FOR APPROVAL OF SETTLEMENT AND WITHDRAWAL OF TENURE CHARGES

INTRODUCTION

Counsel for the Petitioner, Hammonton Board of Education (the "Petitioner" or "Board") and Counsel for its tenured employee, Respondent, James DiDomenico, (the "Respondent") join in moving before this Honorable Court for an Order declaring that the Settlement Agreement between the parties attached hereto as Exhibit A, (the "Settlement Agreement") meets the requirements of *N.J.A.C.* 1:1-19.1 and *N.J.A.C.* 6A:3-5.6(a) and recommending that the Settlement Agreement be approved by the Commissioner of Education (the "Commissioner") on the condition that the Commissioner approves without modification the Settlement Agreement attached hereto as Exhibit A and ordering that the Settlement Agreement be implemented and that the tenure charges filed by the Board be withdrawn and this matter dismissed with prejudice.

PROCEDURAL STATEMENT

This matter arises out of tenure charges certified by the Board to the Commissioner of Education on September 30, 2002 against Respondent, James DiDomenico, a tenured health and physical education teacher alleging the inappropriate use of physical force against M.P., a

student enrolled in the Board's schools, in preparation for a gym activity involving several classes. Mr. DiDomenico filed an Answer on October 11, 2002. The tenure charges were transmitted to the Office of Administrative Law as a contested case and the matter was assigned to the Hon. Edgar R. Holmes, A.L.J.

The parties have now reached a settlement which is conditioned on the approval of the Commissioner of Education that the tenure charges be withdrawn. The parties agree that upon the Commissioner's approval of the Settlement Agreement without modification the tenure charges against Mr. DiDomenico shall be withdrawn and dismissed with prejudice subject to implementation of the Settlement Agreement. Should the Commissioner fail to approve the Settlement Agreement marked Exhibit A without modification, the parties agree to make every effort to reform their Settlement Agreement to meet any objections thereto or otherwise abide by the directives of the Commissioner, subject to each party's right to reject any such modified Settlement Agreement and proceed with the tenure proceedings.

JUSTIFICATION FOR WITHDRAWAL OF TENURE CHARGES

The Board originally instituted tenure charges against Mr. DiDomenico based upon information concerning his actions set forth above. The Board, through counsel, has had an opportunity to fully investigate and assess the allegations and confer with witnesses during the discovery phase. In preparation for hearing, the Board and Respondent have conducted a detailed and full independent investigation of the allegations, and have exchanged and obtained all relevant information and documentation. In addition, the Board's employees and representatives have communicated with students as to the alleged occurrence. Furthermore, prior to the Board's certification of the Tenure Charges against Respondent, C.P., M.P.'s mother filed criminal charges against Respondent, which charges were returnable before the

Hammonton Municipal Court. These charges were resolved by negotiated plea agreement before the Hon. Frank Raso, J.M.C., of the Hammonton Municipal Court at which time Respondent pled guilty to municipal ordinance violation and not the charges as originally filed by C.P., and wherein, M.P. and C.P., having been advised of the ramifications of such resolution, stated their agreement with the resolution before the Court and their substantial agreement with the factual basis placed on the record by Respondent.

Consequently, this full investigation of all the evidence that might be presented at the tenure hearing has provided the Board with the opportunity to explore means of resolving this dispute in a manner consonant with the public interest and this full investigation has revealed the following facts: this was an isolated incident in an otherwise commendable employment record of Respondent during his tenure of some 22.5 years with the Board; Respondent has shown his service, dedication and contributions to the youth of the Hammonton School District in the form of coaching and other activities; Respondent's position as a gym teacher by its very nature involves close contact with students; that Respondent did not act with malice or ill will, and that the incident as alleged included allegations by Respondent that the student, M.P., engaged in conduct initiating the incident, and that M.P.'s actions caused or resulted in Respondent being required to seek medical attention; student M.P. certified that he did not see a doctor for medical attention; that Respondent does recognize and understand that despite the fact that at the time of the incident he did not know what the intentions of the student were, that the method of his physical intervention with the student was inappropriate; that Respondent did apologize to the student on the day of the incident; Respondent asserts that this isolated incident would never reoccur; and being satisfied in view of the above that such an incident would not reoccur; and C.P., the mother of M.P., was advised of this possible outcome and is aware and has presented

no objection to the Board concerning the Settlement Agreement or the withdrawal of the Tenure Charges.

WHEREAS, in recognition of all of this the Board having reached an informed determination that the allegations originally stated against Respondent should not result in the termination of his employment but rather, a one-year suspension without pay and that after that Respondent should continue in his long-standing position as a teaching staff member for the Hammonton School District and placed on the salary scale provided in the Board's negotiated agreement with Respondent's bargaining unit as if he were not employed for the school year 2002-2003.

WHEREAS, the agreement between the Board and DiDomenico is based upon the understanding of all these facts as well as prior case law regarding tenure cases and increment withholding cases against veteran teaching staff members, In the Matter of the Tenure Hearing of Douglas Nogaki, 1983 S.L.D. 1986, and In the Matter of Claire Miller, Comm. Decision. OAL Dkt No. EDU 5812-01, Agency Dkt No. 240-7/01, both the Board and DiDomenico are satisfied with the resolution of this matter, consider it closed, and believe that this fulfills the public interest.

CONCLUSION

The parties have been fully informed of their respective rights in connection with these proceedings, including those standards for approval of the Settlement Agreement by the Commissioner. The parties are satisfied with the Settlement Agreement (Exhibit "A") and believe that it fulfills the public interest with respect to these matters. For the reasons outlined above, and for good cause shown, this tribunal should conclude that the Settlement Agreement meets the requirements of N.J.A.C. 1:1-19.1 and N.J.A.C. 6A:3-5.6(a), recommend that the

Settlement Agreement be adopted without modification by the Commissioner of Education, order that the Settlement Agreement be implemented on condition that it is so approved, and thereafter upon such approval dismiss with prejudice the tenure charges.

Respectfully submitted,

DONIO, BERTMAN & DONIO
Attorneys for Hammonton Board of Education

BY: _____
WILLIAM S. DONIO

DATED

SELIKOFF & COHEN, P.A.
Attorneys for James DiDomenico

BY: _____
MICHAEL C. DAMM

DATED 2/24/03

2/24/03 _____ - DiDomenico
JAMES DIDOMENICO
DATED

EXHIBIT "A"

SETTLEMENT AGREEMENT REGARDING ACTION PENDING BEFORE THE COMMISSIONER OF EDUCATION

This Settlement Agreement is entered into by and between the Hammonton Board of Education ("Board") and its tenured employee James DiDomenico ("DiDomenico").

WHEREAS, Mr. DiDomenico has been continuously employed by the Board as a physical education and health teacher since in or about November 1980; and,

WHEREAS, on September 26, 2002 the Board certified tenure charges against Mr. DiDomenico to the Commissioner of Education under the Tenure Employees Hearing Law, which charges were captioned:

IN THE MATTER OF THE TENURE
HEARING OF JAMES DIDOMENICO,
HAMMONTON SCHOOL DISTRICT
OAL DKT. NO. EDU 6797-02 AGENCY REF. NO. 305-9/02

WHEREAS Mr. DiDomenico filed an Answer contesting the tenure charges; and,

WHEREAS, the aforesaid tenure charges were assigned for hearing before the Honorable Edgar R. Holmes, A.L.J.; and,

WHEREAS, in consideration for the mutual promises contained herein, the parties intend to resolve all matters in dispute involving Mr. DiDomenico and the incident of March 27, 2002, or which otherwise may be raised by them, in the context of this tenure proceeding;

NOW THEREFORE, the matter in dispute having been amicably adjusted by and between the parties and based on the foregoing having fulfilled the public interest, it is hereby stipulated and agreed as follows:

1. It is agreed by the parties that DiDomenico shall be suspended without pay from September 26, 2002 through September 26, 2003, health insurance to be continued, at which point he will be reinstated with the Board at the appropriate place on the salary guide as if he were not employed during the 2002-2003 school year and otherwise continuously employed without further penalty to his employment.

2. The Parties will seek the Commissioner's approval for this Settlement Agreement, and if the Commissioner approves the Settlement Agreement without modification, ask the Commissioner to allow the tenure charges against Mr. DiDomenico to be withdrawn and dismissed with prejudice subject to implementation. The terms of a Joint Request for Approval

of Settlement and Withdrawal of Tenure Charges submitted to the Commissioner are incorporated herein by reference.

3. Should the Commissioner fail to approve the Settlement Agreement without modification, the parties agree to make every reasonable effort to reform their Settlement Agreement to meet his objections.

4. Should the Commissioner fail to approve the Settlement Agreement and it cannot be reformed to meet his objections and/or the matter referred to hearing, the parties agree that they will not assert in any judicial or administrative proceeding that any statements made by them or their attorneys herein are admissions, admissions against interest or competent evidence of any fact.

5. Mr. DiDomenico and the Board understand and agree that as a contested case which has been brought to the Office of Administrative Law, the settlement documents herein become part of the public record in this matter.

6. Mr. DiDomenico agrees that he has been fairly and adequately represented and advised at all stages of these proceedings, that he is fully satisfied with the services of counsel and that he is voluntarily and without coercion with a full understanding of his rights and the ramifications of this Settlement Agreement entering into it on his own accord. Mr. DiDomenico fully understands that this Settlement Agreement is subject to the approval of the Commissioner of Education.

DONIO, BERTMAN & DONIO
Attorneys for Hammonton Board of Education

BY:_____
WILLIAM S. DONIO

DATED

SELIKOFF & COHEN, P.A.
Attorneys for James DiDomenico

BY:_____
MICHAEL C. DAMM

DATED 2/24/03

2/24/03 _____
JAMES DIDOMENICO
DATED

OAL DKT. NO. EDU 6797-02S
AGENCY DKT. NO. 305-9/02

IN THE MATTER OF THE TENURE	:	
HEARING OF JAMES DI DOMENICO,	:	
SCHOOL DISTRICT OF THE TOWN OF	:	COMMISSIONER OF EDUCATION
HAMMONTON, ATLANTIC COUNTY.	:	DECISION
	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: April 15, 2003

Date of Mailing: April 17, 2003

192-03

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

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

April15, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1729-03
AGENCY DKT. NO. 63-2/03

S.L. ON BEHALF OF A.L.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE,
Respondent.

Anthony N. Picillo, Esq., appearing for petitioner

Stephen Christiano, Esq., appearing for respondent

Record Closed: February 27, 2003 Decided: March 11, 2003

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner brought an application for emergent relief to compel respondent West Orange Board of Education (Board) to allow petitioner's minor child, A.L., to participate on the wrestling team in order to be part of the N.J.S.I.A.A. District Wrestling

Tournament starting on Friday, February 28, 2003. The varsity wrestling coach informed A.L. on Monday, February 24, 2003, that he was no longer on the team. On February 26, 2003, the matter was transmitted to the Office of Administrative Law (OAL) for emergent hearing or a preliminary injunction until a plenary hearing could be held. A hearing on the emergent relief was held on February 27, 2003. A. L. and his father, A.J.L. testified upon behalf of the petitioner. Carol M. Kulik, the Athletic Director, and Keith Appello, the varsity wrestling coach, testified for the District. The decision denying the request for emergent relief was rendered by the undersigned at the end of the hearing. Instructions were given concerning an emergency appeal to the commissioner. Shortly after the ruling the attorney for the parents informed the undersigned that the petitioners would not be filing an appeal. This opinion memorializes the oral decision of February 27, 2003.

TESTIMONY

Petitioner's evidence

A.J.L., father of A.L., testified that at the beginning of the 2002-2003 wrestling season he told the coach to call him if his son had any problems. The coach never did so the father assumed there had been no problems between the coach and his son. . In January 2003 his son had quit the wrestling team because he felt the coach had treated him unfairly but the father and son met with the coach and patched things up.

In the beginning of February 2003 A. L. won first place in his weight class and most outstanding athlete in the Essex County Tournament. He stood a good chance of winning the District tournament on February 28, 2003, and advancing in the state tournament. Wrestling in the state tournament was the ultimate dream for a high school wrestler and since A.L. was a senior the District tournament represented his only opportunity

A.L., a 17-year-old senior in the District, testified that the coach seemed to dislike him for no apparent reason. Twice this season the coach threatened to not allow A.L. wrestle in the state tournament. Throughout the year the coach scolded him for behavior the other wrestlers were allowed to do. For instance the coach yelled at him for not showering after practice but not at the other kids who did not shower. When he quit the team in January the coach brought up that A.L. was frequently late for practice. A.L. generally got permission to be late from an assistant coach because he kept forgetting his practice equipment and had to go home to get it.

On February 24, 2003, after practice, A.L. had just rolled up a mat and sat down to take his shoes off when the coach started yelling at him for not rolling up the mats. Other wrestlers were also not rolling up the mats. In responding to the coach, A.L. had to raise his voice to be heard over the coach's voice. A.L. denied arguing with the coach or calling him insulting names. At the end of the loud discussion the coach told A.L. he was off the team. Subsequently A. L. tried to speak to the coach and finally wrote the coach apologizing for the dispute and asking to be put back on the team.

Board's testimony

Keith Appello, a tenured teacher and varsity wrestling coach, said that A.L. was one of the best wrestlers on the team. Throughout the year A.L. had a serious problem following the rules. A.L. rarely came to practice on time or dressed as required, he refused to shower after practice as required by State rules, he was late for the bus a few times, and he had at least 4 unexcused absences from practice. He also did not make his weight twice, the only team member who did not this season. In January 2003 A.L. had quit the team but was allowed back after promising to follow the rules.

On February 24, 2003, at the end of practice Mr. Appello saw A.L. sitting down taking off his shoes while the other wrestlers were standing around the mats. The coach yelled across the room to A.L. to help roll the mats. A.L. started screaming in a loud and vulgar tone at the coach and a "shouting match" ensured. The coach told A.L.

that if he did not stop yelling he would not play in the District meet but A.L. continued. As A.L. was approaching the coach, he called the coach a "faggot". All the other members of the team were standing around listening to this argument. Because A.L. did not stop arguing, the coach told A.L. that he was off the team. No one on the team has shown the disrespect that A.L. had.

Carol M. Kulik, Athletic Director in the District, testified that the coach contacted her after the dispute to say he had removed A.L. from the team for disrespectful behavior. Ms. Kulik could have overturn the decision but based upon what the coach had said, she concurred. Ms. Kulik also contacted her superior, the Superintendent of Schools, who also concurred.

LEGAL DISCUSSION AND CONCLUSION

Resolution of the emergent relief request is govern by the provisions of *N.J.A.C.* 1:6A-12.1. Emergent relief shall be granted if it is determined from the proofs that:

> (i) Petitioner will suffer irreparable harm if the requested relief is not granted;
>
> (ii) The legal rights underlying the petitioner's claim is settled;
>
> (iii) The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
>
> (iv) When the equities are an interest of the parties or balance the petitioner will suffer greater harm than the respondent will suffer if their requested relief is not granted. [*N.J.A.C.* 6A:14-12.7(m)1].

It is well settled that petitioner must meet these four criteria to prevail on this application. See *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). Regarding the first prong of irreparable harm I **CONCLUDE** that petitioner has not shown irreparable harm. In this case the parties agreed that is no adequate remedy at law as the petitioner seeks no relief but reinstatement to the wrestling team by the next day. Nonetheless, the

Commissioner has repeatedly held that students do not suffer irreparable harm if they are prohibited from participating in extracurricular activity, including sport activities. *BOE of the City of Trenton v. N.J.S.I.A.A.,* 91 *N.J.A.R.* 2d (EDU) 158; *Elmwood Park BOE v. N.J.S.I.A.A.*, 94 *N.J.A.R.* 2d (EDU) 106. Indeed it has been held that participation in an extracurricular activity is not a fundamental right under the federal or state constitution. *Camden Co. Board of Education v. N.J.S.I.A.A.* (App. Div. Dkt. No. AO2802-91T2, February 18, 1992) (unpublished decision). While the importance of sports cannot be lost on the education process, there is no evidence that irreparable harm will be suffered.

Even assuming that irreparable harm could be found here due to the unique set of circumstances, the petitioner must show that the legal right underlying the petitioner's claim is settled. While petitioner made a compelling argument, there has been nothing provided to show that the matter is necessarily clear-cut. Additionally, petitioner has been unable to cite a single case requiring procedural safeguards in the context of a suspension from an extracurricular sports activity. I **CONCLUDE** from the dearth of case law cited that such a claim is any thing but settled.

Additionally, I **CONCLUDE** that the petitioner has not demonstrated the likelihood of success on the merits on this record. It is well established that the actions of a Board of Education which lie within the area of its discretionary powers may not be upset unless patently arbitrary, without rational basis or induced by improper motives. *J.M. v. Hunterdon Central Reg. High Sch.,* 96 *N.J.A.R.* 2d (EDU) 415, 419 (citing *Kopera v. West Orange Bd. of Educ.,* 60 *N.J. Super.* 288 (App. Div. 1960). Plainly, a coach has the right to discipline a disrespectful team member. While the penalty of termination from the team is severe, petitioner has not presented evidence the Board acted patently arbitrarily.

High school sports are not merely about winning but about building character. Requiring a student to be respectful to a coach is an important goal of high school sports. The interest of the district in promoting such a salutary goal is arguably equal

to, if not greater than, the interest of petitioner in participating in a wrestling tournament. I therefore **CONCLUDE** that the petitioner has not shown he will suffer greater harm than the district.

In sum I **CONCLUDE** for the above reasons that petitioner has not prevailed on his application for emergent relief and this application must be **DENIED**. As the only relief petitioner sought was reinstatement to the team by February 28, 2003, the matter has become moot with the passage of time and must be dismissed.

ORDER

Based upon the foregoing, since the petitioner has not met the criteria for granting emergent relief, this application for emergent relief is hereby **DENIED**. The petition for emergent relief is hereby **DISMISSED**.

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

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

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

March 11, 2003
DATE

MARGARET M. HAYDEN, ALJ

Receipt Acknowledged:

3-14-03
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 18 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

jb

OAL DKT. NO. EDU 1729-03
AGENCY DKT. NO. 63-2/03

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

The record of this emergent matter, including the audiotapes of the hearing conducted by the Administrative Law Judge (ALJ)[1] of the Office of Administrative Law on February 27, 2003, and the Initial Decision of the ALJ denying emergent relief and dismissing the petition in this matter have been reviewed.

Upon such review, the Commissioner concurs that petitioner has failed to satisfy the four-pronged standard set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982) for obtaining emergent relief. In accordance with *N.J.A.C.* 6A:3-1.6, a grant of emergent relief is considered an extraordinary remedy which may only be issued where petitioner has demonstrated that the relief is necessary to prevent irreparable harm, where the legal right underlying petitioner's claim

[1]The Commissioner is compelled to comment on the ALJ's statements at hearing characterizing the Commissioner's consideration of this matter as an "appeal" to the Commissioner. As the ALJ correctly states in the Initial Decision, it is the Commissioner of Education who, by law, is authorized to make a final decision in this matter. In accordance with *N.J.S.A.* 52:14B-10, the recommended decision of the ALJ is considered the final decision *only if* the Commissioner does not adopt, modify or reject the recommended decision of the ALJ within forty-five (45) days, unless such time limit is otherwise extended. *See* Initial Decision at 6. The Initial Decision in the instant matter was received on March 14, 2003, thus precluding the Commissioner's review of the ALJ's recommendation on the application for emergent relief prior to the New Jersey State Interscholastic Athletic Association (NJSIAA) District Wrestling Tournament. However, in this instance, even if the ALJ's recommended decision had forthwith been transmitted to the Commissioner for his review pursuant to *N.J.A.C.* 1:1-12.6(i), it would not have altered the Commissioner's ultimate conclusion to adopt the ALJ's well-reasoned determination denying petitioner's application for emergent relief.

is settled, where there is a likelihood of success on the merits and where the relative hardship to the moving party favors granting such relief. *Crowe* at 132-34. As set forth in the Initial Decision, petitioner's application does not, on its face and granting petitioners every inference for purposes of this motion, meet the standards required by *Crowe* for the granting of extraordinary relief and must, therefore, be denied.

Moreover, as the sole relief sought by petitioner was her son's reinstatement to the West Orange High School's wrestling team by February 28, 2003 so that he could participate in the NJSIAA District Wrestling Tournament and all further NJSIAA sanctioned tournaments he might qualify for thereafter,[2] the matter has become moot given the denial of petitioner's request for emergent relief and the passage of time.

Accordingly, the Commissioner adopts the Initial Decision denying petitioner's application for emergent relief and dismissing the petition in the instant matter for the reasons expressed therein.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 4/15/03

Date of Mailing: 4/16/03

[2] The Commissioner notes that the NJSIAA Individual Wrestling Tournament began February 28, 2003 with the District Tournament. (Petition of Appeal at 1) According to petitioner, the top three place winners in each class of the District Tournament are eligible to compete in the Regional Tournament and the top three winners in the Regional Tournament are eligible to compete in the State Tournament. (*Id.* at 2) Thus, failure to compete in the District Tournament effectively ends a wrestler's season as he would not have any chance to compete in the State Tournament. (*Ibid.*)

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.*18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*

195-03

BOARD OF EDUCATION OF THE CITY OF MILLVILLE, CUMBERLAND COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION (EARLY CHILDHOOD EDUCATION),	:	DECISION
RESPONDENT.	:	

April 17, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

PARTIAL INITIAL DECISION
APPROVING WITHDRAWAL OF
ABBOTT EARLY CHILDHOOD ISSUES
OAL DKT. NO. EDU 0379-03
AGENCY DKT. NO. 44-2/03

CITY OF MILLVILLE, BOE, CUMBERLAND CO.,
Petitioner,
v.
NJ STATE DEPT OF EDUCATION (EARLY CHILDHOOD EDUCATION)

Arnold Robinson, Esq., Robinson & Andujar, Attorneys at Law
for petitioner BOE

Kimberly Franklin, DAG,
Peter C. Harvey acting Attorney General N.J.
for respondent NJ State Department Of Education

Record Closed: February 28, 2003 Decided: February 28, 2003

BEFORE **EDGAR R. HOLMES**, ALJ:

STATEMENT OF CASE AND PROCEDURAL HISTORY

The matter was transmitted to the Office of Administrative Law (OAL) to be heard as a contested case pursuant to the Administrative Procedure Act, *N.J.S.A.*52:14B-1 to –15, the act creating the OAL, *N.J.S.A.* 52:14F-1 to 13 and Court Directive concerning "Abbott Appeals" filed January 23, 2003.

STATEMENT OF THE RELEVANT UNCONTESTED FACTS

The parties convened on Friday, February 28, 2003, at the OAL in the Atlantic County Civil Courthouse, Atlantic City and agreed on the record that so much of the petition which concerns the Millville Early Childhood Program can be **WITHDRAWN** based upon the stipulations referred to in the letter attached hereto as J1 dated 2/28/03 and the documents listed in evidence P1 through P4.

The remaining issues shall be continued pending final funding decisions regarding K-12 programs.

The undersigned Administrative Law Judge shall retain jurisdiction.

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

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

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

2/28/03
DATE

Edgar R Holmes
EDGAR R. HOLMES, ALJ

Receipt Acknowledged:

March 6, 2003
DATE

M. Kathleen Duncan (Co)
DEPARTMENT OF EDUCATION

Mailed to Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

WSS

WITNESSES

None

EXHIBITS

For Petitioner:

P1	Letter	Frede and MaGinnes to Miller	01/06/03
P2	Letter	Frede to Miller	02/18/03
P3	Letter	Rosenberg to Chief School Administrator with attachment	02/06/03
P4	Memo	Rosenberg to Millville	02/26/03

For Respondent:

None

Joint Exhibit:

J1	Letter	Robinson to Holmes	02/28/03

ROBINSON & ANDUJAR

Attorneys At Law

2057 Wheaton Avenue
PO Box 788
Millville, New Jersey 08332
Phone 856/825-7700
Fax 856/825-4762
ARobinson@arnoldrobinson.com

Arnold Robinson
Certified Criminal Trial Attorney

Carlos Andujar, Jr.
Member of NJ Bar and Admitted to US Supreme Court

Jennifer Webb-McCrae
Member of NJ & PA Bar and US District Court (District of NJ)

February 28, 2003

Honorable Edgar R. Holmes
1201 Bacharach Boulevard
Atlantic City, NJ 08401

RE: Board of Education of the City of Millville vs.
NJ Department of Education
OAL Docket No.: EDU 00379-03S
Agency Ref. No.: 44-2/03

Dear Judge Holmes:

The above noted appeal concerns (1) Department of Education cuts of specific programs in the Early Childhood Program; and (2) Department of Education's failure to totally fund the Early Childhood Program. I am pleased to advise that the Petitioner hereby withdraws its appeal as to the specific program issues since the District has negotiated a resolution with Dr. Frede who issued an amended approval letter dated February 18, 2003.

As to the Petitioner's appeal of its overall Early Childhood Program aid funding, the Respondent has represented to the Petitioner that the total approved ECP budget of $6,687,451 (as revised by the correspondence from Respondent dated 2/18/03) will be fully funded. However, to date, final funding information has not been conveyed to the Petitioner. Accordingly, I withdraw the Petitioner's appeal of the Abbott District pre school programs and budget proposed for the 2003-2004 school year, pending the receipt of final funding information. This withdrawal is made with reliance upon the Respondent's stipulation that the matter will continue on the regular OAL Education case track pending receipt of final funding information. The parties consent to Administrative Law Judge Holmes' entry of an Order withdrawing the Abbott appeal component only. The Administrative Law Judge shall retain jurisdiction.

The issue reserved is whether final funding would require a reallocation from the District's K-12 budget funds to the ECP which would undermine or weaken the K-12 program.

I have conferred with DAG Kim Franklin and she consents to this request.

Jule
2/28/03

Thank you for your consideration in this matter.

Very truly yours,

ROBINSON & ANDUJAR, LLC

Arnold Robinson

AR:wss
cc: DAG Kimberly Lake Franklin (Via fax 609 777 4036 and regular mail)
Dr. G. Larry Millville, Superintendent
Bryce Kell, Business Administrator

OAL DKT. NO. EDU 0379-03
AGENCY DKT. NO. 44-2/03

BOARD OF EDUCATION OF THE CITY OF MILLVILLE, CUMBERLAND COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION (EARLY CHILDHOOD EDUCATION),	:	DECISION
RESPONDENT.	:	

The pertinent portion of the record in this matter, and the Partial Initial Decision Approving Withdrawal transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-19.2, have been reviewed.

Upon review, the Commissioner affirms the Partial Initial Decision and approves the partial withdrawal, with the remaining issues to be retained by the OAL as set forth in the Decision.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: April 17, 2003

Date of Mailing: April 21, 2003

204-03

S.A., on behalf of minor, R.A.; R.B., on behalf of minor, E.B.; S.K., on behalf of minor, J.K.; D.P., on behalf of minor, J.P.; and R.Z., on behalf of minor, D.Z.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF GARFIELD, BERGEN COUNTY AND NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION ON MOTION
RESPONDENTS.	:	

April 22, 2003

S.A. G.A.L. for R.A., R.B., G.A.L. for E.B., S.K., G.A.L. for J.K., D.P., G.A.L. for J.P., R.Z., G.A.L. for D.Z.,	:	OFFICE OF ADMINISTRATIVE LAW
Petitioners,	:	OAL Dkt. No. 87-3/03 Agency Dkt. No.
v.	:	
GARFIELD BOARD OF EDUCATION, its AGENTS, SERVANTS and EMPLOYEES, and DEPARTMENT OF EDUCATION, OFFICE OF EARLY CHILDHOOD EDUCATION,	:	ORDER
Respondents.	:	

THIS MATTER having been brought to the Office of Administrative Law by an Order to Show Cause and Petition for Emergent Relief by Maycher, Lynch, Bartzos, LLP (Dennis A. Maycher, Esq., appearing) attorneys for petitioners, S.A., G.A.L. for R.A., R.B., G.A.L. for E.B., S.K., G.A.L. for J.K., D.P., G.A.L. for J.P. and R.Z., G.A.L. for D.Z., and opposition having been submitted by Toni Belford Damiano Esq., (Steven M. Segalas, Esq., appearing) attorneys for respondent, Garfield Board of Education, and opposition having been submitted by Peter C. Harvey, Acting Attorney General of the State of New Jersey (Allison Colsey Eck, Deputy Attorney General, appearing) attorney for the Department of Education, Office of Early Childhood Education; and the Office of Administrative Law having considered the written and oral arguments

of the parties; and for the reasons set forth on the record on March 21, 2003; and for good cause shown;

IT IS on this 28th day of March, 2003

ORDERED that effective on February 21, 2003, Respondents Garfield Board of Education and the Department of Education, Office of Early Childhood Education, shall allow Petitioners' children to attend and complete the preschool program offered by the Garfield Board of Education for the balance of 2002-2003 school year only, which preschool program shall be completed no later than June 30, 2003, or upon the conclusion of the contested matter, whichever shall first occur; and

IT IS FURTHER ORDERED that Petitioners shall not be responsible for the payment of tuition and/or reimbursement to the District for the attendance of their children in the preschool program for the balance of the 2002-2003 school year during the pendency of this matter without prejudice; and

IT IS FURTHER ORDERED that a copy of this Order shall be served upon all parties within 5 days of the entry hereof.

This ORDER may be reviewed by the Commissioner of Education either upon interlocutory review pursuant to N.J.A.C. 1:1-14.10 or at the end of the contested case pursuant to N.J.A.C. 1:1-18.6

Barry N. Frank

Honorable Barry N. Frank, A.L.J.

CONSENT AS TO FORM

Maycher, Lynch, Bartzos, LLP
Attorneys for petitioners,
S.A., G.A.L. for R.A.
R.B., G.A.L. for E.B.
S.K., G.A.L. for J.K.
D.P., G.A.L. for J.P.
R.Z., G.A.L. for D.Z.

By: _____
Dennis A. Maycher, Esq.

Toni Belford Damiano, Esq.,
Attorney for Respondent,
Garfield Board of Education

By: _____
Steven M. Segales, Esq.

Peter C. Harvey, Acting Attorney General
of the State of New Jersey
Attorney for Respondent, Department of
Education, Office of Early
Childhood Education

By: _____
Allison Colsey Eck
Deputy Attorney General

OAL DKT. NO. EDU 3109-03
AGENCY DKT. NO. 87-3/03

S.A., on behalf of minor, R.A.; R.B., on behalf of minor, E.B.; S.K., on behalf of minor, J.K.; D.P., on behalf of minor, J.P.; and R.Z., on behalf of minor, D.Z.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF GARFIELD, BERGEN COUNTY AND NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION ON MOTION
RESPONDENTS.	:	

Petitioners' application for emergent relief was opened before the Commissioner of Education on March 17, 2003. On the same date, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing, which was conducted on March 21, 2003. At that time, the Administrative Law Judge (ALJ) issued an oral Order recommending that the requested relief be granted to petitioners, which was later memorialized by written order dated March 28, 2003. The recommended Order was transmitted to the Commissioner by cover memorandum dated April 15, 2003, and received on April 16, 2003.

In this connection, the Commissioner notes that OAL regulations provide that:

> Upon determining an application for emergency relief, the judge *forthwith* shall issue to the parties, *the agency head* and the Clerk a written order on the application. The Clerk shall file with the agency head any papers in support of or opposition to the application which were not previously filed with the agency and a sound recording of the oral argument on the application, if any oral argument has occurred. (emphasis added) (*N.J.A.C.* 1:1-12.6(i))

The Commissioner is further mindful that, notwithstanding the significant delay between issuance of the recommended Order in this matter and its transmittal to the agency, together with the necessary sound recording of oral argument, he is nevertheless bound by regulation to issue a final decision on petitioners' motion "no later than 45 days from entry of the judge's order ***." (N.J.A.C. 1:1-12.6(j))[1] The Commissioner further notes that to the extent the parties have acted in furtherance of the ALJ's recommended Order during this delay, they have done so at their own peril, particularly since the Order is herein set aside.

Petitioners are teaching staff members and employees of the Board of Education of the City of Garfield, an *Abbott* district, see *N.J.A.C.* 6A:24-1.2, whose children have been attending the Board's preschool program since the start of the 2002-2003 school year as non-resident students, free of charge. On or about February 28, 2003, the New Jersey State Department of Education's Office of Early Childhood Education informed the Board that "all children enrolled in Abbott-funded preschool classrooms must reside in the district to be eligible for this program." (Board's Answer at Exhibit A) Thereafter, by letter dated March 12, 2003, the Department presented the District with the following options:

> Parents can choose to keep their children in the program until the end of the school year and pay monthly tuition costs from March 3, 2003, or parents can remove their children from the program as originally planned and incur no fees. (*Id.* at Exhibit D)

Consequently, by letter dated March 12, 2003, the administration notified parents of these options, also instructing that the daily cost to remain in the preschool program is $47.93. The notice provided the following tuition assessment:

March 3-31	(21 days) x	$47.93	=	$1,006.53

[1] The Commissioner further notes that the ALJ's recommended Order erroneously indicates that it is reviewable pursuant to *N.J.A.C.* 1:1-14.10, those procedures established for review of an ALJ's interlocutory order, or at the end of the contested case, pursuant to *N.J.A.C.* 1:1-18.6. Notably, however, *N.J.A.C.* 1:1-14.10(a) specifically excepts those orders issued pursuant to the special review procedures for emergent relief, *supra.*

April 1-30	(16 days) x	$47.93	=	$ 766.88
May 1-30	(20 days) x	$47.93	=	$ 958.60
June 1-19	(14 days) x	$47.93	=	$ 671.02

(*Id.* at Exhibit G)

In accordance with *N.J.A.C.* 6A:3-1.6, a grant of emergent relief is considered an extraordinary remedy which may only be issued where petitioner has demonstrated that the relief is necessary to prevent irreparable harm; where the legal right underlying petitioner's claim is settled; where there is a likelihood of success on the merits; and where the relative hardship to the moving party favors granting such relief. *Crowe v. DeGioia*, 90 *N.J.* 126, 132-134 (1982). Here, petitioners assert that since "Time and Memorial" [sic], they have been permitted to have their nonresident children attend the Board's K-12 program on a non-tuition basis and, later, the preschool program, when it became available. (Petitioners' Letter Memorandum in Support of Motion for Emergent Relief at 2) They contend that they do not have the financial resources to pay the tuition for the program and the sudden removal, therefore, of their children from the program will negatively affect their emotional development and educational progress. (Petition of Appeal at 1, 2) In oral argument, petitioners assert that this interruption of services will irreparably harm their children. Petitioners further claim that their underlying legal right to a free preschool program is settled, in that *N.J.S.A.* 18A:38-3 grants a local board the authority to accept nonresident students and this perquisite has, over the years, become part of their bargaining unit's benefits. Contending that no material facts are in dispute, petitioners reason that the grant of their request to permit their children to remain in the program, without charge, until the end of the year will cause minimal hardship to the Board.

The Board counters that petitioners have not met the standard necessary for the grant of emergent relief, indicating that "[p]etitioners conveniently fail to disclose their salaries, which average in excess of $42,000 annually, and range from $19,000 to over $60,000."

(Board's Answer at 2)[2] In oral argument, the Board underscores that its decision to charge tuition for these students will cause only financial inconvenience to petitioners, a result which cannot constitute irreparable harm. Contrary to petitioners' contention with respect to their underlying legal rights, the Board emphasizes that there is no statutory entitlement to preschool education, and its obligation to provide preschool education extends only to students residing in *Abbott* districts. Finally, the Board notes that it has already been fined over $20,000 by the Department of Education for permitting nonresident, non-Abbott students into its preschool program and argues that:

> [p]etitioners are asking this Court to further disadvantage four hundred seventy three (473) students, who the State has already deemed to be disadvantaged, (and therefore entitled to preschool education), to the benefit of five (5) students, whose parents, presumptively, are responsible for providing their children with a pre-school education out of their own funds. (Board's Answer at 3)

Upon review of the parties' papers filed pursuant to the motion for emergent relief and the audiocassette tape of the oral arguments before the OAL, the Commissioner determines that petitioners have failed to satisfy the four-pronged standard necessary for the grant of emergent relief. In this regard, the Commissioner finds that even assuming, *arguendo*, there is credible evidence on the record to support the ALJ's finding that petitioners' children are likely to be emotionally and/or educationally harmed by their removal from the preschool program at this time,[3] any such finding would have to be predicated on the notion that petitioners *are* financially incapable of paying the tuition to keep their children in the program. Not only have

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[2] The Board's Answer contains a certification from Superintendent Perrapato that S.A. is paid $39,900, plus a $7,500 stipend annually; R.B. is paid $51,455 annually; S.K. is paid $61,185 annually; D.P. is paid $61,185 annually and R.Z. is paid $19,089 annually. (Answer, Certification of Nicholas Perrapato at 4)

[3] The Commissioner notes, however, that this record is devoid of such evidence.

petitioners failed to make a preliminary showing of financial hardship, however, but the Commissioner determines that, under these circumstances, even a preliminary demonstration of financial hardship would be insufficient, where "[h]arm is generally considered irreparable in equity if it cannot be redressed adequately by monetary damages." *Crowe v. DeGioia*, supra, at 132-133.[4]

Further, the Commissioner finds that petitioners have not demonstrated that they have a settled, legal right to have their children attend a preschool program at the Board's expense. Indeed, the statutory authority on which petitioners rely provides only that a board *may* admit nonresident students to the schools in its district, "with or without payment of tuition, as the board may prescribe." *N.J.S.A.* 18A:38-3. Furthermore, even assuming, *arguendo*, that enrollment in the Board's preschool program has become a fixed perquisite of the bargaining unit's contract, the Supreme Court's mandate to provide preschool services to students residing in the identified Abbott districts, *Abbott v. Burke*, 153 *N.J.* 480, 503-508 (1998), together with the State Board of Education's proposed regulations relative thereto, *N.J.A.C.* 6A:10-3.1 *et seq.*, cast doubt as to the legitimacy of such a contractual benefit. Also, for this reason, the Commissioner cannot find that petitioners have demonstrated a likelihood of success on the merits of their claim. Finally, upon balancing the relative hardships to the parties, the Commissioner finds that petitioners have not demonstrated that they, or their children, will suffer a greater hardship than the Board if the relief is not granted, particularly where, absent such relief, petitioners' children are, nevertheless, permitted to remain in the program on a tuition basis.

[4] The Commissioner recognizes that *Crowe* also provides that, "[i]n certain circumstances, severe personal inconvenience can constitute irreparable injury justifying issuance of injunctive relief." *Crowe, supra,* at 133. Petitioners, however, have made no such preliminary showing.

In determining that petitioners are not entitled to emergent relief, the Commissioner underscores that the Board's decision as articulated in the letter of March 12, 2003, *supra*, stands. That is, petitioners' nonresident children may remain in the pre-school program until the end of the school year on a tuition basis, retroactive to March 14, 2003. However, if petitioners so choose to keep their children in the preschool program, in accordance with guidance provided by the Office of Early Childhood Education in the Department of Education, "resident children have priority over the non-resident children, and must be given space in the Abbott preschool program." (Board's Answer at Exhibit D) Thus, seats occupied by petitioners' children must yield to any request for services by an Abbott student who is currently not being served.

Accordingly, the ALJ's recommended Order is rejected and petitioners' request for emergent relief is denied. This matter shall continue for those proceedings which may be necessary to bring it to conclusion.

IT IS SO ORDERED.[5]

COMMISSIONER OF EDUCATION

Date of Decision: April 22, 2003

Date of Mailing: April 23, 2003

[5] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

205-03

#205-03E

BOARD OF EDUCATION OF THE TOWNSHIP OF WALL, MONMOUTH COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON MOTION
MARY LOU MARGADONNA,	:	
RESPONDENT.	:	

April 25, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2409-03
AGENCY DKT. NO. 123-4/03

BOARD OF EDUCATION
OF THE TOWNSHIP OF WALL,
Petitioner,
v.
MARY LOU MARGADONNA,
Respondent.

Douglas J. Kovats, Esq., for petitioner (Kenny, Gross & Kovats, attorneys)

Richard B. Stone, Esq., for respondent (Stone Mandia, attorneys)

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

Record closed: April 24, 2003 Decided: April 25, 2003

STATEMENT OF THE CASE

The basic issue here is whether respondent Mary Lou Margadonna may hold office as a member of the petitioner Board of Education of the Township of Wall (BOE).

The case is complicated, but can be summarized. N.J.S.A. 18A:12-2 states, "No member of any board of education shall be interested directly or indirectly in any contract with or claim

against the board." N.J.S.A. 19:60-5 states that each nominating petition for election to a school board shall state "That the person so endorsed is legally qualified to be elected to the office." For several school years, the BOE employed respondent as a non-tenured teacher, but, in 2002, it declined to offer her another contract to continue that employment. Thereafter, in 2002, respondent served the BOE with a New Jersey Tort Claims Act notice of claim, alleging wrongful loss of employment, damage to her good name, etc. N.J.S.A. 59:8-4. Thereafter, in 2002 also, she petitioned the Commissioner of Education, naming the BOE and its employees and agents as respondents; claiming that the BOE should afford her a public hearing relative to whether it should have offered her another contract of employment; and claiming that the BOE should offer her a contract as a teacher, which by statute would result in tenure. N.J.S.A. 18A:6-9; N.J.S.A. 18A:28-5. In 2002 the Commissioner dismissed her petition, the State Board of Education affirmed, and she has appealed to the Superior Court, Appellate Division. R. 2:2-3(a)(2). In 2003 she submitted to the BOE her nominating petition for the BOE's April 15, 2003, election, wherein, despite her claim that the BOE should employ her and despite N.J.S.A. 18A:12-2, she certified that she was "legally qualified" to be a member of the BOE. P-1(5). She appeared on the April 15, 2003, election ballot and received the second highest number of votes. Consequently, absent disqualification, she could begin as a BOE member at the BOE's April 29, 2003, reorganization meeting required by N.J.S.A. 18A:10-3(b). The BOE requested that respondent notify it as to (1) whether she agreed to withdrawal and/or dismissal with prejudice of her claims against the BOE or (2) whether she would decline a seat on the BOE. She refused withdrawal and/or dismissal of her claims, so the BOE filed the petition resulting in this case. The BOE requested that respondent be ordered to choose between the dismissal of her claims or declining office and the BOE requested that, if she declined office, the matter be referred to the county superintendent of schools for filling the membership of the BOE. N.J.S.A. 18A:12-15. On the record made April 24, 2003, respondent agreed to dismissal of her claims with prejudice, except for a claim still pending before the Appellate Division, i.e., that the BOE must afford her the public hearing relative to whether it should have offered her another contract of employment. Respondent's attorney argues that this would not constitute a disqualifying claim within the intent of N.J.S.A. 18A:12-2. However, the BOE submits that respondent is continuing a claim and that, consequently N.J.S.A. 18A:12-2 prohibits her service as a BOE member. I agree with the BOE and enter orders accordingly.

PROCEDURAL HISTORY

On April 22, 2003, the BOE filed its verified emergent petition with the Department of Education. N.J.S.A. 18A:6-9. The Department transmitted the contested case to the Office of Administrative Law (OAL), where it was filed on April 23, 2003. N.J.S.A. 52:14B-2(b). On April 24, 2003, in the OAL, Trenton, the respondent's opposition papers were filed and the case was argued.

FINDINGS OF FACT

During the 1999-2000, 2000-01, and 2001-02 school years, the BOE employed respondent as a non-tenured teacher. Consequently, if the BOE had employed her for the 2002-03 school year, pursuant to N.J.S.A. 18A:28-5, she would have obtained tenure.

Late in the 2001-02 school year, respondent began to receive reviews that she alleges were inconsistent with her excellent performance and, in April 2002 the BOE notified her that it would not offer her a contract for the 2002-03 school year. The respondent requested a statement of the BOE's reasons for not offering a contract and the BOE provided such a statement and notified her that in that regard she had an opportunity for an informal appearance before the BOE. P-1; see N.J.S.A. 18A:27-3.2, -4.1.

On June 11, 2002, respondent had her informal appearance before the BOE and, thereafter, the BOE notified her that it had not taken action to offer her a contract. Thereafter, members of the public appeared before the BOE to urge it to offer respondent another contract; but the BOE declined to do so.

On June 18, 2002, respondent requested a public hearing before the BOE and the BOE denied her request. P-1(3).

On July 17, 2002, respondent served the BOE with a New Jersey Tort Claims Act notice of claim, wherein she claimed that the BOE had wrongfully denied her rights of due process and wrongfully denied her a public hearing, causing "loss of employment [and] damage to [her] good

name and reputation," etc., and wherein she demanded damages for "loss of salary and benefits," etc. P-1(2); N.J.S.A. 59:8-4.

On or about July 18, 2002, respondent filed a petition with the Commissioner of Education, captioned as Margadonna v. Wall BOE et al., Agency Dkt. No. 225-7/02, wherein she alleged that the BOE had denied her the "right to a public hearing" on the matter of whether it should employ her as a teacher for the 2002-03 school year and wherein she demanded relief, including continued employment as a BOE teacher with tenure. P-1(1); N.J.S.A. 18A:6-9.

On October 29, 2002, in Margadonna v. Wall BOE et al., Agcy Dkt. No. 225-7/02, the Commissioner concluded that respondent's (petitioner in that case) petition failed to state a claim on which relief could be granted and he dismissed it. P-1(3). The Commissioner cited Board of Regents of State Colleges v. Roth, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972), as holding that a non-tenured teacher does not have a protected interest in continued employment and, if the school declines to continue his or her employment the United States Constitution's Fourteenth Amendment does not guarantee due process in that regard. The Commissioner cited Donaldson v. Board of Education of North Wildwood, 65 N.J. 236 (1974), holding that a board of education need not base its declining to continue employment of a teacher on unsatisfactory performance and the board's action or inaction may be based on another valid reason; although a board may not decline to continue employment because of a teacher's membership in a union or exercise of a constitutional right and the teacher has a right to a statement of reasons from the board for declining to continue the employment. The Commissioner cited Lydia Anderson v. State-operated School District of the City of Newark, State Board (February 7, 2001), as holding that, under the New Jersey Constitution, a non-tenured teacher has limited rights to due process in that regard. The Commissioner cited Angelo Velasquez v. Board of Education of the Borough of Brielle, State Board (August 6, 1997), as holding that, when a board of education declines to continue a non-tenured teacher's employment, the teacher may appear for an informal meeting with the board; but he or she does not have a right to a vote by the board on whether another contract should be offered. The Commissioner cited Dore v. Bedminster Township Board of Education, 185 N.J. Super. 447, at 453 (App. Div. 1982), holding that a district board of education's decision not to continue employment of a non-tenured teacher may be based on a broad range of factors, including factors other than the teachers' evaluations and boards have

"virtually unlimited discretion in hiring or renewing non-tenured teachers." The Commissioner also cited Guerriero v. Board of Education of the Borough of Glen Rock, State Board (February 6, 1986), aff'd, No. A-3316-85T6 (App. Div. 1986), as holding that, where a non-tenured teacher challenges a board's declining to offer another contract on the grounds that facts do not support the board's reasons, the non-tenured teacher is entitled to litigate the matter only if the facts he or she alleges are true would constitute a violation of a constitutionally or statutorily conferred right. Given the above, the Commissioner agreed with the BOE that Rice v. Union County Regional High School District, 155 N.J. Super. 64 (App. Div. 1977), cited by respondent as requiring the public hearing relative to the BOE's declining to offer her another contract, did not require such a hearing.

The respondent appealed the Commissioner's decision in Margadonna v. Wall BOE et al., Agency Dkt. No. 225-7/02, to the State Board of Education, which, on February 5, 2003, affirmed the Commissioner. P-1(4); N.J.S.A. 18A:6-27, -28

On February 24, 2003, respondent submitted to the BOE her nominating petition relative to the April 15, 2003, election for membership on the BOE. Her petition certified that she was "legally qualified under the laws of the State to be elected a member of the [BOE]" and included sufficient signatures for placement of her name on the ballot. P-1(5); N.J.S.A. 19:60-5d.

On March 7, 2003, respondent filed an appeal from the State Board's decision in Margadonna v. Wall BOE et al., Agency Dkt. No. 225-7/02, with the Superior Court, Appellate Division, A-3338-02T2. P-1(6); R-2; R. 2:2-3(a)(2).

In the April 15, 2003, BOE election, the respondent's vote total was the second highest, i.e., sufficient for election to the BOE, absent disqualification. P-1.

By letter dated April 15, 2003, the BOE notified respondent that she had obtained sufficient votes to take a seat on the BOE; that, given her claims against the BOE, N.J.S.A. 18A:12-2 prohibited her from holding office as a member of the BOE; that, by April 21, 2003, she should notify the BOE of whether she would withdraw or dismiss the claims with prejudice; and that, if she failed to do so, the BOE would petition for relief. P-1(7).

By letter dated April 16, 2003, respondent's attorney responded that, due to the "complexity of this matter and a pre-planned vacation, a proper response [could not] be provided by . . . April 21, 2003" and he requested a two-week extension to respond. P-1(8).

By letter dated April 16, 2003, the BOE notified respondent that (as required by N.J.S.A. 18A:10-3(b)), on April 29, 2003, it would hold its reorganization meeting and it could not consent to the two-week delay in her response. P-1(9).

By way of respondent's attorney's April 23, 2003 letter brief, respondent represented that she "will withdraw her Notice of Tort Claim under [N.J.S.A. 59:1-1 et seq.]." R-1; emphasis added. On the record made April 24, 2003, respondent agreed to dismissal with prejudice of her claims against the BOE, except for her demand in Margadonna v. Wall BOE et al., No. A-3338-02T2, before the Appellate Division, that the BOE afford her a public hearing relative to whether it should have offered her another contract of employment. Her attorney argued that this does not constitute a claim within the intent of the laws cited above and that, if the BOE decides to offer her employment, she may then decide whether to accept the employment or reject it and continue as a member of the BOE.

CONCLUSIONS OF LAW

"No member of any board of education shall be interested directly or indirectly in any contract with or claim against the board." N.J.S.A. 18A:12-2. Consistent with N.J.S.A. 18A:12-2, the petition of a candidate for nomination for election to a board of education must state that he or she "is legally qualified to be elected to the office." N.J.S.A. 19:60-5.

From July 17, 2002, when respondent served the BOE with her New Jersey Tort Claims Act notice of claim, until April 24, 2003 (during the argument of this case), the respondent asserted a claim that the BOE had wrongfully denied her rights of due process and wrongfully denied her a public hearing, causing "loss of employment [and] damage to [her] good name and reputation," etc., and she demanded damages for "loss of salary and benefits," etc. P-1(2); N.J.S.A. 59:8-4.

On or about July 18, 2002, respondent filed the petition with the Commissioner of Education, Margadonna v. Wall BOE et al., Agency Dkt. No. 225-7/02, wherein she alleged that the BOE had denied her the "right to a public hearing" on the matter of whether it should employ her as a teacher for the 2002-03 school year and wherein she claimed relief, including continued employment as a BOE teacher with tenure. P-1(1). She continued her claim until April 24, 2003 (during the argument of this case), when she agreed to dismissal with prejudice of her petition's claims (now in the Appellate Division), except that she continues her claim that the BOE must afford her a public hearing relative to whether it should have offered her another contract of employment.

Given the above, on February 24, 2003, when the respondent submitted her petition, and on April 15, 2003, at the time of the election, she was directly interested in claims against the BOE that related to a contract and employment.

Howell Township Board of Education v. Suchcicki, 93 N.J.A.R.2d (EDU) 157, where an employee of the board of education submitted a petition for nomination for election to the board, applied N.J.S.A. 18A:12-2 and N.J.S.A. 18A:14-10 (repealed). N.J.S.A. 18A:14-10, like N.J.S.A. 19:60-5 which replaces it, required that petitions for nomination for election to a board of education state that the proposed candidate "is legally qualify to be elected" and the decision states:

> Public policy demands that one who holds public office discharge his duties with undivided loyalty and from this policy the concept of "incompatibility" has evolved. Consistent with this concept, one may not hold two public offices, each of which has an interest which competes with the other, and one cannot hold two public offices where his performance in one office would be subordinate to the other, or subject to its control, or requires him to choose the obligation of one office over another. In such circumstances, it is not enough for the office holder to abstain from participation when an area of conflict arises; holding both the public offices is prohibited. See Jones v. MacDonald, 33 N.J. 132 (1960); Dunn v. Froehlich, 155 N.J. Super. 249 (App. Div. 1978); Kaufman v. Pannuccio, 121 N.J. Super. 27 (App Div. 1972);

Visotcky v. City Council of City of Garfield, 113 N.J. Super. 263 (App. Div. 1971).

Consistent with the concept of "incompatibility," N.J.S.A. 18A:12-2 provides that "No member of any board of education shall be interested directly or indirectly in any contract with or claim against the board." Also, a nominating petition, such as that filed by the respondent, must state that the proposed candidate "is legally qualified to be elected" to the board . . . ." N.J.S.A. 18A:14-10 (Emphasis added.) [repealed and replaced by N.J.S.A. 19:60-5].

Surely the respondent's employment contract, if not his union responsibilities, give him the kind of "interest" which N.J.S.A. 18A:12-2 speaks of. Compare Visotcky v. City Council of Garfield, supra, wherein it was decided that holding the position of teacher is "incompatible" with membership on the Board of Education in the same school district and where membership on the board would be invalid in such circumstances.

During the hearing, respondent represented that it was and is his intention, conditioned upon his election, to resign as an employee and union representative. However, as quoted above, in N.J.S.A. 18A:14-10, the Legislature speaks in the present tense of legal qualification for election to the Board, i.e., there must be qualification at the time of execution of the petition and its accompanying certificate. (This is a reasonable and practical condition intended to assure that a candidate will not later reconsider and decide not to give up his disqualifying employment, etc.) Therefore, I **FIND** and **CONCLUDE** that, despite the respondent's petition's statement and accompanying certification wherein he is described as "qualified," he was and is not qualified.

During the hearing, the respondent also stated that he was unaware of his lack of qualification. This statement is somewhat inconsistent with the respondent's representation that he intended to resign his position as a Board employee if elected, but, in any event, it is the proposed candidate's responsibility to learn applicable laws before certifying his qualification for election. See Graham v. N.J. Real Estate Comm'n, 217 N.J. Super. 130, 138 (App. Div. 1987), and In re Krah, 130 N.J. Super. 366 (App. Div. 1974), for the proposition that everyone is conclusively presumed to know the law, statutory and otherwise, and, in the absence of statutory or constitutional requirements, an agency is not required to give actual notice of the law.

> Given the above facts and circumstances, I **FIND, CONCLUDE** and **DECLARE** as follows: (1) The respondent is not legally qualify for election to the Board; (2) The respondent's nominating petition is invalid, null and void; and (3) The respondent's name as a candidate for election to the Board must be removed from the ballot relative to the April 7, 1992 election.
>
> [Howell Township v. Suchcicki, supra, 93 N.J.A.R.2d at 157-58.]

Since respondent was continuing all of her claims against the BOE at the time she submitted her petition for nomination for election to the board, pursuant to N.J.S.A. 18A:12-2 she was not qualified to serve on the BOE; her petition and her presence on the ballot violated N.J.S.A. 19:60-5; and her election may be voided.

Respondent's attorney argues that her petition in Margadonna v. Wall BOE et al., No. A-3338-02T2, does not constitute a "claim" within the intent of N.J.S.A. 18A:12-2. However, in that case, as the "petitioner" she is "requesting relief or action." N.J.A.C. 1:1-2.1 "Petitioner"; see also N.J.A.C. 6A:3-1.3. See also N.J.A.C. 1:1-1.3(a) and R. 4:5-2, stating that a claim contains a "statement of the facts . . . [purportedly] showing that [she] is entitled to relief." The respondent's petition alleges facts and sets forth a demand for relief: an order commanding the BOE to afford her the public hearing. (It is similar to a mandamus action. Compare R. 4:69.) Consequently, respondent's petition contains a "claim" and N.J.S.A. 18A:12-2 prohibits her holding office as a member of the BOE.

Further, in respondent's case in the Appellate Division, she continues her claim that an order should be entered requiring the BOE to hold a public hearing relative to whether it should have offered her another contract of employment.

The respondent's attorney also contends that N.J.S.A. 19:60-5 and N.J.S.A. 18A:12-2 violate her constitutional rights. In these statutes, the Legislature has articulated important policies to avoid conflicts of interest for public officials and statutes are presumed to be lawful. In any event, this administrative case has not been transmitted here for a decision on such an issue and, as the BOE's attorney has pointed out, respondent has not notified the Attorney General of this challenge to State statutes. N.J.S.A. 52:14B-2(b).

To summarize, the respondent (represented by counsel) brought and maintained claims against the BOE and, contrary to N.J.S.A. 18A:12-2 and despite the requirements of N.J.S.A. 19:60-5, she certified in her nominating petition that she was qualified to serve as a BOE member. Despite the opportunity to do so, she has again refused to dismiss her claim against the BOE. Her real claim and interest is in a contract of employment with the BOE and N.J.S.A. 18A:12-2 prohibits a BOE member from maintaining such a claim. Consequently, although frustrating the will of her voters, her actions require the results ordered below.

ORDER

Consistent with the above, (1) I **ORDER** the respondent disqualified from holding office as a member of the BOE and (2) I refer to the county superintendent of schools the decision relative to the filling the membership of the BOE. N.J.S.A. 18A:12-15.

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

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

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

April 25, 2003
DATE

JOHN R. TASSINI, ALJ

Receipt Acknowledged:

April 25, 2003
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

EXHIBITS

For Petitioner:

P-1 Verified Emergent Petition & Verification, April 22, 2003

P-1(1) Petition, Margadonna v. Wall BOE et al., Agency Dkt. No. 225-7/02, July 8, 2002

P-1(2) Letter from Stone Mandia, July 12, 2002, with notice of claim under the New Jersey Tort Claims Act, July 12, 2002

P-1(3) Letter/decision from Commissioner of Education, dismissing petition, Margadonna v. Wall BOE et al., Agency Dkt. No. 225-7/02, October 29, 2002

P-1(4) Decision of State Board of Education, affirming Commissioner's Margadonna v. Wall BOE et al., Agency Dkt. No. 225-7/02, decision, February 5, 2003

P-1(5) Nominating Petition for April 15, 2003, Annual School Election for Margadonna, February 24, 2003

P-1(6) Notice of Appeal to the Superior Court, Appellate Division, from the Decision of State Board of Education, affirming Commissioner's Margadonna v. Wall BOE et al., Agency Dkt. No. 225-7/02, decision, February 5, 2003, March 5, 2003

P-1(7) Letter from BOE's attorney, April 15, 2003

P-1(8) Letter from respondent's attorney, April 16, 2003

P-1(9) Letter from BOE's attorney, April 16, 2003

For Respondent:

R-1 Letter brief, April 23, 2003

R-2 Statement of Issues, Margadonna v. Wall BOE et al., App. Div. No. A-3338-02T2, with exhibits

OAL DKT. NO. EDU 2409-03
AGENCY DKT. NO. 123-4/03

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

PETITIONER,

V.

MARY LOU MARGADONNA,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION ON MOTION

Upon careful review of the papers submitted pursuant to the Petition for Emergent Relief submitted by the Board of Education of the Township of Wall, and in consideration of the legal standard set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982), the Deputy Commissioner, to whom this matter has been delegated for review, pursuant to *N.J.S.A.* 18A:4-34, hereby orders that Respondent Mary Lou Margadonna must elect, by noon on Tuesday, April 29, 2003, whether she will withdraw her claim against the Board of Education and assume her seat on the Board at its meeting on April 29, 2003 **or** whether she will maintain such claim and be precluded from taking her seat on that date, pending the Commissioner's final review of this matter on its merits.

IT IS SO ORDERED. *

ACTING COMMISSIONER

Date of Decision: 4/25/03

Date of Mailing: 4/25/03 (by Fax)

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

206-03

IN THE MATTER OF THE TENURE	:	
HEARING OF DENNIS GILLIAMS,	:	
SCHOOL DISTRICT OF THE CITY OF	:	COMMISSIONER OF EDUCATION
CAMDEN, CAMDEN COUNTY.	:	DECISION
	:	

May 1, 2003

AGENCY DKT. NO. 404-12/02

IN THE MATTER OF THE TENURE	:	
HEARING OF DENNIS GILLIAMS,	:	
SCHOOL DISTRICT OF THE CITY OF	:	COMMISSIONER OF EDUCATION
CAMDEN, CAMDEN COUNTY.	:	DECISION
	:	

This matter was opened before the Commissioner of Education on December 23, 2002 through the certification of tenure charges alleging chronic and excessive absenteeism, incapacity, incompetence, unbecoming conduct, abuse of sick leave and neglect of duty against a tenured teacher employed by the Board of Education of the City of Camden.

The Commissioner directed respondent, via both certified and regular mail on December 24, 2002, to file an Answer to the tenure charges against him.[1] By letter dated January 24, 2003, the Board notified the Commissioner that, upon further investigation, respondent was believed to have moved to a new address as of July 2002. The Board, therefore, served an additional copy of the charges and exhibits upon respondent on January 24, 2003. Again, the Commissioner directed respondent, via both certified and regular mail on January 27, 2003, to file an Answer to the tenure charges against him.[2]

Both communications from the Bureau of Controversies and Disputes clearly provided respondent notice that, pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4, an individual

[1] The notice sent via certified mail to respondent's address in Camden, New Jersey was returned unclaimed. The notice sent by regular mail to the same address was not returned.

[2] Again, the notice sent by certified mail to respondent's address in Maple Shade was returned unclaimed, but the notice sent via regular mail was not returned.

against whom tenure charges are certified shall have *15 days from the date such charges are filed with the Commissioner* to file a written response to the charges, and that failure to answer within the prescribed period, where no extension has been applied for and granted, or where there has been no submission by the charged employee of a responsive filing indicating that he does not contest the charges, **will** result in the charges being deemed admitted by the charged employee. Because no reply has been received from respondent in response to the Board's charges, each count of the charges against respondent is deemed to be admitted. *N.J.A.C.* 6A:5-3(c).

The Commissioner's review of the tenure charges certified against respondent by the Board and the statement of evidence in support of those charges indicate that respondent has been chronically and excessively absent over a period of four school years. In the 2001-2002 and 2000-2001 school years, respondent was absent for 173 days and 91.5 days, respectively, for a total of 264.5 days, representing 72% of the time. In the 1999-2000 and 1998-1999 school years, respondent was absent for 29 days and 22.5 days, respectively. (Tenure Charges at 1-4)

Further, respondent has demonstrated an "abusive pattern of absences" by "straddling" his absences over weekends, holidays and other dates on which the Camden schools were closed. (*Id.* at 5) Additionally, respondent failed to comply with district procedures and requirements for taking sick leave, in that he did not obtain approval for any of his leaves of absence *prior* to the first day of the leave. (*Id.* at 6)

The Board recognizes that although many of respondent's absences were approved leaves, he has been absent since the start of the September 2001 school year *without leave*, and without submitting necessary medical documentation to the Board. In this regard, respondent was notified by letter dated September 20, 2001 that he was absent without leave and was directed to contact the Office of Human Resources as soon as possible. Respondent did not,

however, respond to the letter. (*Id.* at 3) Because respondent has failed to return to work following the expiration of his last approved leave on June 30, 2001 and has failed to request an additional extension, as required by his collective bargaining agreement, respondent has shown no intent to resume his duties and has abandoned his position. (*Id.* at 12, 13) Finally, as evidenced by numerous notes from his physicians, including the last indication of respondent's medical condition which the Board received from Dr. Stanley Schwartz on June 11, 2001 deeming him "totally incapacitated," respondent is incapable of returning to work. (*Id.* at 10, 11)

The Board asserts:

> While the great majority of Gilliams' absences during the 2000-2001 school year were on extended leave and approved by the Board, these days are nonetheless charged as absences and represent a significant disruption of the continuity of instruction for his students, and a significant loss of instruction time for the district. It should be emphasized that Mr. Gilliams teaches special education students who already face a multitude of learning difficulties, and require consistency. By vacating himself from his duties for 264.5 days in the last two (2) school years, or 72% of that time, Mr. Gilliams has not only deprived his special needs students of their regular and customary teacher, he has thereby hindered their academic achievement. (*Id.* at 3)

Initially, the Commissioner recognizes that the enabling statute provides that tenured staff shall not be dismissed or reduced in compensation "except for inefficiency, incapacity, unbecoming conduct, or other just cause***." *N.J.S.A.* 18A:6-10. Additionally, the Commissioner recognizes that "[w]hether the charges fall under any of the categories is a determination for [him] to make." *In the Matter of the Tenure Hearing of Walter Driscoll, School District of Woodstown-Pilesgrove Regional High School, Salem County,* decided by the New Jersey Superior Court, Appellate Division, October 25, 1983, Docket No. A-748-82T2, Slip Opinion at 3. Deeming the above charges to be admitted, and noting that respondent has chosen not to deny the specific allegations contained therein, the Commissioner finds that the Board has

demonstrated that respondent is incapable of fulfilling his duties as a teacher, and has further demonstrated just cause for respondent's dismissal by virtue of his chronic absenteeism, abuse of sick leave and abandonment of his position.[3]

IT IS ORDERED this 1st day of May 2003 that summary decision shall be granted to the Board, and respondent shall be dismissed from his tenured position as a teacher in the Board's employ as of the date of this order. This matter shall be referred to the State Board of Examiners pursuant to *N.J.A.C.* 6:11-3.6 for action against respondent's certificate as it deems appropriate.[4]

COMMISSIONER OF EDUCATION

Date Issued: 5|01|03

Date Mailed: 5|01|03

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[3] It is herein noted that the Board also charges respondent with "neglect of duty" for, *inter alia*, failing to improve his lesson plans and the submission of same, demonstrating a record of lateness and having problems maintaining control over his classroom. (Tenure Charges at 7, 8) The Commissioner finds, however, these charges sound predominately in inefficiency and, therefore, trigger the procedural safeguards identified in *N.J.S.A.* 18A:6-11; that is, the charged employee must be provided at least 90 days in which to overcome the inefficiency before the charge may properly be certified to the Commissioner. *N.J.A.C.* 6A:3-5.1(c); *See, also, Bd. of Ed. of the Township of Teaneck, Bergen County v. Wilburn*, 91 *N.J.A.R.* 2d (EDU) 48, 58, *aff'd* 92 *N.J.A.R.* 2d (EDU) 328, *aff'd* New Jersey Superior Court, Appellate Division, Dkt. No. A-4663-91T2, April 12, 1993. In that the record does not evidence the Board's compliance with the procedural mandate, the Commissioner determines to dismiss Charge Three.

[4] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

CAROL UNANGST,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF FREDON, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, former tenured part-time art teacher, sought to rescind her resignation, claiming she resigned under duress. Petitioner contended she was the victim of battered woman's syndrome and that, as a result, incapable of rational decision-making. The Board alleged the petition was untimely filed.

The ALJ noted that it was undisputed that the petition was not filed within 90 days of the acceptance of petitioner's resignation and that petitioner was a victim of domestic abuse. The ALJ determined, however, that there was sufficient evidence to demonstrate that petitioner possessed the mental capacity to make meaningful decisions, seek professional help and receive legal advice. Yet, she waited until it was too late to challenge the resignation. A showing of emotional stress alone, without the showing of circumstances amounting to genuine incapacity, was not enough to toll the time limit for appeal. The petition was dismissed.

The Commissioner concurred with the ALJ that the petition was untimely filed. Citing *LeMee* and *Pacio*, the Commissioner did not find that the factual circumstances herein constituted grounds for relaxation of the 90-day rule.

May 1, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 9828-98
AGENCY DKT. NO. 434-9/98

CAROL UNANGST,
Petitioner,
v.
BOARD OF EDUCATION
OF THE TOWNSHIP OF FREDON,
Respondent.

Nancy I. Oxfeld, Esq., for petitioner
(Oxfeld, Cohen, LLC, attorneys)

Craig U. Dana, Esq., for respondent
(Morris, Downing & Sherren, attorneys)

Record Closed: March 10, 2003 Decided: March 13, 2003

BEFORE **KEN R. SPRINGER**, ALJ:

Statement of the Case

This is an appeal by a tenured seeking staff member seeking to rescind her resignation on the ground of duress. Specifically, petitioner contends that, at the time of her resignation, she was the victim of battered woman's syndrome and that, as a result, incapable of rational decision-making. Prior to hearing, district moved to dismiss the petition for failure to comply with the ninety-day rule set forth in *N.J.A.C.* 6:24-2.1(c)

[recodified as *N.J.A.C.* 6A-3.1.3(d).] Recognizing that her petition was not filed within ninety days of the school district's acceptance of her resignation, petitioner urges that strict application of the ninety-day rule should be relaxed under *N.J.A.C.* 6:24-1.17 [recodified as *N.J.A.C.* 6A:3-1.16] to prevent injustice. In response, respondent argues that petitioner was not mentally incapacitated or incompetent so as to prevent her from filing a timely appeal. For the reasons that follow, the circumstances do not justify relaxation of the limitation period for filing a school-law complaint.

Procedural History

Petitioner Carol Unangst ("Unangst") filed her verified petition with the Commissioner of Education ("Commissioner") seeking reinstatement and back pay on September 21, 1998. Respondent Fredon Board of Education ("Board") filed its answer on October 16, 1998, raising the affirmative defense of untimeliness. Subsequently, on October 29, 1998, the Commissioner transmitted the matter to the Office of Administrative Law ("OAL") for hearing as a contested case.

On May 17, 2000, the Board filed a notice of motion, together with a supporting certification and legal brief. Unangst filed her opposing papers on August 16, 2000. The Board filed a reply on August 18, 2000. Thereafter, on August 23, 2000, the OAL took testimony and heard oral argument on the Board's motion.[1] Witnesses and exhibits are listed in the appendix.

Findings of Fact

Carol Unangst had been employed part-time as an art teacher in the Fredon, New Jersey school district since September 1994 and had attained tenure in that position. She worked three days per week in Fredon and for the remaining two days

[1] While the Board's papers were designated a motion for summary decision, the OAL held an administrative hearing and allowed testimony on the issue of timeliness. Therefore, the motion will be treated as a motion to dismiss based on the proofs.

per week in the neighboring school district of Frelinghuysen, New Jersey. At the outset, it is undisputed that Unangst did not file her petition within ninety days of the Board action of which she complains. Unangst submitted her letter of resignation to the Board on March 12, 1998. One week later, on March 19, 1998, the Board accepted her resignation at a public meeting.[2] Nevertheless, she did not file her petition until six months later on September 21, 1998.[3] Moreover, it is undisputed that Unangst had been horrendously abused by her boyfriend and was under great stress at the time of her resignation. Rather, the disagreement involves whether her thought processes were so substantially impaired that she could not appreciate the nature and consequences of her action.

Unangst's relationship with the man who harassed her, Arthur Smith, started in 1994 in Fort Worth, Texas. Although she knew he had a criminal record and was on parole, she did not learn until later that he had been convicted for murder. Their relationship started as a friendship and blossomed into romance. In or around August 1994, Unangst moved from Texas to Pennsylvania in order to live near her grandchildren. Smith joined her in April 1995, and moved into the farmhouse in which she was living. During the following year, the relationship began to deteriorate.

According to Unangst, Smith became overly possessive and "abusive verbally." When she babysat for her grandchildren, Smith would call her "on an hourly basis" and demand to know when she would be coming home. On one night in January 1998, Smith warned her that, if he should ever become angry, "you'd be dead." Then he threatened to bury part of her body in the swamp behind the farmhouse and another part of her body in the unused well on the front lawn. On another occasion, he threatened that, if she didn't do what he wanted, she "would never see [her] grandchildren again." Although he would sometimes push her, she never went to the hospital or sought medical treatment. Afterwards, he would be "sorry and remorseful,"

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[2] Unangst had prior notice of this meeting but opted not to attend.
[3] In his sworn certification, superintendent of schools Frank Fehn recites that he informed Unangst of the Board's resolution by telephone on March 20, 1998.

bring her flowers, beg her forgiveness and promise never to do it again. He would be nice "for a few weeks" and then the cycle would start over again.

A turning point occurred in January 1998, when Smith told her that he had murdered someone else. Unangst called the Pennsylvania state police to get him out of her house and applied to the Northampton County Court for a protective order. About a week later, Unangst let Smith return when he threatened to kidnap her grandchildren if she refused. He promised not to bother her if she "would just let him come back in the house until he could get organized and find a place to live." Although Smith wanted to resume their relationship, Unangst still wanted him to leave. She helped him find an apartment and paid the first month's rent.

In late February 1998, Smith moved to an apartment located in another town, about ten miles away from Unangst's house. Because Smith didn't have any furniture, Unangst's daughter offered to donate a bed. On Sunday March 8, 1998, Unangst delivered the bed to Smith's apartment by truck. Smith unloaded the bed and set it up in his apartment. As Unangst was leaving the apartment, Smith "put his arms across the door," blocking her exit. He wanted her to read a bunch of cards and letters she had sent him while he was in Texas. Unangst managed to slip past him, ran outside into the truck and locked the truck door. Smith followed her outside and threw the cards and letters into the back of the pick-up truck as Unangst was driving away. Yelling words to the effect of "You're not going to forget this day," Smith got into his car and drove past her "going really, really fast."

When Unangst arrived at her house, Smith was in her garage retrieving his motor scooter, which was stored there. While Unangst entered her house and locked the door behind her, Smith continued yelling, "Mark this day on your calendar. You'll never forget it." Smith began banging on the door, but Unangst refused to let him in. Meanwhile, Unangst telephoned her daughter. As they were talking, an operator interrupted with an "emergency call" from Arthur Smith. Unangst refused to accept the call. Later than night, Unangst went to stay at her daughter's house. Her daughter told

her that Smith had called and left a message that he was "at [her] superintendent's house." At the time, Unangst thought he was only bluffing.

Next morning, Monday March 9, 1998, Unangst went to work as usual in the Frelinghuysen school district. Frelinghuysen school superintendent, Mr. Chioffi, told her he had a visitor over the weekend. Smith had come to his house on Sunday and said "some pretty awful things" about her. Chioffi mentioned that he had contacted his counterpart, Fredon school superintendent Dr. Frank Fehn, and advised Unangst to get a protection order.

On the following day, Tuesday March 10, 1998, Unangst went early to school in Fredon in order to talk with the superintendent. Dr. Fehn had already conferred with Board members and surprised her by announcing that the Board no longer wanted her teaching in Fredon. He indicated that the Board didn't want her in the school building and, because she didn't bring a car, offered to drive her to her daughter's house. Dr. Fehn also recommended that she seek a protection order. That same afternoon, Unangst applied to the Northampton County Court and, without assistance of counsel, obtained a temporary order prohibiting Smith "from abusing, threatening, harassing or approaching" her. She returned to both schools on Wednesday, March 11, 1998, to deliver copies of the protection order.

Speaking to her after school on March 11, 1998, Dr. Fehn reiterated that the Board no longer wanted her in the district and, if she did not leave voluntarily, "they were going to get a lawyer and try to break [her] contract." Further, he recommended that it would be "in [her] best interest" to resign because "there wouldn't be any blemish on [her] record" and he would "help [her] find a job." When Unangst inquired when she should resign, Dr. Fehn replied, "the sooner, the better." Unangst also recalled Dr. Fehn cautioning her not to talk with anyone, even her union representative.

At home that evening, Unangst wrote a short letter resigning from her teaching position in Fredon, effective June 30, 1998, and promising to cooperate "to make this transition as smooth as possible for those concerned." Dr. Fehn had suggested that

they meet at a diner in Blairstown, conveniently located halfway between her home and the school. On Thursday, March 12, 1998, Unangst drove to the diner and handed her resignation letter to Dr. Fehn. She received full salary and medical benefits for the remainder of the school year. Her duties were limited to preparing lessons plans, which she dropped off at school on a weekly basis.

Thus far, the parties largely agree on the underlying facts.[4] Most of their factual dispute revolves around Unangst's state of mind at the time of her resignation and during the three-month period immediately after the Board accepted her resignation. Unangst described her condition as "frightened and confused" and "lacking enough confidence to do anything yet." Before submitting her resignation, she had discussed her situation with her son-in-law, who is a practicing attorney in Pennsylvania. He seemed more concerned about the safety of his children than about her and was reluctant to give any advice because "he didn't like to get involved with family things." Nonetheless, Unangst managed to return to court by herself on March 16, 1998 and persuade the judge to issue a final protection order. She also functioned well enough to prepare her weekly lesson plans. Despite the outstanding protection order, Smith continued to show up unannounced and to follow her around. Therefore, Unangst retained an attorney, who went to court on April 1, 1998 and obtained a contempt order. As a result, Smith was found guilty of criminal contempt and incarcerated in a Pennsylvania prison for approximately one month.

Just two weeks after her resignation, Unangst made an appointment to see a counselor at a women's shelter in Bethlehem, Pennsylvania. She contacted the domestic violence hotline of an advocacy organization known as Turning Point on March 26, 1998 and attended four counseling sessions, the final one on May 19, 1998. These sessions explored many personal issues, including Unangst's sudden

[4] Dr. Fehn averred that he counseled Unangst to consult with both an attorney and her union representative before resigning. Unangst was uncertain whether or not Dr. Fehn had encouraged her to seek legal advice. However, she testified that Dr. Fehn urged her not to talk to anyone. Furthermore, Dr. Fehn remembered telling her he would only recommend her resignation to the Board "if she received a paid leave for the balance of the school year." Although Unangst did receive such benefit, she does not recall Dr. Fehn talking to her about it.

resignation and the counselor's apparent belief that she should pursue getting her job back. Unangst stopped going to counseling in late May 1998 because she felt "calmer" and "a little better and a little safer." During April, May and June, Unangst did "a lot of babysitting" for her grandchildren and sent out job applications to "at least a dozen" school districts. In July or August, Unangst had a conversation with her daughter's father-in-law, who happens also to be a retired attorney. He thought that she should talk to her union, which ultimately led to the bringing of this lawsuit in September 1998.

Unangst's chief witness was Martha Doerr, a counselor at Turning Point of Lehigh Valley, an agency devoted to helping victims of domestic violence. Describing herself a "victim's advocate," Doerr characterized her services as "counseling" as opposed to "therapy." She holds a bachelor's degree in psychology and, at the time in question, was working toward a master's degree in "psychological counseling," which she subsequently acquired in July 1998. Doerr does not hold any professional licenses or certifications and has never taken any formal courses dealing with battered women.[5] She has, however, extensive experience counseling women in abusive relationships and completed a one-year internship working with sexual offenders. Presently, Doerr is engaged in private practice under the supervision of a licensed psychologist.

Doerr's initial contact with Unangst was on March 26,1998, when Unangst telephoned the Turning Point hotline and spoke with Doerr for more than one and-a-half hours. During this lengthy conversation, Unangst detailed her relationship with Smith and confided that she was "very frightened of this man," who had "attempted to choke her while she was holding one of [her grandchildren.]" Mostly Unangst "talked and talked and talked," while Doerr "just listened." Doerr described Unangst as "obviously distressed" and "cr[ying] through a lot of the call." Unangst's priority at the time was her safety rather than her job situation. Doerr offered to provide her shelter, but Unangst thought "she was relatively safe where she was."

[5] In order to sit for the psychologists' licensing exam in either Pennsylvania or New Jersey, the candidate must possess a doctoral-level degree.

Unangst attended individual counseling sessions at Turning Point offices for April 2, April 13, May 5 and May 19, 1998. Each session lasted more than the standard one-hour because Unangst "seemed to have a lot to say. " Unangst appeared genuinely fearful for the safety of her family. She believed that Smith "would stop at nothing to ruin her life, cause her public humiliation and undermine her reputation," even if he had to do it by harming her grandchildren. Her demeanor was "usually tearful" and "there was a great deal of anxiety and quivering in her voice." In Doerr's estimation, Unangst was "vulnerable," her self-confidence had been "shaken."

By the time of her first telephone call, Unangst had already resigned from her teaching position at Fredon. Originally, she told Doerr that Smith "had caused her to lose her job," but later she clarified that the superintendent had asked her to resign. Although Doerr expressly told Unangst that the school's treatment of her had been "unfair if not illegal," Unangst remained convinced that the superintendent "had been kind about it" and that resignation was in her best interest. Despite personal reservations that Unangst's decision had been "impulsive, "hasty" and "not well thought-out," Doerr made no attempt to dissuade Unangst from the course of action that she had chosen. Turning Point's philosophy is to empower a victim of domestic violence and "to strengthen her in order to have her make her decisions, rather than giving any kind of advice."

Significantly, Doerr acknowledged that Unangst possessed the capacity to understand what she had done. Doerr never felt it necessary to refer Unangst to a psychologist or other mental health professional. After May 19, 1998, Unangst ceased going to counseling sessions because she was no longer in crisis. Doerr explained that Unangst was "spending a lot of time in New Jersey at one of her children's home" and had "supportive family around her."

I FIND that Unangst possessed sufficient mental capacity to appreciate the meaning of her resignation and to understand her right of appeal.

Undeniably, Unangst was under extreme emotional distress at the time of her resignation due to constant threats and continued harassment by her boyfriend. Whether or not her condition amounted to "battered woman's syndrome" cannot be derived from the proofs because petitioner's only expert lacked adequate qualifications to make a definitive diagnosis. Nevertheless, the factual pattern clearly presents many of the attributes commonly associated with battered woman's syndrome, including physical or psychological coercion, episodes of severe abuse, and periods when her abuser expresses remorse and seeks forgiveness. It cannot be doubted that these conditions put Unangst in genuine fear for her own safety and that of her family.

Without trivializing the demoralizing impact of such events on Unangst's mindset, there is also considerable evidence that Unangst was able to function remarkably well under the circumstances. She had the presence of mind to obtain a preliminary and final protection order, to evict Smith from her house and to help him move to his own apartment. Throughout her difficulties, she received outside support from her counselor at a women's advocacy group, an attorney retained to enforce her legal rights and her own family. By her own admission, she felt much better by mid-May 1998, when she discontinued going to counseling. During this same time, she managed to prepare lessons plans for her replacement at school, search diligently for a new job and take care of her grandchildren.

Certainly it was less than courageous for the district to abandon Unangst in her hour of need, although it is understandable why Board members might consider their primary responsibility to be the safety of the school children. Any alleged impairment of her thought-processes was not caused by anything that the Board did, but rather by intimidation from her boyfriend. Doerr made Unangst aware of options other than resignation before expiration of the ninety-day limitation period. Regardless of whether it was truly in her best interest to resign, Unangst knew she had other options and made a conscious decision not to exercise them.

Conclusions of Law

Based on the foregoing facts and the applicable law, **I CONCLUDE** that the Board's motion to dismiss should be granted.

N.J.A.C. 6:24-1.2 prescribes that an appeal to the Commissioner must be filed "no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education which is the subject of the requested contested hearing." The 90-day rule "provides a measure of repose, an essential element in the proper and efficient administration of the school laws." *Kaprow v. Board. of Educ. of Berkeley Twp.*, 131 *N.J.* 572, 582 (1993). Prompt filing of actions before the Commissioner serves to preserve the immediacy of the record and to stabilize existing relationships, thereby avoiding disruption of the educational process. *Le Mee* v. *Bd. of Educ. of Village of Ridgewood*, OAL Dkt. No. 6889-89 (Comm'r May 3, 1990). Petitioner's counsel concedes, as she must, that Unangst filed her petition with the Commissioner "well beyond 90 days after the resignation had been accepted" and she learned of the Board's action.

Nonetheless, Unangst requests that the Commissioner exercise his authority under *N.J.A.C.* 6:24-1.17 to relax application of the 90-day rule "where strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice." Exceptions to the 90-day rule should be granted sparingly, and only where there exist compelling circumstances to justify enlargement or relaxation of the time limit. *See Riely v. Board. of Educ. of Hunterdon Cent. High Sch. Dist*, 173 *N.J. Super.* 109 (App. Div. 1980). *See also, Weir v. Bd. of Educ. of Northern Valley Reg. High School Dist.,* 1984 *S.L.D.* _ (Comm'r July 20, 1984), *aff'd* No. A-3520 84T6 (N.J. App. Div. April 9, 1986); Bogart v. Bd. of Educ. of East Orange, 1983 S.L.D. _ (Comm'r May 11, 1983). If the rule were relaxed every time that a harsh result occurred, then the rule and its salutary public policy of encouraging prompt resolution of disputes would be nullified. *Pacio v. Bd. of Educ. of Lakeland Reg. High Sch. Dist.*, 1989 *S.L.D.* 2060 (Comm'r July 29, 1989). Equitable considerations which might allow relaxation of the rule include

good faith discussions between parties to resolve the dispute, *Polaha v. Buena Reg. Sch. Dist.*, 212 *N.J. Super.* 628 (App. Div. 1986), delay attributable solely to the board of education, *Perrotti v. Bd. of Educ. of Newark*, 1981 *S.L.D.* _ (Comm'r May 11, 1981), *aff'd* (St. Bd. Sept. 2, 1981), or cases presenting a substantial constitutional issue or matter of significant public interest, *Miller v. Morris Sch. Dist.*, 1980 *S.L.D.* _ (Comm'r Feb. 27, 1980). Although Unangst does not seek to overcome the rule on any of these traditional grounds, she seeks waiver on the basis of battered woman's syndrome.

New Jersey courts recognize battered woman's syndrome as a legitimate diagnosis resulting from a sustained cyclical pattern of physical and psychological abuse. Most notably, in *State v. Kelly*, 97 *N.J.* 178 (1984), the New Jersey Supreme Court held that expert testimony about battered woman's syndrome was admissible to establish a claim of self-defense in a homicide case where a wife was accused of murdering her husband. Typically, victims of battered woman's syndrome become "unwilling to reach out and confide in their friends, family, or the police[.]" *Kelly*, at 195. Some women become so demoralized and degraded by exposure to unpredictable violence "that they sink into a state of psychological paralysis and become unable to take any action at all to improve or alter the situation." *Kelly,* at 194. Subsequent reported decisions have reinforced and refined the approach adopted in *Kelly*. *See State v. Myers*, 239 *N.J. Super.* 158, 169 (App. Div. 1990), clarifying that the defense of battered woman's syndrome to a prosecution for aggravated manslaughter "does not involve insanity, mental disability or diminished capacity," but rather bears on the reasonableness of defendant's belief "that she was in imminent danger of serious injury." *See also, State v. Ellis*, 280 *N.J. Super.* 533 (App. Div. 1995), wherein the Appellate Division ruled that expert testimony concerning battered woman's syndrome could properly be used to explain a kidnapping victim's failure to attempt an escape from defendant during the period of abduction, but not as evidence that the crime had occurred.

Cases dealing with battered woman's syndrome often arise in the context of a criminal trial, where expert testimony is allowed to support a plea of self-defense or justify a victim's failure to resist. Ordinarily, therefore, the doctrine is used as a shield to

protect a victim from punishment or to prevent continued abuse. In contrast, Unangst is attempting to employ that doctrine as a sword to obtain affirmative relief against her former employer after expiration of the limitations period. Courts serve as gatekeepers to prevent litigants from attempting to use the process in domestic violence settings as a sword rather than a shield. *Cf. State v. Hoffman*, 149 *N.J.* 564, 586 (1997). In at least two cases, however, New Jersey courts have authorized victims to pursue claims of a new tort action of battered women's syndrome against their abusers, provided that the plaintiff introduces sufficient expert proof in connection with her claim for damages. *Giovine v. Giovine*, 284 *N.J. Super.* 3 (App. Div. 1995), *overruled on other grounds*, *Kinsella v. Kinsella,* 150 *N.J.* 276 (1997); *Cusseau v. Pickett*, 279 *N.J. Super.* 335 (App. Div. 1994). Both these cases involve suits against the attacker and thus rely, in part, on the premise that the person responsible for severe emotional distress contributing to delay cannot be heard to complain. No case has been found where a victim of battered woman's syndrome has been able to expand that concept to implicate an innocent third party. It is unlikely that our courts would be inclined to extend battered woman's syndrome to someone who had nothing to do with the underlying abuse.

Of course, a potential litigant can always argue that the running of the limitations period should be tolled because she was incapable of understanding her legal rights or because she acted under duress. *Jones v. Jones*, 242 *N.J. Super.* 195 (App. Div., 1990), *certif. den.* 122 *N.J.* 418 (1990). Even if battered woman's syndrome were deemed relevant to such an inquiry, the evidence presented is insufficient to sustain Unangst's burden. Proofs demonstrate that Unangst possessed the mental capacity to make meaningful decisions. Far from remaining helplessly incapable of ending the relationship, Unangst had sufficient mental composure to leave her boyfriend and to obtain a protective order. Unlike the typical victim reluctant to confide in others, Unangst sought out professional help, received legal advice from more than one source, and enjoyed a strong family support system. She continued in counseling until she felt calm and safe, at which point it was still not too late to challenge her resignation. Instead, she decided to trust her school superintendent and follow his career advice. Whether or not she made the best choice, the record reveals that she was capable of making an informed decision and did so. Often employees must decide

whether to resign under trying conditions, such as serious illness, threat of removal or public embarrassment. Emotional distress alone, without a showing of circumstances amounting to genuine incapacity, is not enough to toll the time limit for bringing an appeal to the Commissioner.

Order

It is **ORDERED** that the Board's motion to dismiss the appeal is granted.

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

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

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

March 13, 2003
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

March 19 2003
DATE

M. Kathleen Duncan (for)
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 20 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

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APPENDIX

List of Witnesses

1. Carol Unangst

2. Martha S. Doerr, victim's advocate

List of Exhibits

No.	Description
P-1	Copy of petition for protection from abuse order in the matter entitled Unangst v. Smith, Court of Common Pleas of North Hampton County, Pennsylvania, Dkt. No. 1998-C-20251, dated March 10, 1998
P-2	Copy of Notice to Defendant and Attached Temporary Protection from Abuse Order in the matter entitled Unangst v. Smith, Court of Common Pleas of North Hampton County, Pennsylvania, Dkt. No. 1998-C-10151, entered March 10, 1998
P-3	Copy of Final Order for Protection from Abuse in the matter entitled Unangst v. Smith, Court of Common Pleas of North Hampton County, Pennsylvania, Dkt. No. 1998-C-10151, entered on March 16, 1998
P-4	Copy of Contempt Order in the matter entitled Unangst v. Smith, Court of Common Pleas of North Hampton County, Pennsylvania, Dkt. No. 1998-C-10151, entered on April 1, 1998
P-5	Curriculum vitae of Martha S. Doerr, undated

P-6 Copy of client profile, dated March 26, 1998

P-7 Copy of handwritten case notes of Martha Doerr covering the period of April 2, 1998 through May 5, 1998

P-8 Id. Handwritten notes re: hotline telephone conversation by Martha Doerr, undated

OAL DKT. NO. EDU 9828-98
AGENCY DKT. NO. 434-9/98

CAROL UNANGST,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF FREDON, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision[1] of the Office of Administrative Law (OAL) have been reviewed. The parties filed no exceptions to the Initial Decision.[2]

Upon careful and independent review of the record in this matter, the Commissioner fully concurs with the Administrative Law Judge (ALJ) that the within petition is time-barred and that relaxation of the 90-day timeline set forth in *N.J.A.C.* 6A:3-1.3(d) is not warranted under the circumstances of this case. In so concluding, the Commissioner emphasizes his concurrence that petitioner possessed sufficient mental capacity to appreciate the meaning of her resignation and to understand her right of appeal as demonstrated by her capacity to make meaningful decisions during the period of her emotional distress, such as: 1) leaving her boyfriend and obtaining a protective order, 2) seeking professional help, and 3) obtaining legal advice from more than one source. Although it is

[1]Only two witness names appear on the List of Witnesses in the Initial Decision, petitioner's and a victim's advocate, Martha S. Doerr, on petitioner's behalf.

[2] Respondent filed a letter stating that it would not be filing any formal exceptions, but requesting that the motion package filed by the Board on May 17, 2000, including the Certification by Frank J. Fehn, the then Superintendent, be included as part of the record. (Board's Letter of April 4, 2003) The Commissioner notes that the Board's motion papers of May 17, 2000, including Mr. Fehn's certification, were included in the record certified to the Commissioner by the OAL. Moreover, although failing to identify the particular facts it disputes, the Board also stated that "the Board does not fully agree with the findings of fact, however, we do understand that this Decision was based upon hearing the Petitioner's evidence only and at the conclusion of the same, our Motion to Dismiss has been granted." (*Ibid.*)

evident that petitioner was under emotional distress at the time of her resignation, a showing of emotional stress alone, without the showing of circumstances amounting to genuine incapacity, is not enough to toll the time limit for appeal.

Moreover, the 90-day filing requirement has been strictly construed by the Commissioner, the State Board of Education and the courts and, while the rule gives the Commissioner broad discretion, relaxation is reserved for limited situations wherein a compelling reason can be demonstrated for expanding the limitation period, such as the presence of a substantial constitutional or other issue of fundamental public interest beyond that of concern only to the parties. *LeMee, supra; Pacio, supra.* In that the Commissioner does not find that the factual circumstances presented herein constitute such grounds for relaxation of the 90-day rule, and in that no constitutional issues are involved in this matter, nor does it present issues of significant public interest beyond the parties, I determine, as did the Commissioner in *LeMee, supra*, that the greater public interest herein lies with the enforcement of the 90-day rule.

Accordingly, the Initial Decision of the ALJ granting the Board's motion to dismiss is adopted for the reasons expressed therein and the petition is hereby dismissed.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 5/1/03

Date of Mailing: 5/1/03

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

208-03

TAMIKA COVINGTON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF TRUSTEES OF THE GRANVILLE CHARTER SCHOOL, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

May 1, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 2172-01
AGENCY DKT. NO. 151/01

TAMIKA COVINGTON,
Petitioner,
v.
BOARD OF TRUSTEES OF THE GRANDVILLE CHARTER SCHOOL, MERCER COUNTY,
Respondent.

Richard A. Friedman, Esq., for petitioner (Zazzali, Fagella and Nowak, attorneys)

Thomas W. Sumner, Jr., Esq., for respondent (Sumner George, attorneys)

Record Closed: March 7, 2003 Decided: March 11, 2003

BEFORE **DOUGLAS H. HURD,** ALJ:

This matter was transmitted to the Office of Administrative Law on April 6, 2001, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. This case was originally assigned to Judge Beatrice S. Tylutki and after her retirement the case reassigned to the undersigned.

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

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

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

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

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

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

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

March 11, 2003
DATE

DOUGLAS H. HURD, ALJ

Receipt Acknowledged:

March 20, 2003
DATE

M. Kathleen Duncan (by)
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 24 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/lam

ZAZZALI, FAGELLA, NOWAK,
KLEINBAUM & FRIEDMAN
150 West State Street
Trenton, New Jersey 08608
(609) 392-8172
Attorneys for Petitioner

TAMIKA COVINGTON, Petitioner, v. BOARD OF TRUSTEES OF THE GRANVILLE CHARTER SCHOOL AND THE GRANVILLE CHARTER GRANVILLE CHARTER SCHOOL, MERCER COUNTY, Respondents.	BEFORE THE OFFICE OF ADMINISTRATIVE LAW OAL Docket No. EDU 2172-01 **SETTLEMENT AGREEMENT**

The parties to this matter, hereby agree to settle and resolve the within dispute pending before the Commissioner of Education in relation to petitioner's claim for payment of the difference between temporary disability benefits paid to her and sick leave pursuant to N.J.S.A. 18A:30-2.1, based upon the following terms:

1. Respondent shall pay to petitioner, the sum of $5,142.22, which constitutes the agreed upon amount due petitioner for the difference between

temporary disability benefits paid to her and her full salary for the time period covered by N.J.S.A. 18A:30-2.1.

2. Respondent shall remit any required pension contributions to the Teachers' Pension and Annuity Fund and Division of Pensions, and shall take whatever actions are necessary to assure that petitioner receives pension credit for all time periods that petitioner was employed by respondent but did not receive pension credit, and for all time periods that petitioner has received or does receive workers' compensation temporary disability benefits, paid sick leave, or workers' compensation permanent partial disability benefits.

3. The payment to petitioner referred to in paragraph 1 shall be made within 14 days of the Commissioner of Education's approval of this settlement agreement.

4. A. For all time periods that petitioner is entitled to pension credit under paragraph two of this agreement, respondent shall make any required pension contributions to the Teachers' Pension and Annuity Fund and Division of Pensions on the following schedule:

B (1). For all time periods that petitioner was employed by respondent but did not receive pension credit, and for all time periods that petitioner has already received workers' compensation temporary disability benefits, paid sick leave, or workers' compensation permanent partial disability benefits, respondent shall make the pension contributions required by this agreement within 14 days of the Commissioner's approval of the settlement agreement.

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ATTORNEYS AT LAW

B (2). For all other time periods, respondent shall make such pension contributions simultaneously with the payment to petitioner of workers' compensation temporary disability benefits, paid sick leave, or workers' compensation permanent partial disability benefits.

5. The above payment shall be made without prejudice to any party's position, claims, or defenses in the workers' compensation case presently pending before the Division of Workers' Compensation entitled Tamika Covington v. Granville Charter High School, CP No.: 2000-40057, and petitioner does not waive, abandon or relinquish any claim to any other or additional benefits in the workers' compensation case, including but not limited to temporary disability benefits, permanent disability benefits, or payment for medical bills.

6. This settlement shall not limit any defenses that respondent may have to any claims that petitioner may assert in the above workers' compensation case.

7. This settlement agreement shall not limit any other claims that petitioner may have against respondents or against any other person or entities, whether based on law, equity, or otherwise.

8. This settlement agreement limit any defenses that respondent or any other persons or entities may have against any other claims asserted by petitioner.

9. The parties agree that respondent shall not deduct any taxes from the payments to be made to petitioner under this settlement agreement, and that it shall be petitioner's obligation to pay any state, federal, or other taxes due from her as a

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result of the amount to be paid under this settlement agreement.

ZAZZALI, FAGELLA, NOWAK
KLEINBAUM & FRIEDMAN
Attorneys for Petitioner

By:_____ Dated: 2/3/03
Richard A. Friedman, Esq.

By:_____ Dated: 3 Feb 03
Tamika Covington

SUMNERS, GEORGE & DORTCH
Attorneys for Respondent

By:_____ Dated: 2/7/03
Thomas W. Sumners, Jr., Esq.

OAL DKT. NO. EDU 2172-01
AGENCY DKT. NO. 15-1/01

TAMIKA COVINGTON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF TRUSTEES OF THE GRANVILLE CHARTER SCHOOL, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 5/1/03

Date of Mailing: 5/1/03

LEEANN WOOD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF PEMBERTON, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning physical education teacher, whose full-time position was abolished and replaced with a 4/5th's position, claimed tenure and seniority rights to other full-time positions within the scope of her certification.

The ALJ found that petitioner's tenure and seniority claims were cured when the Board offered and petitioner accepted a full-time position without any loss of pay or benefits, notwithstanding issues raised by petitioner regarding her working, without written agreement under the Interlocal Services Act, *N.J.S.A.* 40:8A-1 *et seq.*, two days a week in respondent's schools and three days a week in the Pemberton Township schools. (In preceding years, her schedule had been three days in respondent's schools and two days in Pemberton Township.) The ALJ ordered the petition dismissed.

The Commissioner adopted the Initial Decision as his own, clarifying that petitioner had not raised claims arising from the shared services arrangement in her pleadings, and that Pemberton Township, an indispensable party to any such claims, was neither named as a respondent nor otherwise involved in proceedings.

May 1, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4388-02

AGENCY DKT. NO. 177-6/02

LEEANN WOOD,

Petitioner,

v.

BOARD OF EDUCATION
OF PEMBERTON BOROUGH,
BURLINGTON COUNTY,

Respondent.

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

Barry J. Wendt, Esq., for the respondent

Record Closed: February 24, 2003 Decided: March 14, 2003

BEFORE **SOLOMON A. METZGER**, ALJ:

This matter arises out of a complaint filed by petitioner with the Commissioner of Education alleging that her tenure rights have been violated in contravention of N.J.S.A. 18A-1 to –14. The matter was referred to the Office of Administrative Law as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to –15. Respondent has now filed a motion for summary decision, N.J.A.C 1:1-12.6; *Brill v. Guardian Life Ins. Co. of America*, 142 N.J. 520 (1995).

The facts are substantially undisputed. Petitioner holds an instructional certificate with an endorsement in health and physical education (K-12) issued in December 1984, and an endorsement in elementary education (K-8) issued in 1996. In September 1985, petitioner commenced employed with respondent as a full-time physical education teacher and she served in that position continuously through the 2001-2002 school year. Through these years petitioner taught in the respondent district and was also assigned to teach in the Pemberton Township district. During the last few years she has been teaching two days a week in the Pemberton Township district.

On or about March 21, 2002, petitioner was advised that her position would be abolished and that instead respondent would create a 4/5th's physical education teacher position. She received an employment contract on May 17, 2002 to this effect. Petitioner appealed to the Commissioner in June 2002 alleging that her tenure/seniority rights were violated by the retention of non-tenured and/or less senior teaching staff in full-time positions. On August 8, 2002 respondent offered petitioner a contract for the current school year as a full-time physical education teacher without any loss of pay or benefits. This contract required her to reverse her teaching schedule so that she worked two days a week in respondent's schools and three days a week in the Pemberton Township schools. Petitioner executed this contract on August 31, 2002 and noted in writing that she was doing so without waiving any tenure or seniority rights she might have.

From the initial certifications it appeared there might be a fact question concerning an assertion by petitioner that she was required to work a slightly longer day in Pemberton Township. I inquired of counsel and they agreed to submit supplemental certifications. The Pemberton Borough Superintendent, Charles E. Smith, certified that he met with petitioner on September 24, 2002 to discuss differences in the school day between the two districts. He offered to contact the Pemberton Township district to resolve any unfairness, but petitioner responded that she had already worked these discrepancies out. Pemberton Township has now advised Mr. Smith that it will honor the 6 hour and 40 minute school day with petitioner that respondent uses. In her own certification petitioner acknowledges that the length of her school day is the same in both districts.

The parties agree that no written agreement exists between the two districts regarding petitioner's shared schedule under the Inter-Local Services Act, *N.J.S.A.* 40:8A-1 *et seq,* and petitioner contends that this is improper. This is the substance of the record.

Petitioner maintains that when respondent moved to abolish her position and create a 4/5th's position, it triggered tenure and seniority rights as against other teachers and that these questions must now be resolved. At the very least, the motion must await completion of discovery into these areas. I disagree. Respondent's original decision to reduce petitioner's status raised tenure and seniority issues, *Bednar v. Westwood Bd. Of Ed.*, 221 *N.J. Super.* 239 (App. Div. 1988), cert. denied 110 *N.J.* 510 (1988); *Capodilupo v. West Orange Be. Of Ed.*, 218 *N.J. Super.* 512 (App. Div. 1987) cert. denied 109 *N.J.* 514 (1987), but these were cured when respondent offered and petitioner accepted a full-time position. Any differences in the length of her day were adjusted at the outset and petitioner has not been diminished in the least. Thus, any tenure/seniority issues are moot.

Regarding the Inter-Local Services Act, it is apparent from the language of the Act that local bodies of government are entitled to enter into formal arrangements regarding shared services, but petitioner points to no authority that requires it. She has been employed in accordance with the understanding between the two districts for many years; the only thing that has changed is that she now spends a third day in Pemberton Township.

Based on the foregoing, I **CONCLUDE** that respondent is entitled to decision as a matter of law and it is **ORDERED** that this petition be dismissed.

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

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

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

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

3/14/03
DATE

SOLOMON A. METZGER, ALJ

Receipt Acknowledged:

March 20, 2003
DATE

M. Kathleen Duncan (by)
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 24 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/cad

WITNESSES

For Petitioner:

None

For Respondent:

None

EXHIBITS

For Petitioner:

None

For Respondent:

None

OAL DKT. NO. EDU 4388-02
AGENCY DKT. NO. 177-6/02

LEEANN WOOD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF PEMBERTON, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Timely exceptions were filed by petitioner, as were replies by the Board of Education (Board).

Petitioner's exceptions reiterate the previously raised contention that her tenure and seniority rights were triggered, notwithstanding her subsequent assignment to a full-time position, upon her receipt of *notice* that her employment for the following year would be reduced to a 4/5 position. Thus, she claims, she is now entitled to a determination of her tenure and seniority rights in both the Pemberton Borough (the respondent herein) and the Pemberton Township school districts, as well as to a directive from the Commissioner ordering the two districts to enter into a written agreement regarding these matters pursuant to the Interlocal Services Act (the Act), *N.J.S.A.* 40:8A-1 *et seq.* In reply, the Board urges adoption of the Initial Decision and maintains its prior stance that it is not required to provide joint services through the Act.

Upon review, the Commissioner determines to adopt the Initial Decision of the OAL. In so doing, however, he notes that this matter was pled strictly as a tenure/seniority entitlement claim against the respondent Board,[1] but that, when events transpired so that petitioner's employment was never actually reduced, petitioner's arguments before the Administrative Law Judge (ALJ) turned to claims based on the shared arrangement with Pemberton Township and the provisions of the Interlocal Services Act, notwithstanding that the Petition of Appeal made no reference whatsoever to such claims, no amended petition was ever filed, and an indispensable party to any determination in these regards, the Pemberton Township Board of Education, was neither named as a respondent nor provided an opportunity to intervene pursuant to *N.J.A.C.* 1:1-16.4. Therefore, like the ALJ, the Commissioner finds petitioner's tenure/seniority claim against the respondent Board to be moot, and on the basis set forth above, rejects petitioner's contention that she is entitled to determination on the further issues raised.

Accordingly, for the reasons expressed in the Initial Decision and herein, the recommendation of the OAL dismissing the Petition of Appeal is adopted as the final decision in this matter.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 5/1/03

Date of Mailing: 5/1/03

[1] Petitioner alleged that her employment had been reduced even though the Board was retaining nontenured and/or less senior teachers in positions for which she was qualified.

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

JERRY COHEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MIDDLESEX, MIDDLESEX COUNTY, AND PATRICIA JOHNSON, SUPERINTENDENT,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioner, former nontenured high school guidance counselor, alleged the Board terminated him absent the appropriate procedural requirements set forth at *N.J.S.A.* 18A:27-3.2.

The ALJ found that pursuant to a letter dated May 9, 2002, prior to the effective date of the termination, petitioner resigned from the District and was no longer a teaching staff member as that term is defined by the New Jersey school laws. Thus, the ALJ found that petitioner relinquished any rights that would have otherwise accrued to him had he merely been the recipient of a letter from the District indicating that his annual contract would not be renewed. (Although it was not obligated to do so, the Board still sent him a statement of reasons for nonrenewal.) The ALJ ordered that the petition be dismissed.

The Commissioner adopted the Initial Decision as his own.

May 1, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION

OAL DKT. NO. EDU 6787-02

AGENCY DKT. NO. 307-9/02

JERRY COHEN,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF MIDDLESEX, MIDDLESEX COUNTY, AND PATRICIA JOHNSON, SUPERINTENDENT,

Respondents.

Jerry Cohen, petitioner, *pro se*

Ellen S. Bass, Esq., for respondents (Rand, Algeier, Tosti & Woodruff, attorneys)

Record Closed: March 17, 2003 Decided: March 18, 2003

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This is an appeal taken by the petitioner, Mr. Jerry Cohen, which commenced with his filing of a petition before the Commissioner of Education on or about September 30, 2002. Mr. Cohen alleges *inter alia* that the respondent Board of Education ("Middlesex" or "Board") and its individual members violated his rights under Title 18A of New Jersey statutes. Specifically,

Mr. Cohen contends that his non-tenured position as a high school guidance counselor with respondent was terminated absent the appropriate procedural requirements set forth at *N.J.S.A.* 18A:27-3.2. He alleges he failed to receive reasons in writing for the respondent's failure to renew his contract for the school year commencing September 2003. Moreover, he alleges that the respondent even if *arguendo* it did provide notice did so outside of the 30-day prescribed period set forth by the same statute. In seeking a remedy in this matter, the petitioner asked that the Commissioner award him legal fees, costs, pre- and post-judgment interest and loss of income for a period of approximately three years. He indicates in closing that the total damages he requests is $27,024.

On October 4, Middlesex filed its answer with the Commissioner. In addition to denying the various substantive allegations set forth in Mr. Cohen's brief, asserting that at all times it complied with substantive and procedural requirements contained in the New Jersey school laws, the Board specifically asserts that petitioner resigned from his position of employment and that resignation rendered moot any of the procedural protections and requirements for a statement of reasons and "informal appearance" otherwise accorded to non-tenured employees upon non-renewal of a contract. It further asserts that the petitioner's resignation was accepted by the Board at a duly scheduled public meeting and passed by resolution. Further, Middlesex asserts a number of other defenses which, if necessary, I shall address in the analytic portion of this opinion.

The appeal was transmitted to the Office of Administrative Law as a contested case on October 11, 2002, pursuant to *N.J.S.A.* 52: 14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. After a number of adjournment requests, the matter was preheard by telephone on January 30, 2003, and it was at that time that the parties agreed that the case should initially be heard on cross motions for summary decision. I received all of the moving papers submitted by the Board on March 4, 2003, and on March 12 of this year, Mr. Cohen submitted his responsive papers. On or about March 13, 2003, I requested that my secretary reach out to Board counsel to determine if it would be submitting a reply brief. On March 17, 2003, counsel for Middlesex submitted a letter reply. Accordingly, the record closed on the latter date, March 17, 2003.

STANDARDS FOR GRANTING MOTION FOR SUMMARY DECISION

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

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

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

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

The Supreme Court in *Brill v. Guardian Life Ins. Co.*, 142 *N.J.* 520, 523 (1995) provided further guidance for the summary decision analysis: "whether the evidence presents a sufficient disagreement to require [a hearing] or whether it is so one sided that one party must prevail as a matter of law." *Id.* at 536. Thus, a court should deny a summary judgment only where the party opposing the motion has come forward with evidence that creates a genuine issue of material fact. *Id.* at 529.

A contested case can be summarily disposed of before an ALJ without a plenary hearing in instances where the undisputed material facts indicate that a particular disposition is required as a matter of law. *In the Matter of Robros Recycling Corp.*, 226 *N.J. Super.* 343, 350 (App.

Div.1988). A summary decision must be based on an examination of the totality of circumstances, mitigating and aggravating factors, adequate factual findings and conclusions of law. *Ibid.*

THE FACTS

Unless otherwise noted, the following is a substantially uncontradicted narrative of the operative facts in this matter exclusively for purposes of addressing the Board's motion. It is based entirely on the certifications and exhibits submitted on the motion, as well as in its opposition. If a factual dispute presents itself which is genuine, then, of course, I am mandated to deny the motion. However, if I find that a factual issue is contested but that the evidence clearly supports a finding for one side or the other, I shall explicitly arrive at that finding of fact and give reasons to support it. Accordingly, I **FIND**:

The petitioner, Jerry Cohen, had been employed by respondent district in the capacity of a high school guidance counselor commencing February 2001 through July 2002. On April 30, 2002, Cohen was informed by the superintendent of schools that his annual employment would not be renewed for the 2002-2003 school year. As is noted in the brief submitted on behalf of the Board, Cohen had been employed by the district for less than a year and one-half. Thereafter, by letter dated May 9, 2002, Mr. Cohen unequivocally and unambiguously advised the Board in writing that effective July 1, 2002, he would resign his position with the Board. At its public meeting of May 13, 2002, the Board, by resolution, accepted Mr. Cohen's resignation which, because of the circumstances surrounding his age, resulted in his retirement. By letter dated September 6, 2002, the Division of Pensions and Benefits accepted Mr. Cohen's application for an ordinary disability retirement allowance.

Subsequent to these events, Cohen continued to pursue his request for a statement of reasons for non-renewal, pursuant to *N.J.S.A.* 18A:27-3.2. In fact, at one point he engaged counsel to write a letter on his behalf to the Board. In her certification submitted on behalf of the Board's motion, Ms. Patricia Johnson, the Superintendent of Schools for Middlesex, indicates that the initial reply by Middlesex was to advise Cohen that his request for a statement of reasons for non-renewal was no longer necessary in light of his written resignation. He was also advised

that as a consequence of his resignation, his relationship with Middlesex was terminated as well as any statutory obligation that Middlesex would have had in respect to providing him with a reason for non-renewal. Irrespective of the foregoing and in an effort to end the ongoing correspondence between the parties, the Board did, in fact, provide Cohen with the requested statement of reasons by letter dated August 2, 2002. Counsel argues on behalf of Middlesex that the submission of the statement of reasons is without prejudice in that it remains the Board's contention that once the resignation was executed, it no longer was required to provide Cohen with anything in respect to an explanation of why his contract had not been renewed and that the decision to provide him with the information in early August of 2002 was, in its view, simply "an effort to put an end to the barrage of correspondence" that was being received from the petitioner.

The petitioner, in spite of the fact that he did receive this explanation, did not request an informal appearance before the Board, which would have been perhaps his right under *N.J.A.C.* 6:3-4.2. Rather, on September 10, 2002, Mr. Cohen filed an action in the Superior Court of New Jersey, Middlesex County, alleging that the lateness of the statement of reasons damaged him and requested $400 in legal fees as well. On September 18, 2002, the Board filed a motion to dismiss Mr. Cohen's complaint, and the Superior Court by order of October 11, 2002, granted the motion to dismiss. Thereafter, the matter proceeded on its administrative track. Mr. Cohen's letter of resignation accompanies the Board's moving papers and may be found as Exhibit C. As Exhibit D is a formal memo directed to Mr. Cohen from the Board of Trustees of the TPAF advising him that effective July 1, 2002, Mr. Cohen would qualify for ordinary disability retirement allowance. I infer from this, of course, that effective as of that date, Mr. Cohen has begun receiving his pension pursuant to his retirement and his rights under the Teachers' Pension and Annuity Fund. It appears from the papers that Mr. Cohen submitted his resignation when he was approximately 62 years of age. He is currently approximately 65 years of age.

It should be noted at the outset that Mr. Cohen in opposition to the motion provides no affidavits or certifications that set forth a factual matrix from which one would conclude that there is a factual divergency of views between the parties. Rather, Mr. Cohen simply sets forth in narrative form the circumstances under which he believes the motion should be denied. Because Mr. Cohen is a *pro se* litigant, I will exercise discretion and address his moving papers affording

him all benefits and inferences. Unfortunately, and notwithstanding the lack of certifications or affidavits, Mr. Cohen cites no legal authority under which his assertion that he would be entitled to a statement of reasons for his non-renewal and an opportunity to appear informally before the Board of Education. Those clearly are rights conferred upon a non-tenured faculty member under *N.J.S.A.* 18A:27-3.2. Specifically, the statute requires that a non-renewed teaching staff member shall be given a written statement of the reasons for non-renewal of his contract by the superintendent no later than 15 calendar days after the teaching member has received notice of his or her non-renewal. That statement is to provide the teaching staff member with reasons set forth with particularity resulting in his non-renewal. Precision is demanded by the statute. Such statement shall be delivered to the employee within 30 calendar days of the receipt of his request. Moreover, pursuant to regulation, *N.J.A.C.* 6:3-4.2(a), the non-teaching staff member is entitled, if he requests it, to an informal appearance before the Board within 30 days of the employee's receipt of the Board's statement of reasons. It should be noted that irrespective of whether the Board was or was not required to provide Mr. Cohen with a written notice, as previously set forth, it did. Nevertheless, Cohen never requested the opportunity to appear before the Board upon such receipt.

Nowhere in his moving papers, in my view, does Cohen assert that his letter of resignation was coerced, resulted from misrepresentation or fraud, or was for any other reason not a voluntary, intentional reflection and manifestation of his intention that he wished to effectively terminate his employment with the Board effective at the end of the school year. There is no issue of any substance at all regarding Cohen's letter to the Board of May 9, 2002 advising, "Please accept this letter as notice of my intention to retire from the district effective July 1, 2002." Accordingly, I explicitly **FIND** that pursuant to Cohen's letter dated May 9, 2002, he resigned from the district, was no longer a teaching staff member as that term is defined by the New Jersey school laws and thus he relinquished any rights that would have otherwise accrued to him had he merely been the recipient of a letter from the district indicating that his annual contract would not be renewed. No one, including the district, would argue that had Mr. Cohen not resigned from his position, he would have been accorded those rights under the statute. In addition, as was noted, in an effort to at least "stop the bleeding," the Board provided Mr. Cohen with the statement of reasons for his non-renewal by letter of August 2, 2002. The letter notes in passing that the basis of the decision not to renew included: (1) his attitude towards his work, his

coworkers, students and parents; (2) his failure to accept and act on constructive criticism; and (3) his nonchalant reaction and response to parents of students frequently requesting that he be removed as a counselor assigned to their child. Chronologically, it will be recalled that Cohen was advised by the Middlesex board and superintendent the fact that his employment would not be renewed for the school year 2002-2003 by letter of April 30, 2002. Only some nine days later, Cohen submitted his letter of resignation. The fact that he refers to his intent to retire does in no way diminish the impact of his letter as a clear unequivocal expression on his part that he is resigning on his own behalf.

Nevertheless, attached to her reply brief of March 17, 2003, counsel for Middlesex provides an affidavit submitted by the school business administrator for the Board, Ms. Michele Previte. In regard to the assertion that Mr. Cohen received workers compensation benefits, the Board through its administrator indicates that Cohen did file for unemployment compensation and the administrator contested that claim. Nevertheless, following a telephonic hearing, it was the determination of the hearing examiner that Cohen was entitled to unemployment compensation. The examiner found that Cohen resigned because he knew he would be terminated.

In my view, that determination has no direct bearing on the issue before me. The fact that Cohen collected unemployment compensation benefits because the hearing examiner concluded that his resignation was an anticipation of termination in no way vitiates the validity of his resignation as it relates to procedural due process that he would otherwise have been accorded absent such resignation.

The only authority cited is offered on behalf of the district which articulates the proposition that an acceptance by a board of education of a resignation is an irrevocable termination of the employment relationship between the teaching staff member and the board. *See Cutro v. Board of Education of Hazlet*, 94 *N.J.A.R.*2d (EDU 402); *Andrews v. Lamb*, 136 *N.J.L.* 548 (Sup Court 1948). Thus, by resigning his position some nine or ten days after he received notice by the Board that it would not renew his contract for the following school year, Cohen relinquished any rights that may have otherwise accrued to a non-tenured teaching staff member who sought to challenge his non-renewal. That the letter of resignation may have been

prompted by the fact that he was advised his contract would not be renewed does in no way vitiate the fact that the resignation was a voluntary, uncoerced, knowing relinquishment of his job. That the motive may have been to avoid what may have followed a informal proceeding before the Board is of no consequence in these proceedings. Accordingly and based upon the foregoing, I **CONCLUDE** that the respondent has demonstrated that the requirements for granting summary decision have been met. Accordingly, it is **ORDERED** that the petition of Mr. Cohen be and is hereby **DISMISSED.**

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

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

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

3/18/03
DATE

Steven Reback, ALJ
STEVEN C. REBACK, ALJ

Receipt Acknowledged:

March 21, 2003
DATE

M. Kathleen Duncan (ka)
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 24 2003

Jeff S. Masin
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

cmo

OAL DKT. NO. EDU 6787-02
AGENCY DKT. NO. 307-9/02

JERRY COHEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MIDDLESEX, MIDDLESEX COUNTY, AND PATRICIA JOHNSON, SUPERINTENDENT,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Timely exceptions were filed by petitioner, as were replies by the Board of Education (Board). Petitioner's response to the Board's submission is not considered herein, since no provision is made for such filings by applicable rule, *N.J.A.C.* 1:1-18.4.

Upon review, the Commissioner observes that petitioner's arguments on exception hinge in their entirety upon his central contention, purportedly overlooked in the Initial Decision, that once petitioner was notified of his impending nonrenewal, any action he may have subsequently taken to "resign" or "retire" cannot be considered to have terminated his relationship with the Board so as to free it from its statutory obligations to nontenured persons whose employment is not recommended for renewal. However, the Commissioner determines that the Initial Decision has, in fact, adequately and correctly addressed petitioner's claims, through findings and conclusions with which the Commissioner fully concurs.

Accordingly, for the reasons expressed therein, the Initial Decision of the OAL is adopted as the final decision in this matter.[1]

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 5/1/03

Date of Mailing: 5/1/03

[1] For technical accuracy, the Commissioner clarifies that *N.J.S.A.* 18A:27-3.2 provides that a written statement of reasons may be *requested* by the affected employee within 15 days, not that the employee shall be *given* such a statement within that time (Initial Decision at 6).

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

IN THE MATTER OF THE DIVISION OF :
ASSETS AND LIABILITIES AMONG THE :
CONSTITUENT DISTRICTS OF LOWER :
CAMDEN COUNTY REGIONAL HIGH :
SCHOOL DISTRICT NO. 1, CAMDEN COUNTY.:

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner, Township of Waterford, appealed the Camden County Superintendent of Schools' distribution of assets and liabilities of the Lower Camden County Regional High School District resulting from the dissolution of the Regional district.

The ALJ found that the undisputed financial data submitted by petitioner substantiated that the non-building districts were treated disproportionately and inequitably when compared to the building districts. *Citing Union County,* the ALJ determined that deviation from the distribution formula in the County Superintendent's Report was necessary to correct the inequities. Moreover, the ALJ found that no binding agreement existed pertaining to the distribution of the liquid assets. The ALJ concluded that although not perfect or fair, the redistribution of the liquid assets from the building districts to the Waterford Board of Education was reasonable and consistent with the spirit and intent of *Union County.* The ALJ found that the County Superintendent's Report should be modified and additional liquid assets should be redistributed only to Waterford and not to the other non-building districts because the other three non-building districts obtained a benefit from their send/receive relationships. The redistribution of an additional $2,809,011 should be paid to Waterford in five yearly installments commencing June 1, 2003.

The Commissioner modified the Initial Decision. The Commissioner concurred with the ALJ that the facts of the matter justify a deviation from the asset distribution ordered in the County Superintendent's Report as authorized by the Court in *Union County.* The Commissioner, however, could not accept the ALJ's position that involvement in a send/receive relationship constituted a quantifiable asset, which must be factored into a redistribution plan. The Commissioner found that the most equitable allocation would be to divide the total liquid assets among the four non-building districts in proportion to the percentages of school taxes that each of those non-building districts paid to the former regional district, without regard to the contributions of the building districts. Each building district shall make payments in five equal, annual installments commencing July 1, 2004 to each of the non-building districts according to the five-year installment payment schedule.

May 2, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 328-02

AGENCY DKT. NO. 418-10/01

IN THE MATTER OF THE DIVISION OF ASSETS AND LIABILITIES AMONG THE CONSTITUENT DISTRICTS OF LOWER CAMDEN COUNTY REGIONAL HIGH SCHOOL DISTRICT NO. 1

John R. Armstrong, Esq., for petitioner Township of Waterford (Cooper, Perskie, April, Niedelman, Wagenheim & Levenson, attorneys)

Allison C. Eck, Deputy Attorney General, for respondent Camden County Superintendent of Schools (Peter C. Harvey, Acting Attorney General for the State of New Jersey)

Howard C. Long, Jr., Esq., for respondent Waterford Township Board of Education (Higgins, Long & Bonfiglio, attorneys)

Anthony Padovani, Esq., for respondent Pine Hill Board of Education (Sahli & Padovani, attorneys)

Robert A. Muccilli, Esq., for respondents Berlin Township Board of Education and the Borough of Clementon Board of Education (Capehart Scatchard, attorneys)

David M. Serlin, Esq., for respondent Winslow Township Board of Education

Richard K. Tavani, Esq., for respondent Winslow Township (Weber, Gallagher, Simpson, Stapleton, Fires & Newby, attorneys)

Robert J. Borbe, Esq., for respondent Lindenwold Board of Education

Harvey C. Johnson, Esq., for respondent Borough of Chesilhurst

Emmett E. Primas, Jr., Esq., for respondent Chesilhurst Board of Education

Record Closed: January 31, 2003 Decided: March 6, 2003

BEFORE **W. TODD MILLER,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On October 5, 2001, petitioner, Township of Waterford ("Waterford"), filed an action with the Department of Education, Bureau of Controversies and Disputes, challenging the Camden County superintendent of school's proposed distribution of assets and liabilities of the Lower Camden County Regional High School District ("Regional District") resulting from the dissolution of the Regional District. The Bureau of Controversies and Disputes transmitted the matter to the Office of Administrative Law ("OAL") on January 30, 2002, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

Answers to the petition were filed by various governmental agencies, including Pine Hill Borough and Board of Education, Winslow Township and Board of Education, and Chesilhurst Borough and Board of Education, and by the Camden County superintendent of schools, Daniel Mastrobuono (hereinafter "superintendent"). The director of the OAL assigned the undersigned to hear this matter, and a prehearing conference was held on June 5, 2002. As a result of the prehearing conference the parties agreed to submit the contested issues in summary fashion. The parties were permitted to request an evidential hearing and, if no requests were received prior to January 31, 2003, the matter would be decided on the papers.

On September 16, 2002, the Pine Hill Board of Education ("Pine Hill") filed a motion seeking to stay the superintendent's proposed distribution of certain non-building assets, or liquid assets, to the constituent districts, as more particularly set forth in the superintendent's June 30, 2001, Report on the Division of Assets and Liabilities Among the Constituent Districts of Lower Camden County Regional High School District No. 1. (Armstrong Certification, Exhibit E, hereinafter "Report"). Opposition to the motion for a stay was filed by the Waterford Township Board of Education. Additionally, the Waterford Township Board of Education filed a cross-motion for summary decision seeking payment of the funds due the Waterford Township Board

of Education pursuant to the superintendent's Report. The remaining parties took no position or relied upon the moving papers and arguments offered by Pine Hill and Waterford.

Oral argument was heard on November 20, 2002, at the OAL in Atlantic City, New Jersey, and the record for the motion for interim relief and cross-motion for summary decision closed on that date. On November 25, 2002, an Order was entered **DENYING** Pine Hill's motion to stay the first installment, and the Waterford Board of Education's cross-motion seeking to compel payment was **GRANTED**.

SUMMARY OF UNDISPUTED MATERIAL FACTS

In October 1997 a majority of the constituent municipalities and boards of education petitioned the Commissioner of Education for the dissolution of the Regional District. *N.J.S.A.* 18A:13-54. The Commissioner submitted the petition to the Board of Review, which on January 8, 1998, decided that the petition should be granted and, therefore, that the question of dissolution should be submitted to the voters of the constituent districts. *N.J.S.A.* 18A:13-56; Armstrong Certification, Exhibit A. The referendum read as follows:

Referendum Question

> Should the Lower Camden County Regional High School District No. 1 be dissolved on a date to be determined by the Commissioner of Education?

Interpretive Statement

> If approved, the dissolution of the Lower Camden County Regional High School District No. 1 will result in all constituent districts having the responsibility of providing for a K-12 education.
>
> By law, each constituent district, upon dissolution, takes title to and control of all schools grounds, buildings and furnishings situated therein. Therefore, Lindenwold will acquire the Overbrook Junior High School facility; Pine Hill will acquire the Overbrook Senior High School facility, and Winslow Township will acquire the Edgewood Senior and Edgewood Junior High School facilities.

> No capital indebtedness will be assumed by any of the constituent districts upon dissolution. Therefore, dissolution will have no effect on the borrowing margin of any constituent district.
>
> [Armstrong Certification, Exhibit C.]

On May 12, 1998, a majority of the voters of the constituent districts of the Regional District approved a referendum dissolving the regional high school district. *N.J.S.A.* 18A:13-54. Following the voter approval, the Commissioner of Education set June 30, 2001, as the effective date of dissolution of the Regional District. *See* Report at 1. On June 30, 2001, the superintendent issued a Report setting forth how the assets (both building and non-building) of the Regional District would be distributed. *N.J.S.A.* 18A:8-24; *N.J.S.A.* 18A:13-62. The Regional District owned six buildings as well as the land on which each is situated. The buildings were identified as Overbrook High School, Overbrook Junior High School, Edgewood High School, Edgewood Junior High School, the district's administrative offices, and the so-called MIS Building, which housed the Regional District's computer system. Report at 2. There was no outstanding bonded indebtedness incurred by the Regional District as of June 30, 2001. Report at 3; Armstrong Certification, Exhibit G at RFA 10. The Report concludes that the building assets shall remain where they are situated and the shared or rotated assets (liquid assets) shall be fairly apportioned among the constituent districts. *N.J.S.A.* 18A:13-61. The superintendent valued the shared or liquid assets at $8.4 million and the building assets at $62.3 million. The most recent appraisals valued the land and buildings as follows:

BUILDING	VALUE
Overbrook HS	$19,923,563
Overbrook JHS	$13,153,941
Edgewood JHS	$13,104,909
Edgewood HS	$15,372,305
Admin. Office Bldg.	$800,000
MIS Building	Unappraised
TOTAL	**$62,354,718**

[Pet'r Br. at 12, Table 1: Value of regional district real estate]

The building assets were allocated by statute to the three "building districts," which were Lindenwold, Pine Hill and Winslow. The Regional District had no real estate in the four "non-building districts," which were Berlin Township, Chesilhurst, Clementon, and Waterford Township. Report at 2. The liquid assets remained with the respective building districts and therefore the superintendent allocated a portion of the value of the liquid assets to the non-building districts in order to equalize the distribution. The Regional District's six buildings are equipped with a substantial amount of personal property, that is, office equipment and furniture necessary to administer each school, *e.g.*, audio-visual, athletic, vocational training, science and musical equipment; library books; vehicles, etc. (again, the "liquid assets"). Report at 6. The superintendent noted that there are no significant liabilities to be apportioned among the districts and therefore the building assets were conveyed to the building districts debt free. The superintendent valued the liquid assets, after adjustments for various offsetting capital outlays, at $8,469,326. Report at Exhibit C. Pursuant to *N.J.S.A.* 18A:13-62 and -24, the superintendent distributed the liquid assets to all seven constituent districts in proportion to the amount each contributed to the overall tax levy for the Regional District as of school year 2000-2001. This was the last year the school tax was recalculated, and the calculations were as follows:

DISTRICT	% TAX CONTRIBUTION	ENTITLEMENT
Berlin Township	9.7021026	$821,703
Chesilhurst	1.4751950	$124,939
Clementon	5.4888015	$464,864
Lindenwold	14.9252315	$1,264,067
Pine Hill	8.3458839	$706,840
Waterford Township	16.3416574	$1,384,028
Winslow Township	43.7211281	$3,702,885
TOTAL		**$8,469,326**

[Pet'r Br. at 13, Table 2: Constituent district tax contribution and liquid asset entitlement]

The superintendent also noted that "[s]hould any controversy arise after the issuance of this report, all parties notwithstanding will have the ability to file a petition of appeal pursuant to N.J.A.C. 6A-3.1." Report at 9. The only party to formally file a petition contesting the superintendent's Report and proposed allocation of assets and liabilities was Waterford Township.

LEGAL ANALYSIS

Petitioner seeks to have the superintendent's June 30, 2001, liquid asset distribution formula modified and all of the liquid assets redistributed to the non-building districts. Respondents assert that any redistribution of the liquid assets is contrary to: 1) the applicable statutes, *N.J.S.A.* 18A:8-24, 18A:13-61 and 18A:13-62; 2) the controlling case law, *In re the Distribution of Liquid Assets Upon Dissolution of the Union County Regional High School District No. 1, Union County*, 168 *N.J.* 1 (2001) (hereinafter "*Union County*"); and 3) an alleged informal but unexecuted agreement between the constituent districts.

At the prehearing conference held on June 5, 2002, the parties agreed that the following issues should be considered:

> 1. Whether the proposed plan of distribution by the County Superintendent of Schools dated June 30, 2001, meets the requirements of the statute and related case law and therefore should be upheld?
>
> a. Are there any procedural grounds or estoppel arguments precluding the filing of the petition?
>
> 2. If the proposed plan of distribution by the County Superintendent does not meet the requirements of the relevant statutes and case law, what method of distribution would be fair and equitable and should that be determined by the ALJ or referred to the Department of Education?
>
> [Prehearing Order dated June 11, 2002.]

The dissolution of a regional school district is governed by *N.J.S.A.* 18A. The county superintendent of schools is charged with dividing the assets and liabilities among the constituent districts pursuant to *N.J.S.A.* 18A:13-63, which provides in pertinent part as follows:

> Upon the effective date of a dissolution of a regional district each constituent municipality shall thenceforth be constituted a separate local school district and be governed by the laws applicable thereto, **and its assets and liabilities shall devolve upon the respective constituent districts in accordance**

> **with the division made by the county superintendent as provided in section 12 of P.L.1975, c. 360 (C.18A:13-62).**
>
> [Emphasis added.]

In the case of a dissolution of a regional school district, the districts where the building assets are located shall take title to same and the superintendent shall give due consideration to the value of the buildings allocated to those districts when dividing the remaining rotated or liquid assets. In this regard, *N.J.S.A.* 18A:13-61 provides:

> The withdrawing district and the remaining districts, or each constituent district in the event of a dissolution, shall take title to and control of all school grounds and buildings, and the furnishings and equipment therein, other than those which had been rotated or shared among the regional schools, situated in their respective districts on the effective date of withdrawal or dissolution as established by the commissioner. **The county superintendent shall allot a fair proportion of the shared or rotated furnishings and equipment to the withdrawing district or to each of the constituent districts in the event of a dissolution.**
>
> . . . In the event of a dissolution, the county superintendent and board of review, in determining the amount of indebtedness to be assumed by each constituent district, **shall give due regard to the value of school buildings and grounds being conveyed to the constituent district in which those buildings and grounds are located.**
>
> [Emphasis added.]

The county superintendent is required to file a report making a division of the assets and liabilities, if any. The scope of the superintendent's duties and the asset distribution formula are set forth in *N.J.S.A.* 18A:8-24, which states:

> The county superintendent in a written report filed by him at the end of the school year preceding that in which the new district is created shall make a division of the assets, except school buildings, grounds, furnishings and equipment, and of the liabilities, other than the bonded indebtedness of the original district, between the new district and the remaining district on the

> basis of the amount of the ratables in the respective districts on which the last school tax was levied, and in determining the amount of assets to be divided, he shall take into account the present value of the school books, supplies, fuel, motor vehicles and all personal property other than furnishings and equipment. In the case of any vehicle used for the transportation of school children, the original cost of the vehicle, less any state aid appropriated therefor, shall be deemed to be the present value.

The superintendent, respondent building districts Pine Hill, Lindenwold and Winslow and respondent non-building districts Berlin and Clementon argue that the superintendent properly fulfilled his statutory duty. They further assert that petitioner's reliance upon *Union County* is misplaced. There is no dispute regarding the superintendent's valuation of the liquid assets.

In discharging his duties, the superintendent must prepare a report that values and divides the assets and liabilities. *N.J.S.A.* 18A:13-62. Thereafter, the superintendent is required to allot a "fair proportion" of the liquid assets "to each of the constituent districts." *N.J.S.A.* 18A:13-61. Respondents assert that it is an imperfect process that will not always result in an equitable distribution. But, so long as the distribution methodology is executed in accordance with the statute(s) and the corresponding distribution is fair, the superintendent's report is entitled to great weight and should not be disturbed. The superintendent is only fulfilling the will of the Legislature and to that extent a court should not substitute its judgment. *Roman Check Cashing, Inc. v. Department of Banking and Ins.*, 169 *N.J.* 105 (2001); *New Jersey v. Freysinger*, 311 *N.J. Super.* 536, 542 (Ch. Div. 1994). There is no dispute that the superintendent fulfilled the procedural obligations pursuant to the applicable statutes. The real issue in this matter is what does *Union County* stand for and how does it affect this case?

In *Union County, supra*, 168 *N.J.* 1, the New Jersey Supreme Court was confronted with a challenge to the distribution of liquid assets following the dissolution of the Union County Regional High School District No. 1. The district possessed approximately $110 million in real property or building assets and $3.3 million in liquid assets. The real property was located in four out of the six constituent districts. The superintendent correctly allocated the building assets among the constituent districts where the building assets were situated. In *Union County*, as in the present matter, there was no significant debt to be allocated such that the distribution of

assets could be equalized by re-allocating debt. Only the liquid assets were available to equalize the distribution. The Union County superintendent recommended that the non-building districts "receive all liquid assets of the Regional District." 168 *N.J.* at 5. The State Board of Education, Board of Review, rejected the superintendent's report and allocated the liquid assets to all six municipalities. The Appellate Division affirmed. The New Jersey Supreme Court reversed and clarified the purpose of the legislation. The Court stated:

> The legislative history and the statutory scheme for dissolution of regional districts illustrate clearly that the **overriding goal of the statutory scheme is to distribute equitably** the regional district's assets and liabilities.
>
> [*Id.* at 15; emphasis added.].

In *Union County* the Court reversed the allocation made by the agency and allocated all of the $3.3 million of liquid assets to only the non-building districts. The Court corrected significant inequities in the agency's asset allocation. The Court found that there were overriding or compelling circumstances. The decision corrected misconceptions connected with the agency's interpretation of the relevant statute(s) because the agency's interpretation produced an unfair result. The Court noted:

> The "fundamental consideration" in reviewing agency actions "is that a court may not substitute its judgment for the expertise of an agency 'so long as that action is statutorily authorized and not otherwise defective because arbitrary or unreasonable.' " *Williams v. Dep't of Human Servs.*, 116 *N.J.* 102, 107, 561 *A.*2d 244 (1989) (quoting *Dougherty v. Dep't of Human Servs.*, 91 *N.J.* 1, 12, 449, *A.*2d 1235 (1982)). . . . We are, however, "in no way bound by the agency's interpretation of a statute or its determination of a strictly legal issue," *Mayflower Sec. Co. v. Bureau of Sec.*, 64 *N.J.* 85, 93, 312 *A.*2d 497 (1973), and we will intercede if the agency's action exceeds the bounds of its discretion. *In re Taylor*, 158 *N.J.* 644, 657, 731 *A.*2d 35 (1999) (noting that "an appellate court's review of an agency decision is not simply a *pro forma* exercise in which [the court] rubber stamp[s] findings that are not reasonably supported by the evidence"); *L.M. v. State Div. of Med. Assistance and Health Servs.*, 140 *N.J.* 480, 490, 659 *A.*2d 450 (1995) ("When an agency's decision is manifestly mistaken . . . the interests of

> justice authorize a reviewing court to shed its traditional deference to agency decisions.").
>
> [*Id.* at 10-11.]

Respondents argue that the *Union County* decision turned on contract-related issues and is not a clear precedent to depart from the statutory distribution formula proposed by the superintendent. In the Court's holding, it acknowledged that the *Union County* parties agreed upon a predistribution formula ("agreement") that represented a more equitable assets allocation. The Court considered the predistribution agreement as a factor in its decision, but again reiterated the overriding purpose of the statutory framework, and held:

> **Given the obvious purpose of the statutory scheme to distribute assets and liabilities equitably, and the generalized assumption in the statute that debt allocation is a sufficient mechanism for ensuring equity**, we are persuaded that in these circumstances insistence on strict application of the asset distribution scheme in *N.J.S.A.* 18A:8-24 is unwarranted, particularly where, as here, the parties entering into dissolution have agreed to an alternative liquid asset distribution formula that represents a more equitable asset allocation. **To hold otherwise would be to ignore the clear overriding purpose of the statutory framework in favor of ritualistic application of statutory language divorced from context**. "In discharging our interpretive responsibility, we are admonished that 'each part or section [of the statute] should be construed in connection with every other part or section so as to produce a harmonious whole,' and that 'it is not proper to confine interpretation to the one section to be construed.'" *In re Passaic County Utilities Auth. Petition Requesting Determination of Financial Difficulty and Application for Refinancing Approval,* 164 *N.J.* 270, 300, 753 *A.*2d 661 (2000) (quoting Norman J. Singer, *Sutherland Statutory Construction* § 46.05 at 103 (5th ed. 1992)).
>
> [*Id.* at 17; emphasis added.]

The decision in *Union County* made it abundantly clear that the "statutory framework permits deviation from the asset distribution formula." *Id.* at 18.

The facts in the instant matter are compelling and, likewise, justify judicial deviation from the asset distribution formula in the Report. Petitioner's Table 3 depicts the disparity created by the formula used by the superintendent:

DISTRICT	REAL ESTATE REC'D	LIQUID ASSETS REC'D	TOTAL ASSETS REC'D	% REG. DISTRICT ASSETS REC'D	% TAX CONTRIB.	PRO RATA VALUE OF TOTAL ASSETS BY % TAX CONTRIB.	GAIN/LOSS
Berlin Twp.	$0	$821,703	$821,703	1.16	9.7021026	$6,871,421	($6,049,719)
Chesilhurst	$0	$124,939	$124,939	0.18	1.4751950	$1,044,793	($919,854)
Clementon	$0	$464,864	$464,864	0.66	5.4888015	$3,887,391	($3,422,527)
Lindenwold	$13,153,941	$1,264,067	$14,418,008	20.36	14.9252315	$10,570,653	$3,847,355
Pine Hill	$19,923,563	$706,840	$20,630,403	29.13	8.3458839	$5,910,892	$14,719,511
Waterford Twp.	$0	$1,384,028	$1,384,028	1.95	16.3416574	$11,573,823	($10,189,794)
Winslow Twp.	$29,277,214	$3,702,885	$32,980,099	46.57	43.7211281	$30,965,071	$2,015,028
TOTAL	**$62,354,718**	**$8,469,326**	**$70,824,044**	**100.00**	**100.00**	**$70,824,044**	

[Pet'r Br. at 14, Table 3: Total assets received compared with percentage of taxes paid]

Petitioner's Table 3 illustrates that the non-building districts are being treated substantially different than the building districts. For instance, Waterford contributed 16.34% towards the cost of the Regional District's total assets, based upon its percentage of tax contributions, and it is receiving 1.95% back upon dissolution. Waterford is incurring a $10.1 million loss. The same is true for the remaining non-building districts. Each non-building district is receiving significantly less than what it contributed in terms of percentages and real dollars. Conversely, the building districts are reaping significant gains in percentage terms and in real dollars. For example, Pine Hill contributed 8.34% towards the cost of the Regional District's total assets, based upon its percentage of tax contributions, and it is receiving 29.13% back upon dissolution. Pine Hill will reap a $14.7 million gain. Clearly, the undisputed financial data confirms that the distribution formula used by the superintendent created an unfair and inequitable result. This scenario is almost identical to the one in *Union County*.

In *Union County* the superintendent set out to avoid just such a result by allocating all of the liquid assets to the non-building districts in his initial report. He recognized the disparity and made the appropriate adjustments to properly correct inequities. The Commissioner of Education and the Board of Review chose not to follow the superintendent's recommendation, but the New Jersey Supreme Court's decision in *Union County* made clear that deviation from the strict

statutory formula is not only permissible but is required when inequity is present. 168 *N.J.* at 17. The Court stated:

> First, does the statutory scheme allow for deviations? And if so, did the State Board err in not ordering a deviation from the statutory scheme in this case? We answer both of those questions in the affirmative.
>
> [*Id.* at 15.]

Here, I **FIND** that the undisputed financial data submitted by petitioner substantiates that the non-building districts were treated disproportionately and inequitably when compared to the building districts. I further **FIND** that the financial data submitted by petitioner is sufficiently similar to the data in *Union County*, and therefore deviation from the distribution formula in the superintendent's Report is necessary to correct the inequities.

Respondents Berlin and Clementon argue that any further redistribution is prohibited by an informal, unexecuted agreement. Respondents note that all of the districts had various meetings leading up to the completion of the superintendent's Report, and they reached an informal agreement to receive their entitlement of the liquid assets rather than the hard assets themselves. Many financial considerations were discussed at these meetings and there was an informal, unsigned agreement not to contest the proportionate distribution of the liquid assets to all of the districts. Resp'ts Berlin/Clementon Br. at 6. Respondents support this argument by reference to the superintendent's Report, Exhibit I, which is a document entitled "DIVISION OF ASSETS AGREEMENT."

There are however, glaring facts that refute the assertion that an agreement existed among the districts concerning the distribution of the liquid assets. First, the agreement is not signed by all of the districts. This is undisputed and does not weigh heavily in support of the assertion that there was a meeting of the minds. Moreover, no other writing(s) were offered that reflect a meeting of the minds regarding this material provision. Finally, the superintendent incorporated the unexecuted agreement as part of his June 30, 2001, Report (Exhibit I). Paragraph 12 of the document, entitled "Binding Agreement," states, "This Agreement shall benefit and be binding

upon the Districts and their respective successors and permitted assigns. However, the parties recognize that there currently exists litigation brought by the Township of Waterford to obtain a share of the Building Assets and the parties agree, notwithstanding the foregoing sentence, to be bound by a final decision rendered in the litigation." The superintendent's June 30, 2001, Report and the draft agreement annexed thereto (Exhibit I) show that a controversy existed over the distribution of the assets before June 30, 2001. In fact, petitioner forwarded a letter to the superintendent on June 7, 2001, requesting that the final distribution of the liquid assets be made only to the non-building districts. Resp't Winslow's Br., Exhibit 1. Further, the referendum question posed to the voters did not contain any specific language that could be construed as a binding commitment to distribute the liquid assets one way or another.

In order for there to have been an enforceable oral agreement, there would have to have been an unequivocal acceptance of an offer (or a commitment), with the intent to be bound, incorporating mutually agreeable terms and conditions. *Weichert v. Ryan*, 128 *N.J.* 427, 435 (1992). The lack of a signed agreement, the confirmation of an existing dispute as of June 7, 2001, the confirmation of a dispute in the draft agreement appended to the superintendent's Report, and the lack of any other evidence leave no doubt that an enforceable oral agreement did not exist. Similarly, the referendum question did not bind the parties to a particular distribution plan. Accordingly, I **FIND** that no binding agreement existed pertaining to the distribution of the liquid assets.

Like Waterford, Berlin and Clementon are non-building districts, but they oppose the redistribution of liquid assets as proposed by Waterford. Berlin and Clementon are in send/receive relationships with a former building district (Pine Hill). The existence of a send/receive relationship between most of the constituent districts is a fact that was not present in *Union County*. Waterford is the only non-building district in this matter that is not in a post-dissolution send/receive relationship with a former building district. Based upon these differences in post-dissolution relationships, the interests of all of the non-building districts are not the same and, thus, this matter must be approached differently from *Union County* in this respect.

Berlin and Clementon assert that any change in the June 30, 2001, distribution of the liquid assets will adversely affect the former building districts. They argue that any cost increase visited upon the building districts will be passed through to the non-building districts in a send-receive relationship as increased tuition. But, the send/receive relationship results in another significant distinction that must be considered. Upon dissolution of the Regional District, a constituent district in a send/receive relationship derives a continuing benefit from the liquid assets bestowed upon the building district with which it has the send/receive relationship. The particular relationships before and after the dissolution are depicted in the superintendent's Report, at page 2, as follows:

Configuration of Building Districts/Sending Receiving Before Dissolution

Lower Camden County Regional Prior to July 1, 2001 Grades 7-12	Constituent Districts Prior to July 1, 2001 Grades K-6
Buildings	
District Admin. Offices Edgewood High School Edgewood Jr. High School MIS Building Overbrook High School Overbrook Jr. High School	Berlin Twp. Chesilhurst Clementon Lindenwold Pine Hill Waterford Winslow

Configuration of Building Districts/Sending Receiving for 7/1/01 to 6/30/02

Lindenwold School District 7/1/01 to 6/30/02 Grades K-11	Pine Hill School District 7/1/01 to 6/30/02 Grades K-12	Winslow School District 7/1/01 to 6/30/02 Grades K-12
Buildings From Dissolution	Buildings From Dissolution	Buildings From Dissolution
Overbrook Jr. High School	Overbrook Sr. High School MIS Building	Edgewood Jr. High School Edgewood Sr. High School District Admin. Building
Receiving Districts	Receiving Districts	Receiving Districts
NONE	Berlin Twp. Gr. 9-12 Clementon Gr. 9-12 Lindenwold Gr. 12 only Winslow Gr. 12 only	Chesilhurst Gr. 7-12 Waterford Gr. 8, 9, 10, 12*

* Waterford School District, after June 30, 2002, will send all students from grades seven through twelve to Hammonton School District in Atlantic County.

Configuration of Building Districts/Sending Receiving After 6/30/02

Lindenwold School District 7/1/01 to 6/30/02 Grades K-12	Pine Hill School District 7/1/01 to 6/30/02 Grades K-12	Winslow School District 7/1/01 to 6/30/02 Grades K-12
Buildings From Dissolution	Buildings From Dissolution	Buildings From Dissolution
Overbrook Jr. High School	Overbrook Sr. High School MIS Building	Edgewood Jr. High School Edgewood Sr. High School District Admin.
Receiving Districts	Receiving Districts	Receiving Districts
NONE	Berlin Twp. Gr. 9-12 Clementon Gr. 9-12	Chesilhurst Gr. 7-12

The newly formed districts are comprised of sending and receiving districts from the former Regional District. As such, they are equipped with proportionate shares of the buildings and related liquid assets from the former Regional District. Therefore, non-building districts that form a send/receive relationship with a building district are treated more fairly or equitably because they continue to derive a benefit from the assets they purchased. The newly formed configuration encompasses a proportionate share of the liquid assets from the Regional District. This alleviates the need for the new school district to purchase new assets. It also avoids added costs being passed through to the sending districts, which include the non-building districts. The net result is that non-building districts that have joined up with building districts will receive two benefits, that is, 1) the proportionate share of liquid assets cashed out and distributed through the superintendent's formula, and 2) the continued use of the assets retained by the building district through a newly formed send/receive relationship.

On the other hand, a non-building district that does not form a send/receive relationship with a building district does not receive the same proportionate benefit of the liquid assets from the Regional District. Rather, it must forge a new relationship outside of the former Regional District. This increases costs for the new or foreign receiving district. For example, Waterford now sends its students to the Hammonton district. Hammonton was not part of the Regional District and therefore must acquire sufficient liquid assets to serve the influx of new students from Waterford. There are significant costs incurred by Hammonton to accommodate the new students from Waterford, and these costs must be passed through to Waterford. Moreover,

Waterford does not benefit from the continued use of the liquid assets it purchased during its relationship with the former Regional District. Therefore, Waterford receives a smaller portion of distributed assets than it contributed as a percentage of ratables.

Accordingly, I **FIND**, based upon the facts of this matter, that a non-building district that does not form a send/receive relationship with a former building district does not proportionately share in the liquid assets of the dissolved Regional District because it must create a new send/receive relationship with a foreign district. I further **FIND** that when a non-building district has established a send/receive relationship with a building district of the Regional District, that relationship must be factored into the distribution formula. In the present matter, Berlin, Chesilhurst and Clementon are receiving a proportionate share of the liquid assets from the Regional District by virtue of the cash distributed by the superintendent combined with ongoing relationships with former building districts, through which they benefit from the building districts' liquid assets. As a consequence of the cash distribution and ongoing relationships, they are being treated fairly and equitably. It would serve no practical purpose to redistribute additional cash to the non-building districts that have formed send/receive relationships with former building districts and thereafter have that money passed through as higher tuition. This would be an inefficient remedy.

I **FIND** and **CONCLUDE** that Berlin, Chesilhurst and Clementon, as non-building districts, are in send/receive relationships with former building districts and therefore are benefiting from the liquid assets at issue. These relationships and corresponding benefits are sufficient and do not justify redistributing the liquid assets. I therefore **FIND** that these districts were treated fairly and equitably. Also, I note that Berlin and Clementon fully participated in the briefing process and oppose redistribution because of the financial impact redistribution would have.

REMEDIES

Having concluded that the applicable statutes and decisional law require redistribution of the liquid assets, consideration must be given to how much redistribution is required. The inequities and corresponding analysis for relief are best illustrated by the various tables submitted

by petitioner. Petitioner's Tables 4, 5 and 6 show the relative tax contributions and other related data for purposes of this analysis:

Non-Building District	% Tax Paid to Regional District	% of Proportional Total
Berlin Twp.	9.7021026	29.39
Chesilhurst	1.4751950	4.47
Clementon	5.4888015	16.63
Waterford Twp.	16.3416574	49.51
TOTAL	**33.0077565**	**100.00**

[Pet'r Br. at 15, Table 4: Proportional distribution of school taxes for non-building districts]

Non-Building District	% Tax Paid to Regional District	% of Proportional Total	Liquid Assets After Redistribution	Liquid Assets Before Redistribution	Increase
Berlin Twp.	9.7021026	29.39	$2,489,423	$821,703	$1,667,720
Chesilhurst	1.4751950	4.47	$378,514	$124,939	$253,575
Clementon	5.4888015	16.63	$1,408,349	$464,864	$943,485
Waterford Twp.	16.3416574	49.51	$4,193,039	$1,384,028	$2,809,011
TOTAL	**33.0077565**	**100.00**	**$8,469,326**		

[Pet'r Br. at 15, Table 5: Liquid assets for non-building districts before and after redistribution]

District	Real Estate	Liquid Assets After Redistribution	Total Assets	% Total Assets Received After Redistribution	% Tax Paid to Regional District	% Total Assets Received Before Distribution
Berlin	$0	$2,489,423	$2,489,423	3.51	9.7021026	1.16
Chesilhurst	$0	$378,514	$378,514	0.53	1.4751950	0.18
Clementon	$0	$1,408,349	$1,408,349	1.99	5.4888015	0.66
Lindenwold	$13,153,941	$0	$13,153,941	18.57	14.9252315	20.36
Pine Hill	$19,923,563	$0	$19,923,563	28.13	8.3458839	29.13
Waterford Twp.	$0	$4,193,039	$4,193,039	5.92	16.3416574	1.95
Winslow Twp.	$29,277,214	$0	$29,277,214	41.34	43.7211281	46.57
TOTAL	**$62,354,718**	**$8,469,326**	**$70,824,044**	**100.00**	**100.00**	**100.01**

[Pet'r Br. at 16, Table 6: Summary of assets distribution, with and without redistribution of liquid assets]

As the data shows, Waterford seeks to increase its proportional share of the total assets from 1.95% to 5.92%. Table 6. In real dollars the increase is significant. The redistribution would increase Waterford's share of the distribution from $1.3 million to $4.1 million, for a total increase of $2.8 million. Table 5. The redistribution would provide Waterford with 5.92% of

the assets after redistribution, whereas it contributed 16.34% towards the acquisition of these assets. Waterford would still realize a loss even upon redistribution. On balance, the redistribution sought by Waterford would better equalize the overall distribution to all parties. Upon redistribution, as shown in Table 6, the building districts would incur a slight loss rather than significant gains. *Compare* Table 6 *with* Table 3. For example, Winslow would receive 41.34% after redistribution compared with its contribution of 43.72%. Pine Hill would still reap a significant gain (8.34% contributed and 28.13% returned). Waterford would still realize a significant loss, but an increase from 1.95% to 5.92% would be more equitable and would move all of the constituent districts closer to parity. The tools or devices available to equalize the distribution of assets held by a regional school district are very limited, as recognized in *Union County*. Although not perfect or fair, the redistribution of some of the liquid assets from the building districts to Waterford is reasonable and consistent with the spirit and intent of *Union County*.

I **FIND** that petitioner has established by the preponderance of the credible evidence that the superintendent's June 30, 2001, Report containing the distribution of liquid assets from the Regional District should be modified and the liquid assets should be redistributed in accordance with the decision in *Union County*. The redistribution should be made only to Waterford and not to the other non-building districts because of their send/receive relationships.

DECISION AND ORDER

For the reasons set forth above, it is hereby **ORDERED** that the motion for partial summary decision filed by petitioner, seeking redistribution of the liquid assets to the non-building district of Waterford Township, is **GRANTED**. Waterford shall be awarded 5.92%, or $4,193,039, out of the total assets distributed to the constituent districts. The net increase of $2,809,011 shall be redistributed from the building districts to Waterford based upon the building districts' relative share calculated from their percentage of tax paid to the Regional District. (Table 6 – Winslow, 43.72%; Pine Hill, 8.34%; and Lindenwold, 14.92%.) The five-year installment payment schedule for the initial distribution of liquid assets, as determined by the Camden County superintendent of schools, remains unaffected by this Initial Decision. The redistribution of the additional $2,809,011 shall be paid in five yearly installments commencing

June 1, 2003. No interest shall be charged upon any installment before June 1, 2003. Any installment payment that is more than thirty days past due shall be charged the post-judgment interest rate set forth in the New Jersey Lawyers Diary.

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

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

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

3-6-03
DATE

W. TODD MILLER, ALJ

Receipt Acknowledged:

March 20, 2003
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 24 2003
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

DOCUMENTS CONSIDERED

For Petitioner:

Petitioner's Brief, dated October 31, 2002

Certification of John Armstrong, Esq., dated October 31, 2001 (including the Superintendent's June 30, 2001, Report)

Petitioner's Reply Brief, dated January 9, 2003

For Respondents:

Camden County Superintendent of School's Brief, dated November 15, 2002

Certification of Allison Colsey Eck, DAG, dated November 15, 2002

Joint Brief submitted by Berlin Township Board of Education and Borough of Clementon, dated December 18, 2002

Affidavit of Howard Paynter, Superintendent of Schools, Berlin Township

Affidavit of Paul Spaventa, Superintendent of Schools, Clementon District

Joint Brief submitted by Winslow Township Board of Education and Winslow Township Municipal Government, dated December 19, 2002

Letter Brief from Lindenwold Board of Education, dated December 17, 2002

Letter Brief from Pine Hill Board of Education, dated December 15, 2002

OAL DKT. NO. EDU 328-02
AGENCY DKT. NO. 418-10/01

IN THE MATTER OF THE DIVISION OF ASSETS AND LIABILITIES AMONG THE CONSTITUENT DISTRICTS OF LOWER CAMDEN COUNTY REGIONAL HIGH SCHOOL DISTRICT NO. 1, CAMDEN COUNTY.	COMMISSIONER OF EDUCATION DECISION

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Exception and reply arguments were submitted in accordance with *N.J.A.C.* 1:1-18.4.

Upon careful and independent review of the record in this matter, including all submissions before the OAL, as well as all *timely* exception arguments[1] and the replies thereto, the Commissioner determines to modify the Initial Decision as set forth herein.

Initially, the Commissioner notes that when submitted to the voters of the constituent districts, the referendum question did not specify a liquid asset distribution scheme; therefore, the issue is fairly raised by petitioner.[2] (Initial Decision at 3) Here petitioner, the Municipality of the Township of Waterford, challenges the distribution of the over $8.4 million in liquid assets to all seven districts, asserting that the more equitable distribution of those assets is to the non-building districts only, based upon their respective percentages of school taxes paid

[1] Counsel for the Boards of Education of the Township of Berlin and Borough of Clementon requested, and was granted, an extension of time in which to submit exceptions, in accordance with *N.J.A.C.* 1:1-18.8.

[2] In *Union County, supra*, the Court clarified that the holding in *Egg Harbor Bd. of Ed. v. Greater Egg Harbor, Etc.*, 188 *N.J. Super.* 92 (App. Div. 1982), stands for the proposition "that if a liquid asset distribution scheme is specified in a referendum question, that issue is 'off the table' if the referendum is approved; parties to a withdrawal from or dissolution of a regional district cannot later seek alteration of that scheme by the Superintendent of Schools or any other executive body." *In re Union County* at 14.

to the Regional District, without regard to the taxes paid by the building districts. (Petitioner's Brief in Support of Motion for Partial Summary Decision at 15-17) In this connection, the Commissioner acknowledges the argument of the respondent Boards of Education of the Township of Berlin and the Borough of Clementon that the informal agreement reached by the constituent districts to distribute the liquid assets proportionately among *all* seven districts should be honored, *not* because it represents a "binding contract," but because it represents the culmination of an "extensive consultative process" among the constituent districts, each of whom is responsible for providing a thorough and efficient education for its students. (Exceptions, Respondent Boards of Education of the Township of Berlin and the Borough of Clementon at 7-9) The Commissioner stresses, however, that while such an agreement may represent a *recommendation* to the County Superintendent, it is the County Superintendent who is specifically vested with the authority to distribute assets pursuant to *N.J.S.A.* 18A:13-62, subject to review by the Commissioner and State Board of Education.[3] *Union County, supra*, at 13.

Based on the record herein, the Commissioner concurs with the ALJ that the facts are sufficiently compelling to justify a deviation from the asset distribution ordered in the County Superintendent's June 30, 2001 Report, as authorized by the Court in *Union County, supra.* (Initial Decision at 11) There, the Supreme Court determined that "the overriding goal of the statutory scheme is to distribute equitably the regional district's assets and liabilities." *Union County* at 15. The Court acknowledged, however, "[that the statutory scheme] presumably can result in equalization for all constituent communities, including those without real property, only when the debt load is significant (or when all communities received real property)." (*Id.* at 16) Due to the relative absence of debt in *Union County*, the Court concluded:

[3] For this reason, the Commissioner finds the ALJ's discussion on pages 12 and 13 of the Initial Decision with respect to the enforceability of the agreement to be misplaced.

> Given the obvious purpose of the statutory scheme to distribute assets and liabilities equitably, and the generalized assumption in the statute that debt allocation is a sufficient mechanism for ensuring equity, we are persuaded that in these circumstances insistence on strict application of the asset distribution scheme in *N.J.S.A.* 18A:8-24 is unwarranted, particularly where, as here, the parties entering into dissolution have agreed to an alternative liquid asset distribution formula that represents a more equitable asset allocation. (*Id.* at 17)

The Commissioner is likewise persuaded by the undisputed facts in this matter that application of the principles set forth in *Union County* will serve to effectuate a more equitable distribution herein, where equalization cannot similarly be realized through debt allocation,[4] notwithstanding the lack of agreement by the constituent districts to depart from the statutory scheme, which agreement the Commissioner does not view as determinative in the Court's analysis. In so concluding, the Commissioner notes that he finds on this record no "policy justification for insisting on distributing the liquid assets to each municipality, and thereby exacerbating the overall disproportion of the municipalities' asset shares." *Union County, supra,* at 19.

The Commissioner cannot, however, accept the ALJ's position that involvement in a send-receive relationship, in effect, constitutes a quantifiable "asset" that must be factored into an equitable distribution vis-à-vis the non-building districts. The Commissioner, therefore,

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[4] In his June 30, 2001 Report, the County Superintendent noted, "There is no long-term debt regarding building/grounds/equipment to address with the exception of a Lease Purchase Agreement. On March 18, 1999, Lower Camden County entered into a school building lease purchase agreement to finance technology improvements in all four buildings. Certificates of Participation in the par amount of $2,750,000 were issued and the proceeds were used to finance technology improvements including the acquisition and installation of furnishings, equipment and site work. The distribution of debt was based on the equalized valuation of the three Building Districts and equipment received by each. [Exhibit E] is the breakdown of the percentage share of debt and the specific debt obligation for [the] 01-02 school year. As principal/interest obligations are due in future years, the percentage share of the debt will be used for this calculation.***" The report shows the principal/interest obligations for the 2001-2002 school year to be $83,610.57 for Lindenwold; $57,340.74 for Pine Hill and $228,061.19 for Winslow. (*Report of the County Superintendent of Schools on the Division of Assets and Liabilities Among the Constituent Districts of Lower Camden County Regional High School District No.* 1 at 3)

does not concur with the ALJ's discussion and findings at pages 13-16 of Initial Decision that the Boards of Education of the Township of Berlin, the Borough of Clementon and the Borough of Chesilhurst should not be included in a redistribution remedy. Rather, consistent with the Court's conclusions in *Union County, supra*, the Commissioner finds that the most equitable allocation of the former Regional District's assets, under these circumstances, would be to divide the total liquid assets among the four non-building districts in proportion to the percentages of school taxes that each of those non-building districts paid to the former regional district, without regard to the contributions of the building districts.

Accordingly, the Initial Decision of the ALJ is modified as set forth herein.[5] The Commissioner underscores that the five-year installment payment schedule for the initial distribution of liquid assets, as determined by the County Superintendent of Schools, shall remain unchanged by this decision,[6] and designated as "Payment Schedule I." (*See, Report of the County Superintendent of Schools on the Division of Assets and Liabilities Among the Constituent Districts of Lower Camden County Regional High School District No. 1* at Exhibit C2, showing a total of $2,795,535 in liquid assets to be distributed to the non-building districts.)

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[5] Pursuant to *N.J.A.C.* 1:1-14.10(j), however, the Commissioner declines to adopt the ALJ's interlocutory order dated November 25, 2002. On September 16, 2002, more than two months *after* the Board of Education of the Borough of Pine Hill Board was due to make its first of five payments in accordance with the County Superintendent's June 30, 2001 Report, the Board moved for a stay of the payments ordered in the June 30 report. (Pine Hill Board of Education's Motion for Stay, September 16, 2002) The ALJ entertained the motion, notwithstanding that: the motion was not made directly to the Commissioner; the Pine Hill Board was a respondent in this matter; the motion wholly failed to address the legal standard for granting such relief, *N.J.A.C.* 6A:3-1.6; and based on the pleadings filed herein, together with the Prehearing Order agreed upon by the parties (Initial Decision at 6), the issue raised by Pine Hill's motion was not before the ALJ. To the extent the Pine Hill Board of Education sought to challenge the distribution schedule ordered by the County Superintendent in his June 30, 2001 Report, it should have filed a Petition of Appeal before the Commissioner of Education pursuant to *N.J.A.C.* 6A:3-1 *et seq.*; however, *it did not*. Pine Hill's motion, therefore, should have been summarily dismissed.

[6] The County Superintendent's June 30, 2001 Report, reflecting the *original* distribution of liquid assets, directed that "payments among districts shall be made over a five year period **beginning July 1, 2002,** in 5 equal installments ***." (*Report of the County Superintendent of Schools on the Division of Assets and Liabilities Among the Constituent Districts of Lower Camden County Regional High School District No. 1* at 7) (emphasis added) ***Thus, to the extent any payments have not been made relative thereto, all boards in this matter are directed to immediately comply with the terms of the County Superintendent's Report.***

Of the total $8,469,326 in liquid assets, $5,673,792 remains to be *re*distributed, as per this decision, on "Payment Schedule II." Specifically, funds shall be redistributed from the liquid assets received by, and remaining in, the Board of Education of the Township of Winslow ($3,702,885), the Board of Education of the Borough of Pine Hill ($706,840) and the Board of Education of the Borough of Lindenwold ($1,264,067). Each building district shall make payments in five equal, annual installments, commencing July 1, 2004,[7] to **each** of the non-building districts as follows:

- 29.39% to the Board of Education of the Township of Berlin for a total increase of $1,667,720 over the five-year period;
- 4.47% to the Board of Education of the Borough of Chesilhurst for a total increase of $253,575 over the five-year period;
- 16.63 % to the Board of Education of the Borough of Clementon for a total increase of $943,485 over the five year period; and
- 49.51% to the Board of Education the Township of Waterford, for a total increase of $2,809, 011 over the five-year period.[8]

[7] Both the Board of Education of the Township of Winslow and the Board of Education of the Borough of Lindenwold indicate that, to the extent there is a redistribution remedy ordered by the Commissioner herein, payments should not begin until July 1, 2004 at the earliest, since the additional funds were not included in either the 2002-2003 or 2003-2004 school year budgets. (Winslow Exceptions at 4; Lindenwold Exceptions at 1)

[8] By way of example, the Board of Education of the Township of Winslow shall distribute its $3,702,885 in five equal installments of $740,577. For each of five years, Berlin shall receive 29.39% of $740,577, Chesilhurst shall receive 4.47% of $740,577, Clementon shall receive 16.63% of $740,577 and Waterford shall receive 49.51% of $740,577.

In so directing, the Commissioner notes he does not include any award of interest, which is governed by *N.J.A.C.* 6A:3-1.17.

IT IS SO ORDERED.[9]

COMMISSIONER OF EDUCATION

Date of Decision: 5/2/03

Date of Mailing: 5/2/03

[9] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

#212-03E

212-03

OAL DKT. NO. EDU. 2437-03
AGENCY DKT. NO. 131-4/03

L.J., on behalf of minor child, S.J., and DAVID WICKHAM,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MANCHESTER, OCEAN COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

lay 2, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER GRANTING PETITIONERS' MOTION FOR EMERGENT RELIEF

OAL DKT. NO. EDU 2437-03

AGENCY DKT. NO. 131-4/03

L.J., ON BEHALF OF MINOR CHILD, S.J. AND DAVID WICKHAM,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF MANCHESTER, OCEAN COUNTY,

Respondent.

Howard A. Teichman, Esq., for petitioners (Furlong and Krasny, attorneys)

Lawrence L. McIver, Esq., for respondent (Gilmore and Monahan, attorneys)

Record Closed: April 29, 2003 Decided: April 30, 2003

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

PROCEDURAL HISTORY

On April 28, 2003, this matter was transmitted to the Office of Administrative Law as a contested case, pursuant to *N.J.S.A.* 52: 14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. Specifically, the transmission was for a petition for emergency relief filed on behalf of the petitioners seeking to overrule the respondent school district (hereinafter "Manchester") from precluding Mr.

Wickham from accompanying S.J., a minor and a student at Manchester Township High School, to the junior prom which is scheduled to be held on the evening of May 3, 2003. It should be emphasized at the outset that Manchester is *not* seeking to preclude S.J. from attending the junior prom. She qualifies in every respect; what the district is seeking to do is to preclude Mr. Wickham from attending as her prom date.

After the matter was transmitted to the OAL, it was received by my office late on the afternoon of the transmission, and it was accompanied by a motion and supporting documents submitted to the Commissioner of Education by petitioners on April 25, 2003. I did not receive any responsive papers from Manchester until the morning of April 29 when it submitted its brief and several affidavits and exhibits in support of its position. Because Mr. Teichman had not received one or more of those documents (without in any way suggesting that Manchester was guilty of any improper conduct), he was provided with one of the affidavits which he had not received and given a reasonable opportunity to review it before we proceeded. Oral argument was then conducted and concluded in the late morning of April 29, 2003, at which time the record on the motion closed. Because of the nature of the case, this decision fully disposes of all issues in dispute. There will be no further OAL proceedings.

STANDARD OF REVIEW

The standards for granting emergency relief or denying same is not dissimilar from those which adhere in the judicial forum. Pursuant to *N.J.A.C.* 1:1-12.6(a), emergent relief may be granted only when irreparable harm will result without an expedited decision granting or prohibiting some action or relief connected with the case. Harm is generally considered irreparable if it cannot be redressed adequately by monetary damages. Typically, to prevail on an emergency relief motion with a preliminary injunction, the applicant must make a preliminary showing of a reasonable probability of ultimate success on the merits. However, that requirement is usually tempered by the principle that mere doubt of the claim's validity is not an adequate basis for refusing to maintain the status quo. So, frequently emergency relief is granted to prevent a decree on the merits from becoming futile or useless by preventing the res from destruction or impairment. Finally, in considering the granting of emergency relief, an agency

will weigh the relative hardship to the parties in granting or denying the relief. *See Crowe v. DiGioia,* 90 *N.J.* 126 (1982).

The factual matrix of this proceeding is based exclusively upon the affidavits submitted by counsel and accompanying exhibits, where appropriate. To the extent that there is a limited factual record, I shall set forth what I believe to be the operative facts in these proceedings. If a factual dispute does present itself, I shall make an effort to resolve that dispute and give reasons to support it and accompany that with an explicit finding of fact.

Accordingly, I **FIND**:

S.J. is a 17 year-old high school junior attending Manchester High School. She is a student in good standing and as such was given an invitation to attend the junior prom to be held on May 3, 2003 this year at a country club in Lakewood, New Jersey. S.J. learned about the prom and the various requirements to be met in order to attend either in late February or early March 2003. She completed the appropriate forms at about that time, and in late March of 2003, was once again notified that she was approved to attend and she had also paid the required amount of $90 for herself and her guest as admission to the prom.

Not long thereafter, she began to hear "rumors" floating through the school that her boyfriend, David Wickham, currently a student at a different high school and an adult for purposes of this proceeding, would be prohibited from attending the prom as her date. Upon hearing this information, S.J. met with Mr. Robert Conover, Vice Principal of Manchester, and following what was described as a consultation with Mr. Conover and the principal, S.J. was advised that indeed David Wickham would not be permitted to attend the prom. She was advised that the sole reason for such refusal, and it seemed to me that the same argument exclusively was offered at oral argument, was that his presence could jeopardize the safety of other students. No explanation was given as to how or why Mr. Wickham's presence would place other students in jeopardy. Subsequently, S.J.'s father, whose affidavit became part of the record in this proceeding, met with an official of Manchester and was advised that the high school administration had the final word on the matter, which was thereafter reaffirmed when he met with Mr. Conover. As is often the case, both S.J. and Mr. Wickham expended considerable time,

energy and money in preparation to attend the junior prom. The facts indicate that those expenditures exceeded $1,500 and are nonrefundable in whole or in part. When S.J. was advised that she would be permitted to attend the prom, in addition to a formal invitation, she was provided with a statement of rules concerning attendance, which was filed as Exhibit B with the petitioners' moving papers. Each of those criteria were met by S.J. and to the extent that they could be met by Mr. Wickham (one of the requirements is that a student have no more than 10 demerits on May 2). Obviously, since Mr. Wickham is not a student at the high school, he could not be measured under this standard. However, pursuant to the argument offered by counsel based upon his record while he was at that school, which ran for approximately two and a half years, he did not exceed the 10 demerit standard.

Mr. Wickham is currently a full-time student at a different high school where, based upon the record before me, he is a student in good standing and is not the subject of any particular identifiable disciplinary problems.

Manchester bases its decision that Mr. Wickham could present a danger to the safety of students and other persons attending the prom on his disciplinary record at Manchester. That record, attached to Exhibit B, serves as the sole basis for the Manchester decision to preclude Wickham from attending the prom with his girlfriend. A review of that record demonstrates that the primary problem Wickham experienced while at Manchester was tardiness and not attending class. Some 16 of the items noted in his disciplinary record relates to lateness, most of which occurred in 1999 when presumably he was a freshman. Others relate to cutting class and leaving school property. It would appear that during the course of his entire record, Mr. Wickham's primary infraction on which the Board ostensibly relied to justify its refusal to permit him to attend the junior prom was an incident which occurred on January 23, 2002. The disciplinary record only indicates "under infl. alc suspension." Obviously, this is a reference to a charge of being under the influence of alcohol while in school, and he may have been suspended one day although that is not clear because he had agreed to submit to a blood alcohol test, and it could be that he remained out of school until the results of that test were concluded. The uncontested facts asserted by the petitioners reveal that the results of the blood alcohol test was negative; that is, legally, there was no proof at all to indicate that Mr. Wickham was either under the influence of alcohol when he attended school on that date in January or was apparently under the influence of

alcohol on that day. The precipitator of the charge is a hearsay assertion related to David J. Walling, the principal of the Manchester Township High School, that is set forth at Paragraph 6 of his affidavit. He notes:

> On January 23, 2002, petitioner, David Wickham, was reported by a teacher as being under the influence of alcohol. Mr. Wickham smelled of alcohol and was sent for a screening later that day. During a meeting with Mr. Wickham's mother, Juanita Wands, it was admitted that David was drinking into the early morning hours before arriving at school.

Thus, the only support for a finding that Wickham was under the influence of alcohol was the olfactory sense of one teacher (who remains to this day not identified in this record) who perhaps smelled alcohol on Wickham's breath. That determination may have been correct. She may have smelled mouthwash. She may have smelled what she believed to have been alcohol. But what we do know is that whatever she did smell did not constitute any wrongdoing on Wickham's part as the result of the conclusions of the blood alcohol test. Nothing in Ms. Wickham's affidavit, which was submitted on behalf of her son, indicates that she ever advised representatives of the board of education that he was drinking on the previous evening. It should also be noted that based upon the representations of counsel, throughout his career at Manchester, Wickham's mother (the father does not live in the home) was never notified of any apparent misconduct on his part, the inference asked to be drawn is that nothing that occurred raised sufficient red flags in the eyes of the school district to alert the parents that they have a son who is a potential safety hazard and danger to other people. She notes as well that her son is currently attending Toms River Adult High School (as well as a vocational program elsewhere) and that his grades for the most recent marking period contain 2 A+, 1 A, 1 B and 1 C. Further, no disciplinary infractions at this current school have occurred.

The second basis under which Manchester looks to Mr. Wickham's record to justify its decision that on May 3, 2000, Wickham was "fighting." The notation beneath that reference, presumably made by the driver of the school bus where the fight apparently occurred, was that another student had made some remarks about Wickham's sister and a fight ensued. Police removed the students from the bus, mother was notified by phone and Wickham was picked up by his uncle. That incident occurred some three years ago. It is also unclear as to the circumstances surrounding that fight. No criminal charges were ever filed, and I have to assume

that it was a fist fight that was quickly quelled. I also asked Wickham whether he had ever been involved with criminal behavior and he noted that as a juvenile he was twice placed under arrest and on both occasions the charges were dropped, and on one occasion the arresting officer was relieved from duty. The assertion by Mr. Teichman that Wickham's mom when she went to the school to look at her son's disciplinary record was mistakenly given the record of another student is in my view irrelevant to this case. Respondent represented unequivocally that it based its judgment on David Wickham's disciplinary record, not on anyone else's. Upon inquiry, I was advised that the prom maintains security including members of the local police department, and that it is expected that there will be 200 to 300 persons in attendance.

ANALYSIS

It should at the very outset be noted that - tragically - public schools in America are not as safe as they once were and are perceived as unsafe. Crimes of the highest order have been committed by students in a variety of schools throughout the country. Could these have been averted had the school district been more sensitized to the child's disciplinary record? It is my view that no one can ever anticipate the actions of another. It is not surprising that many instances of horrific crimes have been committed by students with fine records. Thus, I commend Manchester on its concerns for the safety of the students and for looking at the reality of the school environment as a place no longer of nurturing and peace but sometimes of danger. Irrespective of its good faith, however, in order to justify a decision to ban an individual – whether that individual is a student or the significant other of a student – from attending a prom based exclusively on a disciplinary record comprised primarily of latenesses and cutting classes occurring in most instances some three years ago is in my view unreasonable. I, of course, do not know Mr. Wickham and he did not participate in the proceedings but he attended the courtroom, and it was clear to me that both he and S.J. were intensely concerned with whether or not this motion would or would not be granted. I take it that they have been romantically involved for a significant period of time. Whether this relationship will end in anything more than a high school romance remains to be seen and it really is not the point. What is the point is that it was clear that these kids care about one another deeply. It is beyond peradventure that the last thing Wickham would *ever* want to do at this very special event is to embarrass or in any way jeopardize S.J.'s reputation or make the prom anything but a night that will be relived during the

course of her adulthood and will be filled with wonderful memories. I also believe that the presence of municipal police authorities as security would be appropriate, not because of David Wickham but because when you have 200 or 300 kids at a prom, there is always the possibility that drinking will have taken place or some altercation would follow and there is a need for security, and I'm sure that the parents agree with that. That Wickham may have had an altercation with another student on a school bus several years ago because the other student presumably made some pejorative remarks about his sister, while it is not condoned, it is certainly understandable and in and of itself presents no justification to conclude that Wickham is a danger. In addition, the incident concerning alcohol was nothing more than an allegation which was ultimately disproven and would be disproven in a court of law or in an administrative proceeding were Mr. Wickham to be charged with such misconduct based upon the scientific findings and results of the blood alcohol test.

It is well settled in New Jersey that decisions of local boards of education are entitled to a presumption of correctness and are to stand undisturbed unless shown to be "patently arbitrary, without rational basis or induced by improper motives." *J.M., By His Guardian, D.M. v. Hunterdon Central Regional High School District, Hunterdon County*, 96 *N.J.A.R.*2d (EDU) 415, 419; *R.A.M. and C.A.M. v. Board of Educ. of the Township of Tabernacle*, 94 *N.J.A.R.*2d (EDU) 573, 576 (*citing, Kopera v. West Orange Bd. of Educ.*, 60 *N.J.Super.* 288 (App. Div. 1960)). *See Boult v. Board of Educ. of Passaic City,* 136 *N.J.L.* 521(E. & A. 1948); *Fraser v. State Bd. of Educ.*, 133 *N.J.L.* 15 (Sup. Ct. 1945); *Offhouse v. State Bd. of Educ.*, 131 *N.J.L.* 391 (Sup. Ct. 1944); *Greenway v. Board of Educ. of the City of Camden*, 129 *N.J.L.* 461 (E. & A. 1943). Petitioner bears the burden of proving, by a preponderance of the evidence, that the respondent's action was "arbitrary, capricious or unreasonable." *J.M., supra,* 96 *N.J.A.R.*2d at 419.

In my view, the petitioner has succeeded in meeting this burden in the matter *sub judice.* The determination arrived at by Manchester that resulted in the opinion of the principal and vice principal to deny Wickham the right or the privilege, whichever way one wishes to describe it, to accompany his girlfriend to the junior prom was based exclusively upon his disciplinary record. That record does not approach the kind that would lead one to reasonably and intelligently conclude that this person presents a risk factor to other students or others attending the prom. He

had a punch out on a bus three years ago when he was a freshman defending his sister from insults and/or ridicule. He was, based upon the record, vindicated from the assertion he had imbibed alcohol or was under the influence of alcohol. Certainly, lateness and class cutting do not present a danger to others. It may present a danger to the student who engages in it. Thus, I **CONCLUDE** that the determination by Manchester, which exclusively premised its decision to preclude Wickham from attending the junior prom on the his disciplinary record was not predicated upon any rational nexus between his prior behavior – in most cases occurring years ago – and the potential that he could create problems at the prom. Plus, as I had indicated earlier, it seems to me that Wickham's worst nightmare would be to do anything inappropriate at the prom which would embarrass S.J. or in any way scar her memories of the experience or hold her up to ridicule by her classmates. Implicit in my statement is the assertion as well that were this matter to have gone to plenary hearing (which it will not because the matter will be moot as of May 3, 2003), it is my view that the petitioners present a very real likelihood of prevailing on the merits.

In addition, the equities of the parties are at issue here. The petitioners have expended in excess of $1,500, anticipating going to the prom, not to mention the expectation and energy expended since February of 2003 in looking forward to it and talking about it. It is fairly obvious that to deny Wickham the opportunity to attend will result in S.J. not attending either. Given the importance of prom to this generation of students, the equities clearly favor the petitioners, and with the security being what it was described to be at the prom, I think any risk is clearly outweighed by the harm imposed upon both petitioners in these proceedings.

I am not unaware of the administrative decision cited by respondent in *W.L.B. and K.B. on behalf of their minor son, W.M.B., and W.B. and J.B. on behalf of their minor daughter, M.B., v. The Board of Education of the Woodbury School District, Gloucester County,* 96 *N.J.A.R.*2d (EDU 695), final decision May 17, 1996. In that matter, basically, the Deputy Commissioner of Education ruled that a high school student who did not achieve the requisite number of credits is not entitled to emergent relief to attend the prom. In that decision, the Assistant Commissioner held that prohibition from attending a senior prom does not constitute irreparable harm. He also held that the petitioner in *W.M.B.* was unable to make a showing of the likelihood of success on the merits or establishing that the board's policy was arbitrary, capricious or unreasonable. In

addition, the decision was couched in a determination that in balancing the equities, greater harm would inure to the board of education than to the student if the motion were granted because the board had "an important interest in enforcing its policies to effectively operate its school to ensure academic achievement."

As an administrative law judge, I have an obligation to accord deference to the expertise of the agency head, and I do so in this matter as well. I respectfully, however, disagree that the decision in *W.M.B.* applies to the case at bar. That matter was decided seven years ago. Without assessing the change in American culture over those seven years, it is my view that in the case at bar, the interests of these petitioners having the prom door closed on them would indeed create lifelong irreparable damage. One cannot make light of high school memories. They are significant. They mark the end and the beginning of a new phase in life. In this matter, I have found that all of the other requirements to obtain injunctive relief have been met. In *W.L.B.* that was not the case. As noted previously, the petitioner did not demonstrate a likelihood of success on the merits and the petitioner was not able to demonstrate that the decision of the district was arbitrary, capricious and/or unreasonable. Based upon my reading of *W.L.B.*, I entirely agree with that holding. There, the requirement that was not met by the student and which was not in dispute was an academic requirement – he did not have the requisite number of credits which entitled him to attend the prom. Here, no one is seeking to undercut the authority of the district concerning academic standards. Rather, the decision to reverse the school district is based clearly on a decision arrived at which cannot find support in reason or in the record.

In addition to the notice I referred to during the factual discussion of this case, there was also a reference in the school handbook concerning nighttime activities. As attached to respondent's affidavit of David Walling as Exhibit A is a page of that manual which essentially indicates the following as relevant to this case:

> When you are attending any school function, you are expected to behave in a manner becoming young adults. Regular school rules are in effect. Guests not attending [the Manchester School System] need prior administrative approval to attend dance/proms.

It then goes on to discuss appropriate dress policies, properly remaining out of restricted areas, arranging for transportation at home, and it finally notes that students are responsible for the behavior of any guest brought to a school event. That is a reasonable policy statement. What is unreasonable is its application to the disciplinary record of David Wickham and to his current state of affairs. So that, with all respect accorded to the Commissioner of Education's office, I distinguish the case cited from the matter *sub judice* and do **FIND** that denial of the opportunity of S.J. to attend the prom with her friend does indeed result in irreparable injury to her and to him. Accordingly, and based upon the foregoing, it is **ORDERED** that the decision arrived at by Manchester precluding petitioner Wickham from attending the junior prom as a guest of S.J. be and is hereby **REVERSED**.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

4/30/03
DATE

STEVEN C. REBACK, ALJ

cmo

EXHIBITS

For Petitioners:

A Photocopy of the blood alcohol test administered to Mr. Wickham on 1/24/02 demonstrating a negative finding for alcohol or any other contraband

For Respondent:

A Page 12 of student handbook

B Disciplinary history of David Wickham's attendance at Manchester

OAL DKT. NO. EDU. 2437-03
AGENCY DKT. NO. 131-4/03

L.J., on behalf of minor child, S.J., and DAVID WICKHAM,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MANCHESTER, OCEAN COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

The record of this emergent matter, which included an audiotape of the hearing conducted at the Office of Administrative Law (OAL) on April 29, 2003, and the Order of the Administrative Law Judge (ALJ) have been reviewed.[1]

Upon such review, the Commissioner determines to adopt the Order of the ALJ, in general, for the reasons stated in his Order, as he is persuaded that petitioner has satisfied the requisite standards for the granting of emergent relief pursuant to *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). The Commissioner notes that harm is "irreparable" when, as here, there can be no adequate remedy after-the-fact in law or in equity; monetary damages cannot adequately redress the intangibles of the lost prom experience after the event is over. Although the irreparable nature of the harm and the degree or severity of the harm are actually two separate factors to be

[1] It is noted that, by facsimile dated April 30, 2003, the Board submitted a Motion for Stay requesting that the decision of the ALJ, entered on April 30, 2003, be stayed pending the final decision of the Commissioner. The Board, additionally, submitted exceptions to the ALJ's Order. Pursuant to *N.J.A.C.* 1:1-12.6, the Order of the ALJ is a *recommended* decision, reviewable by the Commissioner after his consideration of the Order and audiotape of the hearing conducted at the OAL. *See N.J.A.C.* 1:1-12.6(i) and (j). Therefore, consideration of a Motion for Stay of the ALJ's decision is unnecessary. With respect to the Board's exception submission, *N.J.A.C.* 1:1-12.6 makes no provision for the filing of exceptions or reply exceptions to an emergent relief Order. As such, the Board's submission in this regard was not considered.

assessed, the two have frequently been addressed together in cases denying emergent relief. Therefore, in his consideration of irreparable harm herein, the Commissioner is cognizant that it is well-established that prohibition from attending a prom does not, in and of itself, rise to the necessary level of irreparable harm. As was stated in *Martin A. Domacasse v. Board of Education of the North Warren Regional School District, Warren County*, decided by the State Board April 17, 1996:

> the memories [petitioners] will have foregone as a result of not participating in ***extracurricular activities, do not provide [them] with the requisite harm warranting the extraordinary relief requested.***
> (*Domacasse* at 2)

Notwithstanding, the Commissioner, likewise, recognizes that "severe personal inconvenience" may also constitute irreparable harm sufficient to satisfy the criteria, under certain circumstances. *Crowe, supra* at 133. Here, as found by the ALJ, "S.J. learned about the prom and the various requirements to be met in order to attend either in late February or early March 2003. She completed the appropriate forms at about that time, and in late March of 2003, was once again notified that she was approved to attend and she had also paid the required amount of $90 for herself and her guest as admission to the prom." (ALJ's Order at 3) The record indicates that both of these submissions identified her intended date. As such, the administration was, or should have been, aware from her very first submission, that S.J.'s intended date for the prom was David Wickham. In reliance on what she could reasonably assume was the administration's approval of her application(s), S.J. and David Wickham, 17 and 18 years old, respectively, made extensive preparations and incurred considerable expense. The Commissioner also finds particularly troubling that the first indication S.J. received that David Wickham would not be permitted to attend the prom did not come from the administration but, rather, from "rumors" floating through the school. (ALJ's Order at 3) Under these particular circumstances, the

Commissioner finds and determines that petitioners have made a preliminary showing that they have experienced severe personal inconvenience sufficient to constitute irreparable harm.

Accordingly, petitioner's request for emergent relief is granted and the Board is hereby ordered to allow David Wickham to accompany S.J. to her junior prom on May 3, 2003. Because, as was noted by the ALJ, due to the nature of this case, this decision fully disposes of all issues in dispute between the parties, no further proceedings at the OAL are necessary, and this matter is, therefore, dismissed. The Clerk of the Office of Administrative Law is hereby requested to return the file pursuant to *N.J.A.C.* 1:1-3.3.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 5/02/03

Date of Mailing: 5/02/03

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

213-03

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 4650-98S

AGENCY DKT. NO. 134-5/98

PAMELA JUSTINIANO,

Petitioner,

v.

BOE OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY

Respondent.

Barbara E. Riefberg, Esq., for petitioner

Eric M. Bernstein, Esq., for respondent

Record Closed: March 11, 2003 Decided: March 11, 2003

BEFORE EDGAR R. HOLMES, ALJ:

This matter was transmitted to the Office of Administrative Law on August 14, 2002, for determination as contested cases, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

May 5, 2003

The parties have agreed to a settlement and have prepared a Stipulation of Settlement/Consent Order indicating the terms thereof, which is incorporated herein by reference and attachment.

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

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

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

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

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

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

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

3/11/03
DATE

EDGAR R. HOLMES, ALJ

Receipt Acknowledged:

March 20, 2003
DATE

M. Kathleen Duncan (by)
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 24 2003
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

WSS

CONFIDENTIAL

SETTLEMENT AGREEMENT AND GENERAL RELEASE

IT IS HEREBY AGREED by and between **PAMELA JUSTINIANO** ("Justiniano") and the **ATLANTIC CITY BOARD OF EDUCATION** ("Board"), for the good and sufficient consideration set forth below, as follows:

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

2. Justiniano, as used herein, shall mean Pamela Justiniano, her heirs, representatives, privies, executors, administrators, assigns, successors-in-interest and predecessors-in-interest; and,

3. Within thirty (30) working days of the Board's receipt of this Settlement Agreement and General Release, executed by Justiniano before a Notary Public, the Board shall pay to Justiniano an amount equal to ONE THOUSAND FIVE HUNDRED DOLLARS AND NO CENTS ($1,500.00). Justiniano and the Board acknowledge and agree that the payment mentioned above is in settlement of any and all claims that had been asserted, were asserted or may have been asserted or could be asserted by Justiniano for compensatory damages, pain, suffering, emotional distress, stress, humiliation, embarrassment, mental anguish, medical expenses, punitive damages, interests, attorneys fees, costs of suit, loss of sick time, loss of vacation time, loss of benefits, consequential damage, reputation damage, breach of express or implied contract, interference in any contract, economic opportunity or prospective economic advantage which arose out of Justiniano's employment with the Board, as well as deriving from

the incidents related to the matter known as Pamela Justiniano v. Atlantic City Board of Education, Docket No. EDUOA-04650-98S, for, but not limited to, violation of her civil rights, privileges and immunities secured by the Civil Rights Act of 1871, 1964 and 1991, 42 U.S.C. §§1981, 1983, 1985, 1986 and 1988, the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 et. seq., the Fifth and Fourteenth Amendments to the United States Constitution, the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et. seq., the Tenure Protection Act, N.J.S.A. 18A:17-4 and any and all other federal, state and local constitutional, statutory, regulatory or administrative laws, ordinances or common law duties. Justiniano and the Board expressly understand and agree that said payment includes any and all amounts that may be, could be or will be claimed by Justiniano or on her behalf, or by her attorneys, heirs, successors or assigns, against the Board. The payment mentioned above is in complete and full settlement of all amounts that Justiniano is or could be owed by the Board and Justiniano agrees that she will not seek any future compensation or benefits from the Board except what is stated explicitly herein. Further, Justiniano and the Board agree that this Settlement Agreement and General Release is contingent on and subject to approval and ratification by the Board; and,

4. (a) This settlement is intended as a resolution for any and all possible claims, actual or implicit, and Justiniano hereby waives any and all claims for lost wages, income or future earnings and any other benefits potentially available arising out of the matter known as Pamela Justiniano v. Atlantic City Board of Education, Docket No. EDUOA-04650-98S. Justiniano also understands and agrees that any adjustments to her withholding or any estimated tax payments are her responsibility; and,

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

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

6. Justiniano releases, acquits, gives up and forever discharges any and all claims and rights which she may have against the Board up to the time of the execution of this Settlement Agreement and General Release. Justiniano specifically releases the following claims:

Any and all damages, whether known or unknown at this date, arising from or in any way relating to the matter known as Pamela Justiniano v. Atlantic City Board of Education, Docket No. EDUOA-04650-98S or arising from Justiniano's employment with the Board, including, but not limited to, attorney fees pursuant to 42 U.S.C. §1983 and/or 42 U.S.C. §1988 and/or N.J.S.A. 10:5-1 et seq.

More specifically, in consideration of the payment specified in Paragraph 3 above and the entry into this Settlement Agreement and General Release by the Board, Justiniano hereby releases, acquits and forever discharges the Board of and from any and all actions or causes of action, suits, debts, claims, complaints, contracts, controversies, agreements, promises, damages, cross-claims, claims for contribution and/or indemnity, claims for costs and/or attorney's fees, judgments and demands whatsoever, in law or equity, which Justiniano ever had, now has, or may have, as of the date of this Settlement Agreement and General Release, as set forth more particularly in Paragraph 3.

7. Justiniano agrees not only to release, acquit and forever discharge the Board from any and all claims which arose from Justiniano's employment with the Board that Justiniano could make on her own behalf, but also those which have been or may be made against the Board by any other person or organization on her behalf. Justiniano specifically waives any right to become, and promises not to become, a member of any class in any case in which any claim is asserted against the Board, involving any event that has occurred on or before the date of this Settlement Agreement and General Release; and,

8. The Board affirms that, as of the date of execution of this Settlement Agreement and General Release, they have no knowledge of any pending class action against it to which Justiniano could be a potential class member, and,

9. Justiniano specifically acknowledges that the arrangement referred to in Paragraph 3 hereof constitutes additional consideration not otherwise owed to her but for this Settlement Agreement and General Release; and,

10. Unless directed to do so by court order or lawfully issued subpoena with notification to the Board at the time the lawfully issued subpoena was issued, Justiniano agrees that she will not give testimony or evidence against the Board in any proceeding with respect to any incidents related to any incidents/events involving Justiniano's employment with the Board; and,

11. Justiniano and her attorney(s) agree(s) and promise(s) that they will not disclose, either directly or indirectly, in any manner whatsoever, any information regarding either: (a) the substance or existence of his complaints, claims, charges and/or actions against the Board; or, (b) the existence, terms or contents of this Settlement Agreement and General Release, to any person or organization, including, but not limited to, any governmental agency, members of the press and media, present and former officers, employees and agents of the Board and other members of the public, except the office of the United States Attorney/Department of Justice for New Jersey or, if applicable, the New Jersey State Attorney General. This paragraph shall not

preclude Justiniano or her attorney(s) from disclosing the existence or terms of this Settlement Agreement and General Release to: (a) governmental authorities which require such information; and, (b) Justiniano's attorney, who shall also be obligated to keep this information confidential. Justiniano may only state, without elaboration, as follows: "The situation has been resolved to the mutual satisfaction of Justiniano and the Board." In the event Justiniano or her attorney violates this paragraph, Justiniano shall be obligated to pay forthwith to the Board all monies paid to Justiniano by the Board pursuant to this Agreement, as well as any and all attorneys' fees and costs incurred by the Board in obtaining this Agreement attempting to recover the amount referred to above. The Board may also commence an action for equitable relief as they deem appropriate. In the event the Board commences any such action, the remaining provisions of this Settlement Agreement and General Release shall remain in full force and effect; and,

12. The Board and its attorney(s) agree(s) and promise(s) that they will not disclose, either directly or indirectly, in any manner whatsoever, any information regarding either: (a) the substance or existence of Justiniano's complaints, claims, charges and/or actions against the Board; or, (b) the existence, terms or contents of this Settlement Agreement and General Release, to any person or organization, including, but not limited to, any governmental agency, members of the press and media, present and former officers, employees and agents of the Board and other members of the public, except the office of the United States Attorney/Department of Justice for New Jersey or, if applicable, the New Jersey State Attorney General. This paragraph shall not preclude the Board or its attorney(s) from disclosing the existence or terms of this Settlement Agreement and General Release to: (a) governmental authorities which require such information; and, (b) the Board's attorneys, who shall also be obligated to keep this information confidential. The Board may only state, without elaboration, as follows: "The situation has been resolved to the mutual satisfaction of Justiniano and the Board." In the event the Board or its attorneys violate this paragraph, the Board shall be

obligated to pay forthwith to Justiniano all attorneys' fees and costs incurred by Justiniano in obtaining this Agreement attempting to recover the amount referred to above. Justiniano may also commence an action for equitable relief as she deems appropriate. In the event Justiniano commences any such action, the remaining provisions of this Settlement Agreement and General Release shall remain in full force and effect; and,

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

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

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

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

17. Justiniano represents and warrants that no other person or entity has or has had any interest in the claims, demands, obligations, or causes of action referred to in this Settlement Agreement and General Release; that Justiniano has not sold, assigned, transferred, conveyed or otherwise disposed of any of the claims, demands, obligations or

causes of action referred to in her verbal complaint(s) and/or in this Settlement Agreement and General Release; and,

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

19. Justiniano and the Board agree to cooperate fully and execute any and all supplementary documents and to take all additional actions which may be necessary or appropriate to get full force and effect of the basic terms and interest of this Settlement Agreement and General Release; and,

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

21. This Settlement Agreement and General Release shall become effective immediately following execution by Justiniano and the Board and approval by all applicable Board officials, except as noted herein; and,

22. Justiniano and the Board shall bear all costs and expenses arising from the actions of their own counsel in connection with the Settlement Agreement and General Release. As set forth in Paragraph 3, the Board has agreed to only pay the amounts herein mentioned to Justiniano. As further consideration for this Settlement Agreement and General Release, Justiniano and her attorney agree that this sum represents all of the monies which the Board has agreed to pay to Justiniano and her attorney and that any additional attorney's fees which may arise from the actions of Justiniano' attorney in connection with any matter arising from Justiniano' employment with the Board are to be borne by Justiniano; and,

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

corporations, associations or partnerships or any other entity or persons connected therewith, except as set forth herein or as may be agreed to in writing between the parties; and,

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

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

For **PAMELA JUSTINIANO**:

Barbara Reifberg, Esq.
BARON, RIEFBERG & WARD
1307 White Horse Road
Vorhees, New Jersey 08043

For the **ATLANTIC CITY BOARD OF EDUCATION**:

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

IN WITNESS WHEREOF, Justiniano and the Board have hereunto set their hands.

Barbara Reifberg, Esq.

PAMELA JUSTINIANO

By: _____
Pamela Justiniano

Leslie Motz, Interim Business Administrator/
Board Secretary

ATLANTIC CITY BOARD OF EDUCATION

By: _____
James Herzog, Board President

N:\Clients\ACBOE (1752)\1009 Justiniano settlement agreement.doc

STATE OF NEW JERSEY)
) ss.
COUNTY OF)

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

Given under my hand and official seal this 11 day of October, 2002.

Joyce M St John
Notary Public

Joyce M. St. John
Notary Public of New Jersey
My Commission Expires October 7, 2004

OAL DKT. NO. EDU. 4650-98S
AGENCY DKT. NO. 134-5/98

PAMELA JUSTINIANO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF OF ATLANTIC CITY, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision issued by the Office of Administrative Law (OAL), incorporating a Settlement Agreement and General Release, have been reviewed.

The Commissioner is unable to accept the written settlement agreement in its present form in that the language of such agreement, on its face (Term 3), specifies that the agreement, although signed by the Board President and the Interim Business Administrator/Board Secretary, requires final ratification by the Board. In the absence of any indication in the record that ratification has been accomplished, such language, making settlement contingent upon ratification of the Board, reveals that the settlement is not "fully dispositive of all issues in controversy" as required under *N.J.A.C.* 1:1-19.1(b). In that the Commissioner's approval would render this agreement a final decision pursuant to *N.J.A.C.* 1:1-19.1(d), the Commissioner finds that accord to its terms by all necessary entities must be accomplished prior to the Commissioner's approval of the settlement.[1] The Commissioner is

[1] Counsel for the Board was made aware of this deficiency by letter dated April 9, 2003 from the Director of the Bureau of Controversies and Disputes, such letter being sent certified and regular mail, with the certified copy

also compelled to comment on Terms 11 and 12 of this agreement. Although the parties may agree between themselves to keep the specific terms of a settlement agreement confidential, they cannot seek to bind the Commissioner or any other individual to such confidentiality. Furthermore, in the absence of a motion to seal the record for good cause shown, Commissioner's decisions are a matter of public record.

Accordingly, this matter is remanded to the OAL for revision of the settlement terms or other appropriate action in light of this decision.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 5/5/03

Date of Mailing: 5/5/03

having been acknowledged as received by L. Santos on April 14, 2003. Counsel was requested to provide a certified copy of the Board's resolution approving the proposed settlement within ten days of his receipt of the Director's letter. Counsel failed to respond to this request, neither supplying the necessary document nor in any manner explaining its absence, thereby necessitating remand of this matter.

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

243-03

IN THE MATTER OF FAYE BALL, :

EWING TOWNSHIP BOARD OF EDUCATION, : COMMISSIONER OF EDUCATION

MERCER COUNTY. : DECISION

:

SYNOPSIS

The School Ethics Commission determined that respondent Board member violated *N.J.S.A.* 18A:12-24(b) of the School Ethics Act when, using her official title, she requested a delay in the release of a Commission decision. After considering the nature of the charge, the Commission recommended a penalty of reprimand.

Upon review of the record, the Commissioner, whose decision was restricted solely to a review of the Commission's recommended penalty, concurred with the Commission's recommendation and, thus, ordered respondent reprimanded as a school official found to have violated the School Ethics Act.

May 12, 2003

IN THE MATTER	:	**BEFORE THE**
	:	**SCHOOL ETHICS COMMISSION**
OF	:	
	:	**Docket No.: C12-02**
FAYE BALL, Ph.D.	:	
EWING TOWNSHIP BOARD OF EDUCATION	:	**DECISION**
MERCER COUNTY	:	
	:	

PROCEDURAL HISTORY

The above matter arises from a complaint filed by School Ethics Commission member Randy Beverly on May 20, 2002 alleging that Ewing Township Board of Education (Board) member, Dr. Faye Ball, violated the School Ethics Act, N.J.S.A. 18A:12-21 et seq., when she e-mailed Lisa James-Beavers, Executive Director of the Commission, and requested the delay of the Commission's decision in *Ordini v. Vickner,* SEC Docket No. C36-01 (May 28, 2002). Mr. Beverly specifically alleged that the above conduct constitutes a violation of N.J.S.A. 18A:12-24(b).

Dr. Ball filed an answer to the complaint on July 15, 2002 admitting that she e-mailed Ms. James-Beavers, and asked that an attached letter to Chairperson Paul Garbarini be forwarded to the Commission. However, Dr. Ball denied that the intent of the letter was to delay Commission proceedings and asserted that the letter was intended to inform the Commission of her concerns regarding the efforts of certain Board members and the superintendent to expedite the release of a decision on C36-01 so that it would be available for public review prior to the April 16, 2002 Board election. Dr. Ball further asserted that she merely sought to request that the Commission not be persuaded to release an early decision as desired by the Board members. Dr. Ball denies that she violated any provision of the Act.

The Commission invited the parties to its October 29, 2002 meeting to present witnesses and testimony to aid in the Commission's investigation. Both parties appeared. Dr. Ball was represented by counsel, Barry Chatzinoff, Esq. Mr. Beverly appeared, *pro se.* After hearing testimony, the Commission voted at its public meeting to find probable cause to credit the allegation that Dr. Ball's conduct was in violation of N.J.S.A. 18A:12-24(b). The Commission determined that there were no material facts in dispute and directed Dr. Ball to submit a written statement, setting forth why the Commission should not find her in violation of N.J.S.A. 18A:12-24(b).

Dr. Ball submitted a timely response which was considered by the Commission at its meeting of February 25, 2003. It now concludes that Dr. Ball violated N.J.S.A. 18A:12-24(b) of the School Ethics Act for attempting to secure an unwarranted privilege for Dr. Vickner by requesting the delay of a Commission decision involving him.

FACTS

Dr. Faye Ball has been a member of the Board since April 2001. She has been employed by the New Jersey Department of Education as an Education Development Program Specialist II since 1994.

At the March 18, 2002 Board meeting, in its public session, Board members, Edgar Dunham, Vince Ordini and Bruce Buck questioned the status of a complaint that Mr. Ordini had filed against fellow Board member Edward Vickner, (C36-01)[1]. The Board members asked the district superintendent, Dr. Timothy R. Wade to contact the Commission to encourage the release of its decision before the April 16, 2002 Board election.

After the Board meeting, Dr. Ball sent an e-mail to the Executive Director of the Commission, dated March 19, 2002. In the letter attached thereto, Dr. Ball set forth:

> Please forgive my meddling into the School Ethics Commission business. However, at last night's Ewing School Board meeting, there were several innuendos made during public session between Mr. Dunham, Mr. Ordini, Mr. Buck, and Dr. Wade (superintendent). The end result was that, at the urging of Mr. Ordini and Mr. Buck, Dr. Wade agreed to call the School Ethics Commission to see if he could get an early decision regarding the above cited case. Dr. Wade mentioned that Mr. Ordini had received a fax about this case. I asked if the decision was public information and I was told no. However, it was apparent to me that several Board members and the administration seemed to be privy to a decision that had not yet been made public nor shared in executive session with the entire Board since the School District paid Mr. Ordini's legal fees.
>
> Based on these shenanigans, my intuition tells me that their intentions for requesting a speedy resolution to the above cited case is less than honorable. I truly believe that if the decision is not favorable, they will use it to smear Dr. Vickner as he seeks re-election. By the way, Mr. Buck is also running for re-election. Therefore, I respectfully request that the School Ethics Commission delay the release of the decision on the above cited matter until after the April 16 School Board Election. In this way, School Ethics Commission decisions can remain above the fray of the Ewing Township School Board. I have advised Dr. Vickner regarding my request and he is in agreement with me.
>
> Thank you, in advance, for your kind consideration.

---

[1] In C36-01 Vince Ordini alleged that Ewing Township board member, Edward Vickner, violated the School Ethics Act when during the public session of a board meeting, he participated in the discussion regarding the low stipends paid to the Team Leaders of the Fisher Middle School, of which his wife is a member. Complainant also alleged that the respondent disclosed his son's confidential student information to others in violation of the Code of Ethics.

In his memorandum to the Board, dated March 21, 2002, Dr. Wade reported that he had contacted the Commission and was advised that the Commission may act on the matter at its April 2, 2002 meeting.

At the Commission's October 29, 2002 meeting, Dr. Ball testified that she drafted the e-mail during her lunch hour and sent the e-mail during one of her breaks. Dr. Ball also faxed the letter to the Commission from her Department of Education office. New Jersey Department of Education policy provides that "personal use of State equipment shall not amount to more than de minimis, occasional use and may only be permitted during authorized break times, lunch periods or before or after work hours." The e-mail was signed, Faye Frieson Ball, Ph.D., HSPA, SRA, Education Development Specialist, Office of Assessment, NJDOE, and provided two work numbers. Dr. Ball testified that there is an automatic signature and identifying information attached to every e-mail she sends, but she did not intend for the signature or information to be a part of her e-mail. The letterhead identified Dr. Ball as a member of the Ewing Township Board of Education and provided her work e-mail address and phone number. Dr. Ball did not discuss the content of the letter she sent to the Commission with the superintendent, the Board Attorney or any member of the Board, except Dr. Vickner.

ANALYSIS

The Commission found probable cause to credit the allegation that Dr. Ball's e-mail to the Commission requesting it to delay its decision regarding C36-01 was in violation of N.J.S.A. 18A:12-24(b), which provides:

> No school official shall use or attempt to use his official position to secure unwarranted privileges, advantages or employment for himself, members of his immediate family or others.

Dr. Ball testified that she used her computer at her Department of Education office to send the e-mail. Dr. Ball further testified that her computer at work has a function that automatically signs her name with her title and phone numbers when she sends e-mails, but she did not intend to sign the e-mail with that information. Dr. Ball also provided the Commission with a copy of the State policy that allows for minimal and occasional use of State equipment for personal purposes. Dr. Ball also testified that her only intent was to inform the Commission of the Board's plan to request an expedited decision, which she believed to be improper.

In her response to the finding of probable cause, Dr. Ball asserts that in previous matters involving violations of N.J.S.A. 18A:12-24(b) the Commission has considered whether attempts to secure unwarranted privileges were coupled with pressure or leverage.[2] Dr. Ball also argues that she had no authority or ability to pressure or influence the Commission and therefore did not have leverage.

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[2] See generally, Public Advisory Opinion A04-98, In the Matter of Melindo Persi (April 8, 1997), In the Matter of John Galish (September 23, 1997), In the Matter of Edward Mercer C33-96 (October 28, 1997), In the Matter of Ray Dawson C22/25-97 (March 30, 1998), Morales v. Campbell C26-99 (September 27, 2000), Maynard v. Glinsman C30-01 (October 23, 2001), Fenishel v. Hartsough C33-01 (December 18, 2001).

The Commission acknowledges the Department of Education's policy regarding employee use of State equipment and that there may be instances where State employees use State equipment to send e-mails that are unrelated to their job. However, the question is whether Dr. Ball attempted to use her official position as a Board member to secure some unwarranted privilege for herself or others. The letterhead of Dr. Ball's letter identified Dr. Ball as a member of the Board as well as a Department of Education employee. In the letter, Dr. Ball requested that the Commission "delay" the release of a decision that would "smear Dr. Vickner as he seeks re-election," until after the April 16, 2001 Board election. Dr. Ball also set forth in the letter that she had advised Dr. Vickner regarding her request and he was in agreement with it. Dr. Ball testified that she did not discuss the letter with any Board member other than Dr. Vickner, nor did she discuss it with the superintendent or the Board Attorney. She testified that she failed to do so because she was uncomfortable. Dr. Ball also testified that she did not seek authorization from the Board to send the letter.

While Dr. Ball argues that the only intent of the letter was to advise the Commission of the Board's conduct, she went beyond merely advising the Commission of the Board's alleged wrongdoing by independently seeking the delay of the decision. It is clear that Dr. Vickner would benefit from the delay of the public release of a decision that could have negatively influenced his campaign for re-election if it were released before the Board election.

The Commission acknowledges Dr. Ball's argument that in previous matters it has considered whether attempts to secure unwarranted privileges were coupled with leverage, which is also defined as influence. The Commission also recognizes that Dr. Ball did not have the authority to influence the Commission. However, the Commission notes that under N.J.S.A. 18A:12-24(b) the Commission need only find that the school official made an attempt to secure unwarranted privileges. The Commission, therefore, finds that Dr. Ball's request for a "delay" in the release of a Commission decision and her use of her official title as a Department of Education employee and a Board member on her letterhead in making that request, is sufficient evidence to show that she attempted to use her official position to influence the Commission to delay the issue of its decision in a matter that would have clearly benefited fellow Board member, Dr. Vickner.

Dr. Ball further argues that a finding of attempt requires that the particular result be achieved with a "purposeful mental state." The Commission finds that Dr. Ball's written request for a delay in Commission proceedings that would have benefited Dr. Vickner and the fact that she e-mailed and faxed the request to the Commission shows that she possessed a "purposeful mental state" to secure unwarranted privileges for Dr. Vickner.

DECISION

For the foregoing reasons, the Commission finds Dr. Faye Ball in violation of N.J.S.A. 18A:12-24(b) of the School Ethics Act for attempting to secure an unwarranted privilege for Dr. Edward Vickner by requesting the delay of a Commission decision involving him.

PENALTY

The Commission has considered the nature of the offense and notes that in her response, Dr. Ball now recognizes that her concerns could have been more appropriately presented by way of argument to the Board of Education, by contacting the Board Solicitor or by more formally presenting the issues in a complaint to the School Ethics Commission. The Commission finds that the appropriate penalty for Dr. Ball's violation in this case is a reprimand.

This decision, having been adopted by the School Ethics Commission, shall now be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction only, pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, the respondent may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Paul C. Garbarini
Chairperson

Resolution Adopting Decision – C12-02

Whereas, the School Ethics Commission has considered the pleadings filed by the parties and the documents submitted in support thereof and the testimony of the parties; and

Whereas, the Commission found probable cause to credit the allegations that Dr. Ball violated N.J.S.A. 18A:12-24(b) of the School Ethics Act; and

Whereas, the Commission reviewed the written submissions of Dr. Ball in response to the finding of probable cause; and

Whereas, the Commission now finds that respondent violated the School Ethics Act and believes that a reprimand would be the appropriate penalty;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter finding Dr. Faye Ball in violation of the Act and recommends that the Commissioner of Education impose a penalty of reprimand.

Paul C. Garbarini, Chairman

I hereby certify that the School
Ethics Commission adopted this decision
at its public meeting on March 25, 2003.*

Lisa James-Beavers
Executive Director

*Commissioners Robert Bender and Randy Beverly abstained from the vote on this decision.

IN THE MATTER OF FAYE BALL, :

EWING TOWNSHIP BOARD OF EDUCATION, : COMMISSIONER OF EDUCATION

MERCER COUNTY. : DECISION

:

The record of this matter and the decision of the School Ethics Commission ("Commission"), including the recommended penalty of reprimand, have been reviewed.

This matter comes before the Commissioner to impose a sanction upon respondent Dr. Faye Ball, member of the Ewing Township Board of Education, based upon findings of fact and conclusions of law by the Commission that she violated *N.J.S.A.* 18A:12-24(b) of the School Ethics Act when she requested a delay in the release of a Commission decision. The Commission concluded that Dr. Ball's

> use of her official title as a Department of Education employee and a Board member on her letterhead in making that request, is sufficient evidence to show that she attempted to use her official position to influence the Commission to delay the issue of its decision in a matter that would have clearly benefited fellow board member, Dr. Vickner. (Commission Decision at 4)

Upon issuance of the decision of the Commission, respondent was provided 13 days from the mailing of the decision to file written comments on the recommended penalty for the Commissioner's consideration. However, no comments were submitted by respondent, or on her behalf.

Initially, it must be emphasized that, pursuant to *N.J.S.A.* 18A:12:12-29(c) and *N.J.A.C.* 6A:3-9.1, the determination of the Commission as to violation of the School Ethics Act is **not reviewable by the Commissioner herein**. Only the Commission may determine whether

a violation of the School Ethics Act occurred. The Commissioner's jurisdiction is limited to reviewing the sanction to be imposed based upon a finding of a violation by the Commission. Therefore, this decision is restricted solely to a review of the Commission's recommended penalty.

Upon a thorough review of the record, the Commissioner determines to accept the Commission's recommendation that reprimand is the appropriate penalty in this matter for the reasons expressed in the Commission's decision.

Accordingly, IT IS hereby ORDERED that Dr. Faye Ball be reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 5/12/03

Date of Mailing: 5/13/03

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

244-03

IN THE MATTER OF THE TENURE	:	
HEARING OF FRANCES R. METALLO,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
UNION CITY, HUDSON COUNTY.	:	

SYNOPSIS

The Board certified tenure charges of incapacity, excessive absenteeism, unbecoming conduct and other just cause against respondent teacher of mathematics. The Board filed a motion for summary decision pertinent to Count 1 of the tenure charges, incapacity because of chronic and excessive absenteeism.

The ALJ found that, based on the number of absences and the extended period of time of the absences, respondent's absences constituted excessive absenteeism and warranted dismissal. The ALJ concluded that respondent's absences constituted unbecoming conduct, neglect of duty, and/or other cause for the imposition of the penalty of termination. The ALJ ordered that petitioner's motion for partial summary decision regarding Count 1 of the pertinent tenure charges be granted and respondent be terminated.

The Commissioner noted that Count 3 of the tenure charges also alleges chronic and excessive absenteeism and that the ALJ's analysis is applicable to both charges. The Commissioner agreed with the findings and conclusions of the ALJ that the charges of chronic and excessive absenteeism set forth in Counts 1 and 3 were sustained and that such charges warranted respondent's removal from her tenured teaching position. The Commissioner concurred that chronic and excessive absenteeism may constitute incapacity and unbecoming conduct, as well as just cause warranting suspension or dismissal, even in instances where the absences were caused by legitimate medical reasons and where leaves of absence and sick days were approved. The Commissioner ordered respondent dismissed from her teaching position. Since the Commissioner found termination to be the appropriate penalty, it is unnecessary to require further litigation. The Commissioner dismissed Count 2 *without prejudice* in order to preserve the Board's right to move forward in the event that the determination on the adjudicated charges is reversed on appeal because the matter is being transmitted to the State Board of Examiners for its consideration. The Clerk of OAL was requested to return the file.

May 12, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
GRANTING MOTION FOR
PARTIAL SUMMARY DECISION
OAL DKT. NO. EDU 3454-01
AGENCY DKT. NO. 84-4/01

UNION CITY BOARD OF EDUCATION,

Petitioner,

v.

FRANCES R. METALLO,

Respondent.

Mitzy Galis-Menendez, Esq., for petitioner
(Chasan, Leyner, Bariso & Lamparello, attorneys)

Douglas F. Ortelere, Esq., for respondent

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

NATURE OF THE CASE AND PROCEDURAL HISTORY

This matter was opened by the filing of a motion for summary decision pertinent to Count 1 of tenure charges certified by petitioner on March 29, 2001 to the Commissioner of the Department of Education (DOE) against respondent, a tenured teacher of mathematics. Respondent filed an answer to the tenure charges with the DOE on April 20, 2001. The tenure charges consist of two charges. Charge 1 alleges excessive absenteeism during six school years, commencing with the 1994/95 school year and, at the time of the charges, continuing through the 2000-2001 school year. Charge 2 alleges unbecoming conduct by respondent, *i.e.*, that respondent encouraged students to cheat on a national mathematics examination administered in 1996. The DOE transmitted the matter to the Office of Administrative Law as a contested case. Petitioner filed its motion during the course of the proceedings.

The case has an extenuated history. Hearings were initially scheduled to commence in July 2001. Various adjournments were granted at respondent's request, initially, because she was hospitalized, and subsequently, because of documents submitted to the effect that she was not capable of assisting in her defense or participating in a hearing.

This judge directed that counsel appear on July 16, 2001, the first scheduled hearing date, to conduct hearing processes, more specifically, the taking of opening statements and the identification of exhibits to be moved into evidence, in light of pertinent statutory deadlines. *N.J.S.A.* 52:14B-10.1. I ruled, on the record, that consistent with general requirements of due process, the pertinent statutory provision should be interpreted to include the authority to adjourn matters if a respondent were not able to meaningfully participate in a matter because of medical conditions.

This judge previously had directed that respondent's counsel contact her physician and provide documentation of the specific status of her physical and mental conditions, including the expected date of her release from the hospital and her ability to proceed with a defense in the current matter. At the July 16, 2001 proceeding, respondent's counsel represented that he had been unable to ascertain her status and prognosis. Petitioner offered exhibits, and respondent's counsel stipulated to the authenticity of the pertinent attendance records. At the request of respondent's counsel, opening statements were not taken. Pertinent to Count 2, this judge directed, over objections of respondent's counsel, that petitioner be allowed to take the depositions of certain individuals. The balance of the July hearing dates were adjourned until August 10, 2001, pending respondent's release from the hospital. Her counsel was again directed to submit a document from her treating physician regarding her physical and mental status. Such was not provided at that time. A written order granting petitioner's motion to take depositions was issued on July 27, 2001.

Telephone conferences were conducted on August 1 and August 15, 2001. Respondent's counsel represented that respondent was still hospitalized. A physician's documentation was again requested, and subsequently scheduled hearings were adjourned.

Correspondence among the parties and this judge thereafter continued. Respondent's counsel provided several letters, on the letterhead of Nicholas A. Marchese, M.D., PC (Marchese), over time, referencing hospitalizations, for physical and psychological conditions, and Marchese's various conclusions that respondent was, and is, unable to participate in the current matter. Subsequent telephone conferences were conducted, during which requests by respondent that the matter be placed on the inactive list indefinitely were discussed, which requests were opposed by petitioner. Also discussed were requests of respondent that she not be required to respond to the pending motion for partial summary decision. After a series of written communications, this judge issued an order, on July 12, 2002, directing that any reply to petitioner's motion be filed no later than July 30, 2002. This judge also issued an order, on August 16, 2002, denying respondent's motions that the matter be placed on the inactive list, indefinitely, and that she not be required to respond to petitioner's motion. Respondent's counsel thereafter filed another motion that the matter be placed on the inactive list, which was denied by order issued on October 11, 2002.[1] Respondent did not file interlocutory appeals of this judge's rulings and orders. In addition, although respondent's counsel indicated, during certain conferences, that he might file a motion to be relieved as counsel, no such motion was filed. The pending motion should be decided at this point

FINDINGS OF FACT

A motion for summary decision may be granted when the papers, including any supporting affidavits, demonstrate that no genuine issue regarding any material fact exists and that the moving party is entitled to a decision as a matter of law. *N.J.A.C.* 1:1-12.5(b)

Attendance records were filed in support of the motion, the authenticity of which, as noted hereinabove, respondent did not dispute at the July 16, 2001 proceeding. Respondent does not dispute that she was absent on the days in question. Also, respondent's counsel does not address, nor dispute, an affidavit of Frank Vaccarino (Vaccarino), the Assistant Superintendent of respondent's district (District) and Supervisor of Instructional Personnel, filed in support of petitioner's motion. No reply,

[1] This judge was absent for extended periods of time from the fall of 2002 until early 2003 because of emergent family matters.

strictly speaking, to petitioner's motion was ever filed on behalf of respondent. However, it is appropriate to consider the documents from Marchese which were referenced by respondent throughout the proceedings and, to an extent, by petitioner.

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

Ronald Treanor (Treanor) is the Principal of the Woodrow Wilson School (Woodrow Wilson) in the District. Respondent taught at Woodrow Wilson during the 1995/96 school year, under Treanor's supervision, as a mathematics teacher for gifted and talented students. Initially, respondent was a teacher at petitioner's Sara N. Gilmore Elementary School (Gilmore).

Respondent was absent during the pertinent school years as follows: 52 days during the 1994/95 school year; 17 days during the 1995/96 school year; 41 days during the 1996/97 school year; 83 days during the 1997-98 school year; all of September and October and four and one-half days between November and June during the 1998/99 school year; 39 days between November 29, 1999 and January 31, 2000 and, subsequently, the remainder of the school year from February through June during the 1999/00 school year; the entire 2000/01 school year; and, at the very least, the entire school year from September through December 20, during the 2001/.02 school year, totaling approximately 650 days.

Respondent was taken to the emergency room of Christ Hospital in Jersey City, New Jersey, on or about February 2 and March 2 or 3, 1995, by ambulance, from school. In March, respondent complained of severe headaches, dizziness, nausea, and vomiting and was suffering from influenza. She was discharged on March 14, 1995. The diagnoses of one physician, Paul T. Itoop (Itoop), whose letterhead indicates he is a physician practicing in Internal Medicine and Chest Diseases, at that time, were severe hydration and malnutrition, probably because of anorexia nervosa, anxiety disorder, bronchial asthma, and headaches from migraine and blurred vision. The prognosis, at that point, was good, and medications were prescribed. Respondent was authorized to return to work on April 27, 1995.

Treanor met with respondent and her union representative on March 20, 1996 regarding allegations raised pertinent to a contest sponsored by the New Jersey Mathematical League, administered by respondent to students in the District during the 1995/96 school year. Petitioner, at some point, decided that "it would in the best interest of the students to transfer" respondent from Woodrow Wilson.

As of September 1996, respondent was assigned to kindergarten classes at Gilmore. At that time, she requested a transfer to grades five or six, indicating a preference for computer classes. She was advised by Anthony Mussara (Mussara), the then Acting Principal of Gilmore, of his preference not to change schedules without an investigation. He advised her, on September 18, 1996, that her schedule would not be changed and offered various assistance.

Mussara communicated with Vaccarino by letter dated October 4, 1996, advising of an incident at Gilmore during the morning that day. Respondent left school, feeling ill, after being seen by the school nurse.

On October 10, 1996, respondent, while at school, again was escorted to the nurse's office because she was ill. At various times during these incidents, Mussara called, and met with, respondent's father for assistance. A note of Itoop, dated October 10, 1996, reflected continued substantial medical and psychological conditions.

Mussara again communicated with Vaccarino by letter dated October 11, 1996, regarding an occurrence during the afternoon on October 9, 1996. Respondent, who was in the nurse's office, was apparently ill and extremely upset. She reiterated her concerns regarding her schedule. Vaccarino again indicated problems with changing her schedule but offered assistance in various respects. He was subsequently advised that petitioner had become ill during class on October 10, 1996 and was escorted to the nurse's office, obviously ill. Mussara subsequently received a physician's note and a note from Metallo. At that time, she was not scheduled to report for class assignment until October 16, 1996. Mussara requested assistance and guidance from Vaccarino, referencing the note of October 10, 1996 from Itoop. Mussara again discussed with her her request for a change in assignments.

By letter dated October 15, 1996, Mussara advised respondent that he had temporarily adjusted her teaching schedule, apparently in light of a request from a physician, so that all of her teaching assignments would be in one building, and so that her schedule would include additional fifth-grade classes. Mussara communicated with Vaccarino by letter dated October 16, 1996 regarding those determinations, referencing a prior meeting, on October 16, 1996, with respondent and a UCEA representative, as well as another individual. Mussara requested that respondent agree to a psychiatric examination, at petitioner's request. Metallo advised that she was "being treated by a separate physician for her disorder."

By letter dated October 29, 1996, Vaccarino advised respondent that, because she did not agree to a psychiatric examination, petitioner had to "take steps to ascertain whether you have a disability . . . which . . . impacts on your ability to perform the essential elements of your position and what accommodations, if any, are necessary as a result of the disability." Respondent was advised that she should appear on November 19 for a hearing before petitioner, that she could have a representative with her, that the hearing would be in executive session, unless she elected to have a public hearing, and that she should notify petitioner no later than the close of business on November 8 regarding the matter. By letter dated November 25, 1996, Vaccarino advised respondent of a vote by petitioner, at a meeting on November 21, 1996, to require that she undergo a psychiatric examination and that such was scheduled on November 27, 1996 at the offices of Dr. Vincent Ruiz (Ruiz).

By letter dated June 4, 1996, Vaccarino, then the Assistant Superintendent, advised respondent that a prior request by her for family leave because of medical reasons was granted. More specifically, an unpaid leave for the period commencing May 1, 1997 and ending June 30, 1997 was approved. Respondent was also advised that she had to utilize whatever paid leave benefits might be applicable and that if she needed additional leave time, she would be required to make an additional request for such.

Mussara communicated with Highton by letter dated May 13, 1997, regarding illness experienced by respondent while at school on April 30, 1997. Respondent was driven home by school personnel on that date and returned on May 1, 1997, when she

was escorted to the nurse's office. After a telephone call to one of respondent's physicians, respondent was again escorted home by school personnel and was subsequently admitted to Christ Hospital. Mussara's letter indicated that, at time, she was not to be released until at least May 16, 1997 and that no date had been set for her return to school

By letter dated May 13, 1997, Vaccarino advised respondent that, per petitioner's records, she had used all her accumulated sick days effective May 15, 1997 and would be taken off the payroll that date. Respondent was also advised that before she returned, a note from her physician, stating that she was able to perform her duties, was requested.

By letter dated July 18, 1997 to Vaccarino, respondent requested a "sabbatical leave" for the 1997/98 school year to obtain a Certificate in Administration and Supervision and attend mathematics workshops. Vaccarino responded by letter dated October 1, 1996, advising that the request could not be granted because it was not submitted timely pursuant to the pertinent contract. He noted, however, that respondent could apply during the then current school year for a sabbatical for the following year.

By letter dated August 12, 1997 to Vaccarino, respondent advised that she was "recuperating at home under the doctor's care" and would not return to school in September. She requested that she use her family medical leave for medical reasons so that she could "maintain my health benefits while being treated." Vaccarino advised respondent, by letter dated September 9, 1997, that for her request to be considered, she had to provide a medical certification from her physician, containing certain specified information.

By letter dated September 17, 1997 to petitioner, Marchese requested that respondent remain out of work on "sick leave" for 90 days. He noted that she had been under his care since September 10, 1997, that respondent related that her problems began subsequent to accusations of unprofessional conduct, and that she was unable to function, "on either social nor occupational levels due to severe psychological deficits." In reference to that matter, Vaccarino advised respondent, in

part, by letter dated September 22, 1997, that she was entitled to 12 weeks leave under State and federal medical leave acts, that she had already utilized seven of those weeks, that she would be entitled to five additional weeks, and that at the end of the five-week period, insurance coverage would be terminated and she would have the opportunity to purchase her own insurance under COBRA until she returned to work.

By letter dated February 6, 1998, Carl Johnson, petitioner's secretary, advised respondent that a request by her for a three-month medical leave of absence, from December 1, 1997 to March 1, 1998, had been approved by petitioner at a meeting held on January 27, 1998. Vaccarino subsequently advised respondent, by letter dated March 6, 1998, in which he noted that she had not returned, that she should advise, within seven days, when she would return to employment or whether she was in need of additional leave and if she did not respond, it would be assumed that she had "abandoned" her position. Apparently responding to that letter, respondent sent Vaccarino a letter dated March 10, 1998, noting, in part, that she planned to return for the 1998/99 school year and to "resume my position as a math classroom teacher as you promised" and requested "my placement to my regular position as classroom math teacher or at the high school level."

In March 1998, respondent wrote to Vaccarino, indicating that she intended to return to work, for the 1998/99 school year, from a prior leave of absence because of medical reasons, for the 1997/98 school year.

By letter dated August 25, 1998, Vaccarino informed respondent that prior to her return, it would be necessary for her to obtain a "comprehensive medical examination attesting to your physical as well as mental ability to perform your teaching position," that she should contact a referenced individual to schedule an appointment, and that the examination had to be completed before September 1, 1998, "or you will not be permitted to work." Respondent thereafter contacted Barbara Beck (Beck), secretary to petitioner's Superintendent, Thomas Highton (Highton), advising that she would not see physician of petitioner on her "own" time. In August 1998, respondent went to Vaccarino's office, with a physician's note, apparently from a personal physician. Vaccarino advised that respondent had to obtain clearance from respondent's physician pursuant to the pertinent collective bargaining agreement. Petitioner's physician

cleared respondent to return to work on September 2, 1998, pending a psychiatric examination, which was scheduled by Vaccarino with Dr. Charles Carluccio. In a note dated September 2, 1998, Itoop stated that respondent was able to return to work "WITH SOME LIMITATION TO CLIMBING STEPS." In a note dated September 4, 1998, he stated that respondent was able to return to "her work as a school teacher." Another physician, Napoleon Savescu (Savescu), whose letterhead referenced "MINOR EMERGENCIES – FAMILY MEDICAL CARE," in an undated note, stated that appellant was able to return to work "in a physical point of view, pending pysch. Evaluation pending RTW date 9/2/98". A Return to Work form completed by Savescu, dated September 2, 1998, referenced that respondent needed a psychiatric evaluation.

Vaccarino advised respondent, by letter dated September 9, 1998, referencing a "Return to work evaluation," that a psychiatric evaluation was scheduled with Carluccio on September 11, 1998 and that she should not report to work until the results had been received. Carluccio apparently completed the evaluation on the date scheduled. By letter dated September 15, 1998, referencing that evaluation, Vaccarino advised Metallo that the physician had determined she should be allowed to return to work under certain conditions. Respondent had to continue therapy with Marchese and submit notes to petitioner every six weeks, confirming continuing psychiatric treatment. "These notes shall continue for the duration of your therapy or until this office receives a letter signifying your completion of same. If you fail to supply any notes from your physician you will not be permitted to work." Respondent was requested to sign at the bottom of the letter, indicating her agreement to the conditions. Petitioner responded by letter of September 19, 1998, stating: "In your letter you do not specify a date of return and the school. Let me know the date of return and school." Vaccarino called her on September 22, advising her that she could start on September 23, as long as she agreed to the terms of her employment as set forth in the September 15, 1998 letter. Respondent did not sign the agreement and did not return to her teaching position.

By letter dated October 1, 1998 to Vaccarino, her then counsel, Richard Manfre, Esq. (Manfre), in part, requested a meeting to discuss respondent's "concerns about her proper teaching assignment and other related issues."

A meeting was held in Vaccarino's office on October 26, 1998 regarding the matter. Present were respondent, Manfre, a representative from the Union City Education Association (UCEA), and Vaccarino. Vaccarino indicated that respondent could not be assigned to her former position, at Woodrow Wilson School, because of allegations that she had cheated on a national mathematics contest. At the conclusion of the meeting, respondent's counsel apparently advised her to sign the agreement.

Subsequently, by letter dated October 27, 1998, Manfre advised Vaccarino that respondent would report to Gilmore on October 28 "to undertake her present teaching assignment," that she would, at that time, execute the September 15 letter accepting the employment conditions, and that counsel would contact Marchese to request that he provide petitioner with progress reports every six weeks. Respondent executed the referenced agreement on October 27, 1998.

Counsel for petitioner subsequently corresponded with respondent's current counsel, Douglas F. Ortelere, Esq., by letter dated January 3, 2000, regarding "Metallo Request for Extension of Compensation and Benefits." After referencing a federal family leave act, it was requested that respondent advise whether she wanted to apply for that leave benefit and, if so, provide referenced "appropriate medical documentation." Petitioner's counsel concluded with petitioner's "hope that Ms. Metallo recovers quickly from current medical condition and can resume her employment responsibilities."

Ortelere forwarded Vaccarino a letter from Marchese to Ortelere dated March 28, 2000, in support of respondent's "request for a further medical leave." The letter, which requested a leave of absence until December 31, 2000, noted that respondent was being treated for "the intense stress and accompanying depression that she states was caused by confrontations" with petitioner and her "teaching duties" as a mathematics teacher.

By letter dated April 20, 2000, petitioner's counsel advised respondent's counsel that her request to extend her unpaid leave of absence for medical reasons had been extended to the end of the then current school year, June 20, 2000, because a

substitute teacher was already present in the classroom and respondent's absence therefore would not "materially impact on the instruction." Petitioner concluded:

> While there is no question that Ms. Metallo's absences are medically necessary, the continued absence of Ms. Metallo impinges upon the District's obligation to provide educational services to the children of the city. The Board extends their wishes for a speedy recovery and sincerely hopes that Ms. Metallo can resume her teaching responsibilities for the upcoming school year. In the event that her leave does not conclude on the date stated above, she will be considered on an unauthorized leave of absence, subject to discharge.

By letter dated June 12, 2000 to Ortelere, another counsel of petitioner confirmed that respondent's unpaid leave of absence expired on June 22, 2000 and advised that because that date was the last date of the 1999/00 school term, respondent was expected to return to work in September for the next school year. Respondent's counsel, by letter dated August 31, 2000, requested that she be granted a further leave of absence pursuant to State and federal statutes.

Respondent's counsel, by letter dated September 4, 2000, referenced a September 1, 2000 telephone conference request for additional medical leave. The letter concluded that Marchese's letter of March 28, 2000 "clearly indicates that the Board of Education was placed on notice long ago regarding the medical need of Ms. Metallo to remain on leave past September 5, 2000." She requested a leave of absence until December 31, 2000.

By letter dated September 5, 2000, petitioner's counsel advised respondent's counsel of petitioner's position that respondent was ineligible to receive certain statutory leave, that if respondent wished to request additional leave, she must do so "in writing", and that petitioner "fully intends" for respondent to return to work in the then current term, which commenced September 5, 2000. Counsel also addressed certain assertions made by respondent's counsel in prior communications regarding the pertinent collective bargaining agreement.

By letter dated September 20, 2000, at which time respondent had not reported to work, Vaccarino advised respondent, in part, that if she did not indicate her intentions

within five days," . . . it will be assumed that you have abandoned your position and the board will act accordingly." Ortelere responded by letter dated September 25, 2000 to *Vaccarino*, stating, in part, that respondent was "not of the mind that she has abandoned her teaching position" and that she " . . . declares that the most recent request for leave was wrongfully denied by the Board of Education.".

By letter dated September 16, 2001 to respondent's current counsel, Marchese, whose letterhead indicates that he is a physician in Forensic and Adult Psychiatry, stated that respondent had then been recently hospitalized for physical and psychological problems; that her psychological treatment required that she receive electroshock treatments (ECTs); that it was Marchese's "understanding" that she had received eight to ten ECTs, which are "always accompanied" by incapacitating side effects frequently producing memory problems, confusion and forgetfulness; and that respondent was then unable to properly identify, understand proceedings, or participate in legal matters for at least two to three months.

By letter dated October 22, 2001 to respondent's counsel, Marchese stated that respondent was having "serious problems with her memory; that she had "mental blocks" prohibiting her from "coalescing" her thoughts in relation to expression; that she had an inability to concentrate and had inadequate attention span because of "very substantial stress" that Marchese's then evaluation "strongly suggests" that respondent was "mentally impaired" and not able to" handle legal matters"; and that she was unable to participate in a deposition, because of the results of ECTs. By a subsequent handwritten note dated October 22, 2001 to respondent's counsel, Marchese stated, in part, that respondent was "mentally or psychologically" unable to participate in legal matters and would not be able to do so "for a minimum" of four to five months.

Respondent communicated with the presiding judge in a separate legal matter involving the parties, in which respondent was the complainant, in the Appellate Division of the Superior Court. That matter was dismissed, with prejudice, by an order issued on November 9, 2001 by the presiding judge.

DISCUSSION

The Commissioner of the DOE (Commissioner) generally has jurisdiction to hear and determine controversies and disputes arising under the local school laws. *N.J.S.A.* 18A:6-9. A tenured local teacher shall not be dismissed, or reduced in compensation, except for inefficiency, incapacity, unbecoming conduct, or "other just cause." *Id.* at § 6-10.

If tenure charges are proven, the kind and degree of penalty varies according to the specific problem. *In the Matter of the Tenure Hearing of William Kittell, School District of the Borough of Little Silver*, 1972 *S.L.D.* 531 Whether or not a board of education has taken corrective action may be a factor in determining the penalty. *Passaic Bd. of Educ. v. Viani, 92 N.J.A.R. 2d* (EDU) *76* (*Viani*).

Chronic or excessive absenteeism may constitute incapacity and unbecoming conduct, as well as just cause warranting suspension or dismissal. *Trenton Bd. Of Educ. V. Williamson*, 1986 *S.L.D.* 1462. *State-Operated School District of Jersey City v. Pellecchio*, 92 *N.J.A.R. 2d* (EDU) 267, *aff'd, N.J.A.R. 2d* (EDU) 30 (*Pellecchio). Viana, supra.* (*Pellecchio*). It has been recognized that frequent and excessive absences of teachers from regular activities disrupt the continuity of the educational process, even when the regular teacher returns to the classroom. *Pellechio, supra.* It is not necessary for a school district to prove a direct correlation between student achievement and a teacher's attendance to validate concerns about the effects of a teacher's absence on the educational program. As the Commissioner has recognized, " . . . the repeated absences of a teacher from his classroom, however legitimate, will have negative impact on instruction and compromise the basic purpose of the District in the most fundamental obligation of an educator to the student." *In the Matter of the Tenure Hearing of Jerome Day Kacprowicz*, 93 *N.J.A.R.* 2d (EDU) 147, (153) *aff'd*, State Board of Education, 93 *N.J.A.R.* 2d, (EDU) 604 *aff'd*, App. Div. 95 *N.J.A.R. 2d* (EDU) 105. *See also, State-Operated School District of Paterson v. Scott Watson*, 93 *N.J.A.R.* 2d (EDU) 362 (*Watson*). *Viani, supra.* Excessive absenteeism of a teacher disrupts the continuity of the instructional process. *In the matter of the Tenure Hearing of Katherine Weilly, School District of the City of Jersey City*, 1977 *S.L.D.* 403. A

tenured employee may be dismissed when the underlining reasons for the absenteeism indicate there is a likelihood that the conduct will continue in the future. *Pellechio, supra. Viani, supra.* Dismissal may be warranted even without an opportunity to improve attendance. *Bd. of Educ. of the City of Camden v. Rucker,* 94 *N.J.A.R.* 2d (EDU) 190, *aff'd, State Board of Education*, 95 *N.J.A.R.* 2d (EDU) 350. Excessive absenteeism constitutes valid grounds for dismissal of a tenured teacher even if the absences were excused or caused by legitimate reasons due to personal illness or were approved leave or sick days to which the teacher was entitled or the individual was entitled to days off pursuant to a contract. *Kapowitz, supra. Pellecchio, supra. Rucker, supra.* Action may also be taken against a teacher for excessive absenteeism even if such were the result of work-related injuries. *Kochman v. Bd. of Education of the Borough of Keansburg,* 94 *N.J.A.R.* 2d (EDU) 154, State Board of Education, *aff'd*, App. Div. 95 *N.J.A.R.* 2d (EDU) 212. *Board of Education of the Twp. of Irvington v. Pearson*, 97 *N.J.A.R.* 2d (EDU) 329.

The determination of what constitutes excessive absenteeism initially falls within the prerogative and discretionary authority of the local board of education. *Pellecchio, supra.* There are no absolute standards. *In the matter of the Tenure Hearing of Monica Meade-Stephens*, 92 *N.J.A.R.*(EDU) 550. However, the sheer number of a teacher's absences may warrant dismissal. *Watson, supra.*

It is clear, based on the number of absences and the extended period of time, that respondent's absences constitute excessive absenteeism, although one may empathize with health problems she is experiencing, and although some of those absences were pursuant to approved leaves. The sheer number, as petitioner argues, constitutes such a detrimental impact on students in the District to warrant dismissal. A portion of those absences, it is reasonable to conclude, may, in addition, have been related, at least in part, to disputes regarding respondent's assignments. Over an extended period of time, petitioner advised respondent of its position regarding her absences, giving clear notice that her position was in jeopardy, and attempted to accommodate respondent's concerns regarding assignments. At this point, based on the extended absences, and the fact that respondent has not, to date, returned to her position, I am persuaded, pursuant to the applicable decisional law, that petitioner's

motion for partial summary decision should be granted and respondent's position with the District should be terminated.

CONCLUSIONS

I **CONCLUDE** that respondent's absences constitute unbecoming conduct, neglect of duty, and/or other cause for the imposition of a penalty, that, such penalty should be a termination, and that petitioner's motion for partial summary decision regarding Count 1 of the pertinent tenure charges should be granted.

ORDER

It is hereby **ORDERED** that petitioner's motion for partial summary decision regarding Count 1 of the pertinent tenure charges be and is hereby **GRANTED** and that respondent be terminated.

This order may be reviewed by **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** either upon interlocutory review, pursuant to *N.J.A.C.* 1:1-14.10,or at the end of the contested case, pursuant to *N.J.A.C.* 1:1-18.6.

March 27, 2003
DATE

Diana C. Sukovich
DIANA C. SUKOVICH, ALJ

mh/cb

OAL DKT. NO. EDU 3454-01
AGENCY DKT NO. 84-4/01

IN THE MATTER OF THE TENURE	:	
HEARING OF FRANCES R. METALLO,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
UNION CITY, HUDSON COUNTY.	:	

This matter is before the Commissioner by virtue of a request by the Board for interlocutory review of the Administrative Law Judge's (ALJ) Order Granting the Board's Motion for Partial Summary Decision regarding Count 1 in the within tenure matter.[1] By letter of April 10, 2003, the Director of the Bureau of Controversies and Disputes notified the parties that the Commissioner had determined to grant the Board's request for interlocutory review. Because such review has the potential for fully disposing of this case, the parties were advised that the ALJ's Order Granting Motion for Partial Summary Decision would be considered as a Partial Summary Decision under *N.J.A.C.* 1:1-12.5(e) and the parties were, therefore, requested to submit exceptions to the ALJ's Order by April 23, 2003, with replies due by April 30, 2003.[2]

On April 28, 2003, counsel for respondent called the Bureau of Controversies and Disputes and requested an extension until the end of that business day for the filing of exceptions. Counsel was advised that, since exceptions were due on April 23 and the request was, therefore, being made *nunc pro tunc*, he would need to obtain the Board's consent, put his request in writing noting the Board's consent and file such request with his exceptions by the end of that business day.

[1] Respondent filed a letter opposing the Board's request for interlocutory review.

[2] In order to provide for the filing and consideration of the requested exceptions, the Commissioner obtained a 20-day extension for his review from the Director of the Office of Administrative Law.

Respondent's exceptions were received via facsimile at 3:02 p.m. on April 28 with an explanation that a call to his adversary to obtain the Board's consent for the requested extension had not been returned because petitioner's counsel was not in the office. In response, counsel for the Board submitted a letter, dated April 28, 2003 and received via facsimile on April 29, 2003, stating that:

> Mr. Ortelere represents that he contacted this firm seeking an extension of time within which to file exceptions and received no response from me. I have voice mail and a full-time secretary. I received no message from Mr. Ortelere.

The Commissioner notes that the exceptions submitted by respondent are comprised of a one-page, three-paragraph letter reiterating arguments previously expressed before the ALJ, and the September 18, 2002 affidavit of Nicholas A. Marchese, M.D., which is already a part of the record. Given that respondent's arguments and Dr. Marchese's affidavit are contained in the record transmitted to the Commissioner by the Office of Administrative Law (OAL), it is unnecessary to resolve any disputes concerning consent and timeliness.

Thereafter, on April 30, 2003, respondent initiated a conference call and asked that the Commissioner review the ALJ's Orders of August 16, 2002 and October 11, 2002, denying respondent's request to place this matter on the inactive list.[3] The parties were informed that respondent's request for review of the ALJ's determinations denying respondent's requests to place the matter on the inactive list would be addressed within the context of this decision.

Initially, the Commissioner observes that, although the ALJ states that the tenure charges certified against respondent consist of two counts, in actuality, the Board certified three counts in its tenure charges. (ALJ's Order at 1 and Petitioner's Certified Tenure Charges at 1-8) Count 1 alleges that respondent is guilty of incapacity because of chronic and excessive absenteeism, which, although predominately due to legitimate medical reasons, adversely affects

[3] Respondent did not request interlocutory review of these Orders at the time of issuance.

the students in the District. (Petitioner's Certified Tenure Charges at 1-6) Count 2 alleges that respondent is guilty of unbecoming conduct because she encouraged her students to cheat on a national mathematics examination administered in 1996. (*Id.* at 6-7) Count 3 alleges that respondent is guilty of other just cause for dismissal because her chronic and excessive absenteeism threatens the integrity of the educational process by disrupting the continuity of the instructional process. (*Id.* at 8) However, in that Counts 1 and 3 are substantively the same charge, that of chronic and excessive absenteeism, the Commissioner finds that the analysis set forth in the Initial Decision is applicable to both charges.

Upon a careful and independent review of the record of this matter and the Order Granting Motion for Partial Summary Decision of the OAL, the Commissioner agrees with the well-reasoned findings and conclusions of the ALJ that the charges of chronic and excessive absenteeism certified by the Board on March 29, 2001, have been sustained and that such charges warrant respondent's removal from her tenured teaching position. In so determining, the Commissioner emphasizes that respondent does not dispute that she was absent approximately 650 school days during a six-year period. (Initial Decision at 4) As set forth by the ALJ, chronic and excessive absenteeism may constitute incapacity and unbecoming conduct, as well as just cause warranting suspension or dismissal, even in instances where the absences were caused by legitimate medical reasons and where leaves of absence and sick days were approved. *Trenton, supra; Pellecchio, supra; Kapowitz, supra and Rucker, supra.* (*Id.* at 13-14)

In light of the Commissioner's conclusion that termination is the appropriate penalty with respect to these charges, it is unnecessary to require further litigation of the remaining charge certified by the Board at this time. The Commissioner, however, dismisses Count 2 *without prejudice* in order to preserve the Board's right to move forward in the event that the determination on the adjudicated charges is reversed on appeal. This is of particular import since this matter will be transmitted to the State Board of Examiners for its consideration

under *N.J.A.C.* 6:11-3.6(a)(1) and, as such, that body's review will be limited solely to the adjudicated charges.

Accordingly, for the reasons expressed by the ALJ, the Commissioner adopts the recommendation of the OAL and directs that respondent be dismissed from her teaching position with the Union City School District. The remaining charge, Count 2, is hereby dismissed, without prejudice. Given the Commissioner's determination in this matter, respondent's request for review of the denial of her request for this matter to be placed on the inactive list is moot. Since no further proceedings at the OAL are necessary, therefore, the Clerk of the OAL is hereby requested to return the file pursuant to *N.J.A.C.* 1:1-3.3.

Moreover, the Commissioner further directs that this matter be forwarded to the State Board of Examiners in accordance with the above-referenced regulatory provision for any action it deems appropriate.

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: 5/12/03

Date of Mailing: 5/13/03

[4] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

241-03

241-03

STEFANIE WHEATON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF FAIRFIELD, CUMERLAND COUNTY,	:	DECISION
RESPONDENT.	:	

May 13, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 8383-02
AGENCY DKT. NO. 274-9/02

STEFANIE WHEATON
Petitioner,
v.
FAIRFIELD TOWNSHIP BOARD OF EDUCATION,
CUMBERALND COUNTY
Respondent,

Theodore E. Baker, Esquire, for petitioner (Lummis, Krell & Baker, attorneys)

Samuel J. Serata, Esquire, for respondent (Cumberland County Counsel)

Record Closed: February 20, 2003 Decided: April 3, 2003

BEFORE **W. TODD MILLER,** ALJ:

This matter was transmitted by the Department of Education to the Office of Administrative Law on December 9, 2002 for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

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

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement marked filed on February 20, 2003.

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

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

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

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

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

4-3-03
DATE

W. TODD MILLER, ALJ

Receipt Acknowledged:

April 9, 2003
DATE

M. Kathleen Duncan Esq.
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 10 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

Samuel J. Serata
20 Franklin Street
Bridgeton, new Jersey 08302
(856)451-6444
Attorney for Respondent, Board of Education
of Fairfield Township, Cumberland County

STEFANIE WHEATON, Petitioner, vs. THE BOARD OF EDUCATION OF FAIRFIELD TOWNSHIP, CUMBERLAND COUNTY Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY Agency Docket No. 274-9/02 OAL Docket No.: EDUOR 08383-02S SETTLEMENT AGREEMENT

The parties in the above-captioned matter have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in cotroversy between them:

1. Reinstatement of Stefanie Wheaton on January 2, 2003 as an elementary school teacher in the School District.

2. Stefanie Wheaton shall receive back pay from September 1, 2002, at such rates as were effective for a teacher with Stefanie Wheaton's experience and years of service in accordance with the collective bargaining agreement as well as pension contributing insurance coverage and benefits retroactive to September 1, 2002. Retroactive insurance coverage may be provided by the Board of Education directly in lieu of a health insurance carrier to the same extent as health insurance otherwise provided to a teacher with the same experience as the petitioner.

3. Stefanie Wheaton waives all claims against the respondent with regard to this matter, including any award of back pay, except as herein specifically provided, counsel fees and other monetary relief except as otherwise provided herein.

4. In addition the pending grievance which is at the arbitration level will be voluntarily dismissed; and the pending action in which the Fairfield Township Education Association

charges the respondent with unfair labor practice charge now pending before the Public Employment Relations Commission of the State of New Jersey, Docket No. 274-9/02 in which reinstatement of Stefanie Wheaton is the relief sought, which will be settled by her reinstatement.

5. Stefanie Wheaton will sign a Release of all claims against respondent as well as all claims against agents servants or employees of respondent.

6. Both parties agree to waive the right to file exceptions and cross-exceptions.

7. This agreement shall be implemented immediately and shall become final upon the approval of the Commissioner of Education.

Stefanie Wheaton, Appellant

Samuel J. Serata, Attorney for Respondent,
Board of Education of Fairfield Township
(Cumberland County)

Lummis, Krell & Baker, Attorneys for
Appellant

By:_____
Theodore E. Baker, a Member of the Firm

N/A

SAMUEL J. SERATA
Attorney at Law
20 Franklin Street
Bridgeton, New Jersey 08302
Telephone: (856) 451-6444
Mobile: (609) 774-1930
Fax: (856) 451-0110

February 18, 2003

Joanne M. Restivo, Deputy Clerk
Office of Administrative Law
Quakerbridge Plaza, Bldg 9
Quakerbridge Road, P.O. Box 049
Mercverville, NJ 08625-0049

Re: Stefanie Wheaton v. T/Ship of Fairfield BOE, Cumberland County
OAL Docket No.: EDUOR 08383-026
Agency Ref. No.: 274-9/02

Dear Ms. Restivo:

As promised by telephone a few weeks ago, I enclose original Settlement Agreement in the above matter. Please file and refer back to the Commissioner for approval.

Thank you for your attention to this.

Very truly yours,

SAMUEL J. SERATA

SJS/m
Enc.
C: Theodore E. Baker, Esq.
Carol Fredericks, Business Administrator

OAL DKT. NO. EDU 8383-02
AGENCY DKT. NO. 274-9/02

STEFANIE WHEATON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF FAIRFIELD, CUMERLAND COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 5|13|03

Date of Mailing: 5|13|03

246-03

BOARD OF EDUCATION OF THE BOROUGH OF LINCOLN PARK, MORRIS COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF BOONTON, MORRIS COUNTY AND NEW JERSEY STATE DEPARTMENT OF EDUCATION	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioning Board alleged that respondent Board, with whom petitioner is involved in a sending/receiving relationship, improperly included litigation costs in its calculation of the tuition rate to be charged petitioner. The County Superintendent stated it was her belief that respondent acted within its legal rights. Respondent contended the petition was untimely filed.

The ALJ concluded that petitioner was entitled to summary decision on the issue of attorney's fees and that the petition was not filed untimely. The ALJ determined that respondent was not permitted to include in the tuition rate that it charges petitioner any legal fees, costs or expenses associated with litigation between the parties or their agents. Although the governing regulation that addresses the method for determining tuition rates, *N.J.A.C.* 6A:23-3.1, does not list legal expenses as an exclusion, the ALJ noted that it is well-settled, under the "American Rule," in the United States and in New Jersey that each party will bear the cost of its own litigation fees. Moreover, in considering the argument of the State that the County Superintendent's decision regarding the propriety of legal fees should not be disturbed because the decision was not arbitrary or capricious, the ALJ found that the Commissioner and the ALJ are not required to defer to a determination of the County Superintendent or apply an arbitrary and capricious standard.

The Commissioner concurred with the determination of the ALJ with clarification. Initially, the Commissioner found, and noted that the parties herein did not dispute, that because legal costs and fees are not specifically enumerated in *N.J.A.C.* 6A:23-3.1(b)(1) as an exclusion from the calculation of actual cost per student figure for tuition purposes, such costs and fees associated with litigation, against or brought by third parties concerning high school matters, are appropriately included in the tuition calculation. The Commissioner, however, concluded, as did the ALJ, that with respect to legal costs and fees directly attributable to litigation between the parties, inclusion of such costs and fees was prohibited by the "American Rule."

May 15, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY JUDGMENT

OAL DKT.NO. EDU 5944-02

AGENCY DKT. NO.188-6/02

BOROUGH OF LINCOLN PARK BOARD OF EDUCATION, MORRIS COUNTY,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWN OF BOONTON, MORRIS COUNTY AND NEW JERSEY DEPARTMENT OF EDUCATION

Respondents,

Nathanya G. Simon, Esq. for petitioner (Schwartz, Simon, Edelstein, Celso & Kessler attorneys)

Dennis A. Collins, Esq., for respondent (Boonton Board of Education)

Sarah G. Crowley, for respondent (Deputy Attorney General for New Jersey Department of Education)

Record Closed: March 24, 2003 Decided: April 2, 2003

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

Petitioner, Board of Education of the Borough of Lincoln Park ("Lincoln Park"), operates a K-8 school district. Respondent, Board of Education Of The Town of Boonton ("Boonton"), operates a K-12 school district. Lincoln Park and Boonton have been engaged in a longstanding sending-receiving relationship, pursuant to *N.J.S.A.* 18A:38-19, based on a tuition rate of the actual cost per pupil. Lincoln Park sends approximately 329 students in grades 9-12 to Boonton High School, which amount to approximately 52% of the Boonton High School Student body. One member of the Lincoln Park Board of Education serves as its representative on the Boonton Board of Education.

The most recent sending and receiving agreement between Lincoln Park and Boonton is dated April 14, 1999, and covers the seven-year period commencing with the 1999-2000 school year and terminating at the end of the 2005-2006 school year. A provision in the 1999 contract states that "[t]uition rates shall be provided to Lincoln Park by Boonton in an amount not in excess of the actual cost per pupil as determined under rules prescribed under *N.J.A.C* 6:20-1 *et seq.*[1] and *N.J.S.A.* 18A:38-19." However, the contract does not refer to any specific inclusions or exclusions in calculating the actual cost per pupil when determining the tuition that Boonton will charge Lincoln Park.[2] The previous contract between the parties in 1989 delineated many expenses that would be included or excluded from the calculation of the actual cost per pupil in determining the tuition rate. Any costs incurred as the result of a dispute between the parties, such as attorney's fees, accounting fees or other professional fees, where specifically excluded under the 1989 agreement.[3]

Over the past several years Lincoln Park and Boonton have been involved in several law suits against each other to wit: *English v. Boonton Board of Education, Dkt. No* 01-3478 (3rd. Cir. 2002); *Lincoln Park Board of Education v. Boonton Board of Education, Dkt. No.* MRS-C-217-00 (*Chancery Division*); *Stranz/Nielson v. Boonton Board of Education, Dkt. No.* MRS-L-1270-02 (*Law*

[1] N.J.A.C 6:20-1 et seq. is the predecessor to the current N.J.A.C. 6A:23-1 et seq.
[2] See April 14, 1999 Agreement, ¶ M(1) on p.12.
[3] See 1989 Agreement, ¶ 6E(c)(17) on p.8.

Division); and *Board of Ed. Of the Town of Boonton v. Bd. Of Ed. Of the Borough of Lincoln Park, EDUOT* 9211-02N.

On or about January 22, 2002, Boonton advised Lincoln Park of its tentative tuition charge for the 2002-2003 school year. Boonton included certain legal fees associated with litigation concerning high school matters in the tuition rate calculation for that school year amounting to approximately $200,000.00 or $600.00 per pupil. (This figure included legal fees incurred by Boonton in litigation involving Lincoln Park in the amount of $183,675.00). At some point Boonton prepared a flyer entitled "Boonton High School Litigation Update" and distributed it to the student body. The flyer contained the following language:

> To date, although the legal costs and feasibility costs have amounted to over $200,000.00, they have been covered without sacrificing current or future programs offered our students or the community. In fact, all costs incurred are allowable charges in the high school tuition rate and therefore, will be paid back to Boonton in the future by Lincoln Park once the final tuition rate for this school year is certified by the State Department of Education.[4]

On or about March 21, 2002, Lincoln Park's Superintendent, Dr. Joyce Valenza, sent a letter to the Morris County Superintendent of Schools, Dr. Rene Rovtar, questioning the legality of including these legal fees in the calculation of the tuition rate. Dr. Rene Rovtar responded by letter, dated March 26, 2002, stating that it was her belief that Boonton acted within its legal rights by including these legal fees in the calculation of tuition.

Lincoln Park filed a Verified Petition of Appeal with the Commissioner of Education against Boonton and the State Department of Education on June 24, 2002. In its petition, Lincoln Park challenged Boonton's practice of including legal fees and costs incurred by Boonton relating to litigation between the parties

[4] See undated "Boonton High School Litigation Update."

in its calculation of the tuition to be charged to Lincoln Park pursuant to the sending-receiving relationship of the parties. The State Department of Education filed its Answer on or about July 8, 2002, and Boonton filed its Answer on July 11, 2002. The case was subsequently transmitted to the Office of Administrative Law (OAL) as a contested matter. The State Department of Education filed a motion for summary decision on January15, 2003, and Boonton followed suit with its own motion for summary decision on January 23, 2003. On February 19, 2003, Lincoln Park filed its response to the respondents' motions for summary decision and cross-moved for summary decision. Oral argument was heard on the cross-motions on March 24, 2003.

ISSUES AND LEGAL DISCUSSION

Legal Issues and Arguments of the Parties

1. The first issue raised is whether this matter can be decided on Summary Motion. While the parties dispute who should be granted Summary Judgment, they agree that, as a matter of law, there is no genuine issues of material fact with respect to the controversies involved in this matter.[5]

2. The second issue involved is whether the Petition of Lincoln Park was timely filed.

   The respondent argues that according to *N.J.A.C.* 6A:4-1.3(a) the appeal had to be filed within 30 days "of the filing date of the decision being appealed." The decision of the Morris County Superintendent of Schools was dated March 26, 2002, therefore, the appeal was out of time. In the alternative, Boonton argues that appeals of municipal actions must be brought as actions in lieu of prerogative writs in the Law Division and the time for filing is forty-five days from the accrual of the right to appeal. Rule 4:69-6(a).

[5] Lincoln Park asserted that if the issue of who drew up the current contract was germane, then an issue of material fact existed. However, since this issue is not determinative, summary judgment can be granted.

The petitioner's position is that *N.J.A.C.* 6A:4-1.3(a) is wholly inapplicable to the case because it deals with appeals from final decisions of the Commissioner, or of the Board of Examiners or of the School Ethics Commission. Here Lincoln Park sought a determination from the County Superintendent pursuant to *N.J.A.C.* 6A:23-3.1(f)(5). Sec. 1.3(d) of this regulation allows for a petition to be filed no later than the 90th day from the date of receipt of the notice of final order (March 26, 2002). In addition, they argue that, since the legal fees and costs will continue to be charged by Boonton, the continuing violation doctrine applies and is an equitable exception to the Statute Of Limitations. Finally, since Lincoln Park is not appealing Boonton's decision to retain attorneys and experts, this matter is not one that falls within the purview of an action in lieu of prerogative writs.

3. The third issue is whether in calculating the tuition rate for residents of the sending district, who attend high school in the receiving district, it is proper to include the legal fees and costs incurred by the receiving district as a result of litigation between the sending and the receiving districts.

Lincoln Park argues that it would be contrary to well-settled law and public policy for Lincoln Park to have to pay for legal fees incurred by Boonton in litigation between the parties. They assert that New Jersey has a strong policy disfavoring shifting attorney's fees. Under the "American Rule" the prevailing litigant is not entitled to collect attorneys' fees from the loser. What Boonton has attempted to do is exactly what the "American Rule" prohibits. They further argue that the fact that the regulation, *N.J.A.C.* 6A:23-3.1, which lists certain items, which are to be excluded from the tuition rate, is silent on attorney's fees does not mean that the regulation allows this type of legal fee. According to Lincoln Park there must be express, clear and

unequivocal authorization for such fee-shifting. Therefore, the fact that the sending-receiving contract between Lincoln Park and Boonton is silent on this issue of attorney's fees as well should be construed to mean that attorney's fees are not allowed as a tuition expenses.

In addition, Lincoln Park argues that to permit Boonton to include these legal fees in its tuition calculation would have a chilling effect on Lincoln Park's exercise of its statutory right to sue. The inclusion of the legal fees in Lincoln Park's tuition rate would be "inherently inequitable", especially since the district has no effective mechanism to challenge the legal fees or to determine who will render the legal services that are incurred.

The position of the Respondent is that *N.J.A.C.* 6A:23-3.1 governs the setting of tuition for public schools in sending-receiving relationships. The regulation requires the calculation of the "actual cost per student" and that "all expenditures" with certain exclusions are to be included in the calculation of actual cost. Since the regulation does not list attorney's fees as an exclusion, there is no basis for excluding attorney's fees from the calculation of "actual cost per student". If the Court were to find in favor of Lincoln Park that would be creating another exclusion, which is a not listed in the regulation. The Respondents argue that the term in the regulation requiring the inclusion of "General administration and business and other support services" in the calculation of tuition cost points to the inclusion of attorneys' fees. In addition, the contract between the parties closely tracks the regulation. Therefore, on a contractual basis, as well as by regulation, attorney fees are an allowable expense. The Respondents also assert that including fees in the tuition calculations is not the shifting of fees in violation of the "American Rule" because no Court awarded attorney's fees.

4. The fourth issue is: Does the Commissioner of Education (Administrative Law Judge) have jurisdiction to hear the reasonableness of attorney's fees incurred by a receiving district? If jurisdiction exists, are the attorney's fees reasonable?

Lincoln Park argues that, based on case law, the Commissioner of Education (A.L.J.) does not have authority to enter an award for attorney fees. The inclusion of attorney fees in the tuition rate is tantamount to the Commissioner of Education (A.L.J.) awarding fees to Boonton. In addition, Lincoln Park asserts that there is no case law that requires the Commissioner of Education (A.L.J.) to defer to a determination of the County Superintendent or to apply an arbitrary and capricious standard of review to his/her determination.

Boonton argues that including attorney's fees in the tuition calculations is not an award of attorney fees and therefore the jurisdiction of the Commissioner of Education (A.L.J.) to assess the reasonableness of fees is not at issue. As a corollary to these arguments the State asserts that the Administrative Law Court should defer to the determination of the County Superintendent and should not overturn his/her decision unless it is arbitrary or capricious. The State further asserts that if the reasonableness of attorney's fees is going to be decided by the Court, they should be dismissed since they have no part in that issue.

DISCUSSION

1. STANDARD FOR SUMMARY DECISION

The rules governing practice in the OAL provide that a Motion for Summary Decision may be granted if there is no genuine issue of material fact and the moving party is entitle to prevail as a matter of law. This provision mirrors the language of Rule 4:46-2 and the Supreme Court's decision in *Judson v. Peoples Bank and Trust Co. of Westfield*, 17 *N.J.* 67

(1954). Under *N.J.A.C.* 1:1-12.5(b), the determination to grant Summary Judgment should be based on the papers presented as well as any affidavits, which may have been filed with the application. In order for the adverse, *i.e.*, the non-moving party to prevail in such an application, responding affidavits must be submitted showing that there is indeed a genuine issue of fact, which can only be determined in an evidentiary proceeding. The Court in *Brill v. Guardian Life Insurance Co. of American*, 142 *N.J.* 520, 523 (1995), set the standard to be applied when deciding a Motion for Summary Judgment.

> The determination whether there exists a genuine issue with respect to a material fact challenged requires the Motion Judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party... are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party.

If the non-moving party's evidence is merely colorable, or is not significantly probative, summary judgment should not be denied. See *Bowles v. City of Camden,* 993 F. Suppl. 255, 261 (*D.N.J.* 1998).

Based on the Briefs and Affidavits presented by the parties, and having considered the Oral Argument of the Parties, I **FIND**, that there is no genuine issue of material fact and the matter can be decided on Summary Decision.

2. TIMELY FILING OF THE PETITION

Boonton argues that the Petition of Appeal is time barred. They base their conclusion on the 30-day limitation set forth in *N.J.A.C.* 6A:4-1.3(a). This section states that: " final decisions of the Commissioner, or of the Board of Examiners, or of the School Ethics Commission shall be taken within 30-days of the filing date of the decision from which appeal is taken." I believe that Boonton's reliance on this regulation is misplaced. Lincoln Park is not appealing a final decision of the Commissioner or the Board of Examiners or of the School Ethics

Commission. Instead, Lincoln Park disputed the charging of legal fees to the County Superintendent, pursuant to *N.J.A.C.* 6A:23-3.1(f)(5). By correspondence dated March 26, 2002, the County Superintendent stated that it was her opinion that Boonton had acted within its legal right by including the legal fees in the calculation of tuition. Both parties have set forth March 26, 2002 as the triggering date for the running of time to file an appeal. It is the March 26, 2002 decision from which Lincoln Park filed its appeal on June 22, 2002. The Regulation that is applicable to this matter is *N.J.A.C.* 6A:3-1.3(d), which calls for a 90-day time period to file an appeal. The petition was filed on June 24, 2002, which is within the 90-day time limitation. Therefore, Lincoln Park's petition was timely filed.

3. INCLUSION OF LEGAL FEES AND COSTS INCURRED BY BOONTON IN THE TUITION RATE FOR LINCOLN PARK'S STUDENTS

The statute applicable to the tuition of pupils attending a public school in another school district, other than where such pupils reside, is *N.J.S.A.* 18A:38-19, which provides in part:

> Whenever the pupils of any school district are attending public school in another district, within or without the state, pursuant to this article, the board of education of the receiving district shall determine a tuition rate to be paid by the board of education of the sending district to an amount not in excess of the actual cost per pupil as determined under rules prescribed by the commissioner and approved by the state board, and such tuition shall be paid by the custodian of school moneys of the sending district out of any moneys in his hands available for current expenses of the district upon order issued by the board of education of the sending district, signed by its president and secretary, in favor of the custodian of school moneys of the receiving district.

N.J.A.C. 6A:23-3.1 is the governing regulation that addresses the method for determining tuition rates for regular public schools. The relevant part of the regulation states that "[a]ll expenditures for each purpose except Federal and State special revenue fund expenditures and those specifically excluded in (e)5

below shall be included." *N.J.A.C.* 6A:23-3.1(b)1. The exclusions in *N.J.A.C.* 6A:23-3.19(e)5 are as follows:

> Expenditures shall be excluded from the actual cost per student for tuition purposes for the following items:
>
> i. Transportation to and from school, which is paid by the resident district board of education;
>
> ii Employee retirement and social security contributions for TPAF members, which are fully funded by the State;
>
> iii. Principal on lease purchase agreements;
>
> iv. Tuition;
>
> v. Community services;
>
> vi. Resource rooms, which are determined pursuant to (e)9 below and permitted as a separate charge over and above tuition for general education classes;
>
> vii. Accredited adult education programs and non-accredited adult and evening programs; and;
>
> viii. Extraordinary services provided to special education students for which a district board of education may bill directly.

Legal expenses do not appear in these exclusions or elsewhere in this regulation either. Thus, the regulation is silent on this issue and it is unclear whether this issue was contemplated when *N.J.A.C.* 6A:23-3.1 was proposed and adopted.

It is well settled, under the "American Rule," in the United States and in New Jersey, that each party will bear the cost of its own litigation fees. *In re Estate of Lash*, 169 *N.J.* 20, 30-31 (2001).

> Since 1948, New Jersey has consistently adhered to the general principle that 'legal expenses, whether for the compensation of attorneys or otherwise, are not recoverable absent express authorization by statute, court rule or contract.' *Balsey v. North Hunterdon Regional School Bd. of Ed.*, 225 *N.J. Super.* 221, 226 (App. Div. 1988), reversed on other grounds, 117 *N.J.* 568 (1990)(quoting *State Dept. of Environmental Protection v. Ventron Corp*, 94 *N.J.* 473, 504 (1983)).

Here there is no express authorization by statute or court rule to support the shifting of legal expenses. The relevant regulation, in its silence on this issue, simply does not set forth such legal costs as being excluded in the calculation of tuition. This does not rise to the level of an express authorization for the shifting of legal expenses in this matter.

Despite the "American Rule," a party may agree by contract to pay the other party's attorney fees. *North Bergen Rex Transport, Inc. v. Trailer Leasing Co.,* 158 *N.J.* 561, 570 (1999). However, such contractual agreements will be strictly construed in light of the general policy disfavoring awards of attorney fees. *Ibid.* See also *Community Realty Management, Inc. v. Harris*, 155 *N.J.* 212, 234 (1998) (A written lease must expressly permit a landlord to recover reasonable attorney fees and damages before a court may consider those expenses as additional rent and absent such agreement it is unlikely that the parties contemplated the issue).

In the current contract between Boonton and Lincoln Park there is no mention of whether attorney fees and legal costs would be included in the calculation of tuition that would be charged to Lincoln Park. The contract merely provides that the tuition would be calculated pursuant to *N.J.A.C.* 6A:23-3.1. Such a provision cannot be considered an express authorization for the shifting of legal expenses. Also, the fact that the 1989, contract specifically excluded

from the tuition calculation any legal expenses incurred due to litigation between Boonton and Lincoln Park, does not mean that Lincoln Park expressly agreed to the inclusion of such expenses under the current contract merely because the contract is silent with regard to such expenses. The fact that the regulation does not specifically exclude such expenses, and the fact that the previous contract specifically excluded these legal fees, along with a host of other exclusions and inclusions, do not provide the express statutory, regulatory or contractual authorization required to make the inclusion of such expenses in the tuition calculation proper.

As for the assertion of Boonton and the State that the including of fees in the high school tuition rate is not fee shifting because "no Court awarded attorney's fees" and/or "neither district has sued the other for payment of fees incurred in connection with the ongoing litigation", I **FIND** this argument disingenuous. As Boonton has pointed out, the prohibition against fee shifting is not always discussed in the context of Court awards. In many cases Courts are asked to decide if legal fees are recoverable under the terms of a contract. *See Kellam Associates v. Angel Products, LLC*, 2002 *WL* 142281 (App. Div. 1983). In addition, the legal fees, which Boonton wishes to shift to Lincoln Park, were incurred in connection with litigation between the parties, even though the lawsuits did not involve suits for fees. By wrapping the legal fees in terms of "administrative costs", the Respondents cannot change the essential nature of the charge. The calculation of the legal fees in the tuition charged to Lincoln Park students is fee shifting and is not allowed under the "American Rule," unless expressly indicated. Boonton has argued that, if the Court does not allow the inclusion of attorney's fees, in this case, it is in effect making another exclusion from administrative costs, which is not listed in the code. Thus, the Court is essentially legislating. This argument would be valid if it referred to other costs. However, the "American Rule," is an overarching policy that is implicit in all legal matters *i.e.* that each litigant will pay its own legal fees and costs unless there is express, clear and unequivocal authorization for such fee-shifting. Therefore, in

this matter, the Court is not making another exclusion, it is merely recognizing a long established legal exception.

Boonton further argues that, if attorney's fees are not included in the high school budget, there is no other budgetary slot to allocate them to except the K-8 budget, where they do not belong. It is not the Court's function to determine the fine points of the school district's budget, other than to determine whether or not a particular charge is allowable. Here we find that it is not.

Although, I have already **CONCLUDED** that Boonton cannot include legal fees incurred in the litigation with Lincoln Park in the calculation of the tuition for Lincoln Park students, I will briefly comment on the argument put forth by the State regarding the decision of the County Superintendent. The State argues that the County Superintendent's decision regarding the propriety of legal fees should not be disturbed, because the decision was not arbitrary or capricious. They site *N.J.A.C.* 6A:23-3.1(f)(5), which says that the county superintendent has the authority to "mediate" all disputes that arise from the determination of the tentative tuition charge. There are no cases cited which have found that the Commissioner of Education is required to defer to a determination of the County Superintendent or apply an arbitrary and capricious standard. Since the Administrative Law Judge (A.L.J.) stands in the shoes of the Commissioner, for the purposes of this Summary Decision Motion, it follows that the A.L.J., is not required to defer to the conclusion reached by the County Superintendent. See *N.J.S.A.* 18A:6-9. In addition, the State's argument that the court has a limited role in reviewing the decisions rendered by an administrative agency is equally inapplicable. The cases cited by the State deal with judicial review of administrative decisions. *See Atlantic City Medical Ctr. V. Squarrell*, 349 *N.J. Super* 16, 22 (App. Div. 2002) and *In re Code Enforcement Officer* (M00410), 349 *N.J. Super* 426, 431 (App. Div. 2002). The present matter is still before an Administrative body *i.e.* the A.L.J., and therefore, the cases cited do not apply to this matter.

4. THE JURISDICTION OF THE COMMISSIONER OF EDUCATION AND THE ALJ TO HEAR THE ISSUE OF THE REASONABLENESS OF ATTORNEY'S FEES INCURRED BY BOONTON

It is well settled that the Commissioner of Education and thus the A.L.J. do not have the authority to enter an award for attorney fees or legal costs. *See Balsey v. North Hunterdon Bd. of Ed.*, 117 *N.J.* 434, 442-43 (1990), and *Convery v. Perth Amboy Bd. of Ed.*, 1974 *S.L.D.* 372, 377. Therefore, it follows that the A.L.J. would not have the jurisdiction to determine whether such attorney fees are reasonable, because the A.L.J., lacks the authority to award such fees regardless of how reasonable they may be.[6]

CONCLUSION AND ORDER

For the reasons previously stated, I therefore, **CONCLUDE**, that Lincoln Park is entitled to Summary Decision on the issue of Attorney's fees. I further **CONCLUDE**, that the Respondents' motions for Summary Decision shall be denied.

It is hereby **ORDERED** that the respondent, Boonton Board of Education is not permitted to include in the tuition rate that it charges to petitioner, Lincoln Park Board of Education, any legal fees, cost or expenses associated with litigation between the parties or their agents.

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

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

[6] Lincoln Park's request that the A.L.J., determine the reasonableness of attorney's fees and the State's request that it be dismissed from that portion of the case; if that was an issue, are inapplicable, since the Administrative Law Court does not have jurisdiction.

forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

4/8/03
DATE

Carol I. Cohen
CAROL I. COHEN, ALJ

Receipt Acknowledged:

April 4, 2003
DATE

M.K. Duncan (for)
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR - 8 2003
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

id

OAL DKT. NO. EDU 5944-02
AGENCY DKT. NO. 188-6/02

BOARD OF EDUCATION OF THE BOROUGH OF LINCOLN PARK, MORRIS COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF BOONTON, MORRIS COUNTY AND NEW JERSEY STATE DEPARTMENT OF EDUCATION	:	DECISION
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Boonton's exceptions and those of the Department, along with Lincoln Park's reply thereto were filed in accordance with the requirements of *N.J.A.C.* 1:1-18.4.[1]

Upon his full and independent review, the Commissioner concurs with the determination of the ALJ herein that the Boonton Board is not permitted to include any legal fees, costs or expenses associated with litigation between the parties or their agents in the tuition rate which it charges to Lincoln Park. However, after consideration of the parties' submissions in this matter, the Commissioner is compelled to clarify the parameters of this determination in order to eliminate any potential confusion.

[1] The parties' exceptions essentially recast and reiterate their arguments advanced before the Administrative Law Judge (ALJ) below. In that the Commissioner finds that the ALJ reviewed and considered such arguments in her Initial Decision, they will not be revisited herein.

As recognized by the ALJ, *N.J.A.C.* 6A:23-3.1 governs the setting of tuition for public schools in sending/receiving relationships, and requires the calculation of the "actual cost per student." This regulation directs that *all expenditures*, other than Federal and State special revenue fund expenditures, with certain enumerated exceptions, be included in the calculation of actual cost per student. *N.J.A.C.* 6A:23-3.1(b)(1). Attorney costs and fees are not included as an exception. The Commissioner finds, and the parties here do not dispute, that because legal costs and fees are not specifically enumerated in this regulation as an exclusion from the computation of the actual cost per student figure for tuition purposes, such costs and fees associated with litigation, against or brought by third parties, concerning high school matters, are appropriately included in the tuition rate calculation. However, with respect to legal costs and fees directly attributable to litigation *between the parties*, the Commissioner concludes, as did the ALJ, that a long recognized "overarching" policy consideration must be superimposed. As found by the ALJ:

> It is well settled, under the "American Rule," in the United States and in New Jersey, that each party will bear the cost of its own litigation fees. *In re Estate of Lash*, 169 *N.J.* 20, 30-31 (2001).
>
> > Since 1948, New Jersey has consistently adhered to the general principle that 'legal expenses, whether for the compensation of attorneys or otherwise, are not recoverable *absent express authorization by statute, court rule or contract.*' [*Balsley*] *v. North Hunterdon Regional School Bd. of Ed.*, 225 *N.J. Super.* 221, 226 (App. Div. 1988), reversed on other grounds, 117 *N.J.* 568 (1990) (quoting *State Dept. of Environmental Protection v. Ventron Corp.*, 94 *N.J.* 473, 504 (1983)). (emphasis supplied) (Initial Decision at 11)

As *N.J.A.C.* 6A:23-3.1 provides computation authorization implicitly as opposed to explicitly, the express clear and unequivocal authorization requirement contemplated by the "American Rule" for the shifting of legal fees as between parties is not satisfied. As noted by the ALJ, the

parties' sending/receiving contract, similarly, fails to provide the requisite "express" authorization for this particular category of expenses. Consequently, it is hereby held that absent express legal authorization, a receiving district in a sending/receiving relationship is not permitted to charge the sending district for its legal costs in either pursuing or defending litigation against the sending district.

Accordingly, the Initial Decision of the OAL, as clarified herein, is adopted.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 5/15/03

Date of Mailing: 5/15/03

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

247-03

K.C. and C.C., on behalf of minor child, J.C.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning parents, whose son J.C. was suspended for assault and possession of a weapon, alleged the Board improperly transferred him from Lakewood High School to an alternative placement. The Board contended the petition was untimely filed.

The ALJ found that petitioners were officially notified in a letter dated November 25, 2002 of the transfer but did not file a petition of appeal until March 6, 2003, clearly more than 90 days after the notice of the action. Moreover, the ALJ found that no compelling or extraordinary circumstances existed for waiving the 90-day rule. Petition was dismissed.

The Commissioner adopted the Initial Decision as his own.

May 15, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 00739-03S
AGENCY DKT. 75-3/03

K.C. and C.C., ON BEHALF OF MINOR CHILD, J.C.,
Petitioners,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD, OCEAN COUNTY,
Respondent.

Thomas W. Sumners, Jr., Esq., for petitioners (Sumners George, attorneys)
Michael I. Inzelbuch, Esq., for respondent

Record Closed: April 3, 2003 Decided: April 4, 2003

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

This matter originally came before the Office of Administrative Law ("OAL") as an emergent matter transmitted for hearing by the Commissioner of the Department of Education ("Commissioner"). Emergency relief was denied in an interlocutory order issued on March 17, 2003. In that order, I noted that while the parties had not addressed the issue in either written or oral presentations produced in connection with the emergency proceeding, there did appear to be a question as to whether the petitioners had filed their petition for relief with the Commissioner beyond the ninety days permitted for seeking relief pursuant to *N.J.A.C.* 6A:3-1.3 (d). That regulation specifically requires that any petition for relief be filed "no later than the 90th day from receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing."

In this case, the petitioners allege that the respondent Board of Education ("Board") improperly transferred their son from Lakewood High School to an alternative placement, namely the Project Opportunity Program, or "POP". This program is operated for the Board by a private contractor, Sylvan Learning Center. However, the Lakewood students attending POP receive a Lakewood diploma and in some instances can take courses at Lakewood High. It is not disputed at this time that POP is an in-district alternative placement. The transfer occurred after the student was first suspended for disciplinary reasons arising from an incident in which he was charged with assault and also with possession of a weapon.

The petitioners complain that their son's rights were violated in two instances, first when he was suspended for ten days in November 2002 and then, after what they view as a legally deficient "hearing" before the Superintendent on November 25, 2002, when he was transferred to POP. The parents were officially notified of the transfer in a letter dated November 25, 2002. That letter read in part, "[A]t the superintendent's review hearing on Tuesday, November 25, 2002, it was agreed that J. would enroll in POP for the remainder of the school year." It was also noted that he could then reapply to Lakewood High and his readmission would be determined based upon his academic performance, attendance and behavior at POP.

The petition for relief was filed with the Department of Education on March 6, 2003. Ninety days from November 25, 2002, was February 23, 2003. Therefore, the petition for relief was clearly filed after the ninetieth day following the petitioners receiving notice of the action by the district, through its superintendent.

In response to my invitation, counsel for both parties have filed written statements concerning the effect of the ninety-day rule on this case. Counsel for the petitioners argues that the rule should be waived, because this case involves important constitutional or other matters of fundamental public importance that go beyond the concerns of these particular parties. Additionally, counsel contends that the parents were not informed by the Board that they had only ninety days in which to challenge the transfer and that since the Board was in a far better position to know this important information, the parents should not be held liable for their ignorance, as the Board should have informed them of this requirement.

Counsel for the respondent notes, however, that case law cited in the interlocutory order denying emergent relief finds that there are no federal constitutional issues implicated in an in-district transfer accomplished for disciplinary reasons. *Nevares v. San Marcos Consolidated Independent School District*, 111 *F.*3d 25 (5th Cir. 1997); *Zamora v. Pomeroy*, 639 *F.*2d 662 (10th Cir. 1981).

The 90-day rule requiring timely filing of petitions for relief from the Commissioner has received much attention in the courts and has been upheld as a firm and seldom waived requirement that implements important policy goals of repose and certainty. It has been strictly applied, *Gordon v. Passaic Township Bd. of Educ.*, 1985 *S.L.D.* 1929, 1931, *aff'd* No. A-3294-84T7 (N.J. App. Div. May 27, 1986), *cert. den.*, 105 *N.J.* 534; *Elmwood Park Bd. of Educ. v. Farrell*, 95 *N.J.A.R.*2d (EDU) 375, 377. It has been relaxed in certain circumstances where the Commissioner deems its application inappropriate or unnecessary or where its application may result in injustice. However, while the ability exists for the relaxation of the rule, the cases demonstrate that the rule is only relaxed in very limited, indeed, in "exceptional"or "compelling" circumstances.

In the present case, the petitioners complain about alleged violations of procedures in regard to a ten-day suspension. As that suspension has long since ended, the real core issue here is the transfer of the student from the High School to the district's alternative POP program. As the case law reflects, the federal constitutional concerns that are involved in decisions to suspend or expel a student are not applicable in an in-district transfer. As noted in the emergent decisions, no claim is made here that the transfer has resulted in a deprivation of the student's right under the New Jersey Constitution to a thorough and efficient education. Thus, in respect to the transfer, no constitutional rights or matters of compelling public interest that affect others are at stake. In these circumstances, no compelling or extraordinary circumstances exist for waiving the 90-day rule. Further, the suggestion that the parents, who did not appeal from the Superintendent's transfer notice to the Lakewood Board of Education, failed to exercise their right to appeal the transfer notice to the Commissioner within the allowable time frame due to their ignorance of the clear regulation that addresses the need for timely appeals is hardly a reason to waive a strictly applied time limitation that is only waived in instances of extremely

compelling circumstances. The interests of justice will not be compromised by the application of this long-standing rule in this case. Therefore, the petition is **DISMISSED**.

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

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

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

April 4, 2003
DATE

JEFF S. MASIN, ACTING CHIEF ALJ

Receipt Acknowledged:

April 9, 2003
DATE

M. Kathleen Duncan (ea)
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 10 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

mjm

EXHIBITS

None

OAL DKT. NO. EDU 00739-03
AGENCY DKT. NO. 75-3/03

K.C. and C.C., on behalf of minor child, J.C.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioners sought and were granted an extension of time within which to file exceptions to the Initial Decision. Such exceptions and replies thereto were filed in accordance with the extended timelines and were fully considered by the Commissioner in his determination herein.

Upon his full and independent review of the record, the Commissioner concurs with the determination of the Administrative Law Judge, for the reasons cogently articulated in his decision, that the within petition is time-barred and that relaxation of the 90-day timeline set forth in *N.J.A.C.* 6A:3-1.3(d) is not warranted under the circumstances of this case.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 5/15/03

Date of Mailing: 5/19/03

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

248-03

ELIZABETH SCHERBA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF LODI, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

May 19, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 7878-02
AGENCY DKT. NO. 247-8/20

ELIZABETH SHERBA,
Petitioner,
v.

BOARD OF EDUCATION OF THE BOROUCH OF LODI, BERGEN COUNTY,
Respondent.

Kathleen P. Garvey, Esq. for petitioner
(Marotta, Garvey & Cipoletta, attorneys)

William R. Nunno, Esq., for respondent

Record Closed: April 15, 2003 Decided: April 17, 2003

BEFORE **SANDRA ANN ROBINSON,** ALJ:

This matter was transmitted to the Office of Administrative Law on October 1, 2002 for determination as a contested case. Hearing dates were scheduled for March 17-19, 2003. A telephone conference was conducted on March 17th, 2003.

Prior to hearing, the parties agreed to an amicable resolution of the matter and submitted a written Stipulation of Settlement and Settlement Agreement. Having reviewed the record and the settlement terms, I **FIND:**

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

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

Therefore, I **CONCLUDE** that the agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the settlement terms, and it is **FURTHER ORDERED** that the proceedings in this matter be concluded.

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

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

4-17-03
DATE

Sandra Ann Robinson
SANDRA ANN ROBINSON, ALJ

Receipt Acknowledged:

4-23-03
DATE

M. Kathleen Duncan (by)
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 2 8 2003
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cml

MAROTTA & GARVEY
115 RIVER ROAD, BLDG. 3
EDGEWATER, NJ 07020
(201) 943-6300
ATTORNEYS FOR PETITIONER

ELIZABETH SCHERBA, Petitioner, v. BOARD OF EDUCATION OF THE BOROUGH OF LODI, BERGEN COUNTY, Respondent.	:	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY OAL DOCKET NO.: 07878-02N STIPULATION OF SETTLEMENT

The matter in difference in the above entitled action having been amicably resolved and settled by and between the parties, it is hereby agreed that the same be dismissed.

MAROTTA & GARVEY

William R. Nunno, Esq.
Attorney for Respondent

Kathleen P. Garvey, Esq.
Attorney for Petitioner

SETTLEMENT AGREEMENT

This Settlement Agreement and Release ("Agreement"), dated March , 2003, is made and entered into between Elisabeth Scherba ("Scherba") and the Board of Education of the Borough of Lodi ("Board"). This Agreement is made pursuant to the following terms and conditions.

WHEREAS, Scherba was employed by the Board on September 15, 2000 as a school nurse assigned to the Roosevelt School; and

WHEREAS, on or about May 10, 2002 the Board voted to not renew the employment contract of Scherba for the school year 2002-2003; and

WHEREAS, Scherba filed a petition with the New Jersey Commissioner of Education on or about August 8, 2002 challenging the non-renewal of her employment contract for the school year 2002-2003; and

WHEREAS, the Board filed an answer to the petition and the matter was transferred to the Office of Administrative Law, docket number EDUDQ 07878-02N; and

WHEREAS, the parties elected to settle all outstanding matters and allegations in dispute in lieu of litigating the matter pending in the Office of Administrative Law; and

WHEREAS, the Board and Scherba deem it to be in their best interests to set forth in a formal written agreement their respective rights, duties and obligations upon the settlement of the matter pending in the Office of Administrative Law; and

NOW, THEREFORE, with the intent to be legally bound hereby, and in consideration of the mutual promises and covenants contained

herein, Scherba and the Board, agree to the terms and conditions as hereinbelow set forth:

FIRST: Scherba shall and does hereby dismiss her Petition filed with the New Jersey Commissioner of Education with prejudice and shall file any and all documents required by the New Jersey Office of Administrative Law to the effect. The Board and Scherba hereby release and give up any and all claims against each other resulting from anything which has happened up to now concerning the nonrenewal of Scherba's employment contract for the 2002-2003 school year.

SECOND: The Board does hereby hire Scherba as a school nurse for as and of April 3, 2003.

THIRD: As of the date of the commencement of her employment with the Board, Scherba shall be placed on Step 3 of the Teachers Salary Guide 2002-2003. Beginning in September, 2003, Scherba shall be placed on Step 4 of the Teachers Salary Guide 2003-2004.

FOURTH: The employment contract for Scherba shall be renewed, and she shall not be dismissed or reduced in compensation, except for inefficiency, incapacity, unbecoming conduct or other just cause.

FIFTH: The letter dated May 30, 2002 from the Superintendent of Schools to Scherba shall be removed and expunged from Scherba's permanent personnel record.

SIXTH: As of the date of the commencement of her employment with the Board, Scherba shall receive full health care coverage as set forth in Article XIV of the Agreement between the Lodi Board of

Education and The Lodi Education Association ("Agreement"). In accordance with Article XXV A3 the Board shall pay the premiums on behalf of Scherba to assure uninterrupted participation and coverage as and of the date of hire.

SEVENTH: As of the date of separation of employment with the Board, Scherba had ~~one and~~ 2 pc sick days accumulated. As of the date of the commencement of employment with the Board, Scherba shall be entitled to the accumulated sick days and ten (10) sick days for non-tenured personnel as set forth in Article XX of the Agreement and two (2) personnel days as set forth in Article XX of the Agreement.

EIGHTH: It is recognized by the parties hereto that, due to the events that have occurred, there has been an interruption in the employment of Scherba which effects her pension status. Therefore, it is agreed between the parties that should there be an opportunity to either waive this period of interruption in employment, or credit Scherba with time so as to not adversely affect the pension status of Scherba without cost to the Board, then, in such event, it is agreed that this Settlement Agreement shall be amended to reflect such change.

NINTH: The Board shall make every effort to assign Scherba as the school nurse to the Roosevelt School.

NOW THEREFORE, the parties, by their designated representatives do set forth their signatures in confirmation of the above recitals and agreements to be effective on February 26, 2003.

3

In the presence of:

Elizabeth Scherba

Elizabeth Scherba

In the presence of:

LODI BOARD OF EDUCATION

Joseph Capizzi, Secretary

Carmine DeRosa, President

STATE OF NEW JERSEY, COUNTY OF BERGEN SS:

I CERTIFY that on , 2003, Elizabeth Scherba personally came before me and acknowledged under oath, to my satisfaction, that this person is named in and personally signed this document.

Notary public

STATE OF NEW JERSEY, COUNTY OF BERGEN SS:

I CERTIFY that on March 31, 2003. Joseph Capizzi, Secretary of the Lodi Board of Education, personally came before me and acknowledged under oath to my satisfaction that he is the Secretary of the Lodi Board of Education, that he is the attesting witness to the signing of this Agreement by Carmine De Rosa who is the President of the Lodi Board of Education and that this Agreement was signed and delivered by the Board as its voluntary act duly authorized by a proper resolution of the Lodi Board of Education.

Joseph Capizzi

Sworn and subscribed to before me this 31 day of March, 2003.

Susan Verdina
Notary Public SUSAN VERDINA
NOTARY PUBLIC OF NEW JERSEY
MY COMMISSION EXPIRES 5/19/04

OAL DKT. NO. EDU 7878-02
AGENCY DKT. NO. 247-8/02

ELIZABETH SCHERBA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF LODI, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

COMMISSIONER OF EDUCATION

Date of Decision: 5|19|03

Date of Mailing: 5|19|03

249-03

BOARD OF EDUCATION OF THE TOWNSHIP OF ROXBURY, MORRIS COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MOUNT OLIVE, MORRIS COUNTY, BOARD OF EDUCATION OF THE TOWNSHIP OF RANDOLPH, MORRIS COUNTY, AND THE NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENTS.	:	
	:	

May 19, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NO. EDU 5473-02

AGENCY DKT. NO. 59-3/02

BOARD OF EDUCATION OF ROXBURY TOWNSHIP,

Petitioner,

v.

BOARD OF EDUCATION OF MOUNT OLIVE, MORRIS COUNTY, RANDOLPH TOWNSHIP BOARD OF EDUCATION, MORRIS COUNTY AND NEW JERSEY STATE DEPARTMENT OF EDUCATION,

Respondents.

Thomas O. Johnston, Esq., appearing for Petitioner (Porzio, Bromberg & Newman, attorneys)

Marc H. Zitomer, Esq., appearing for Respondent Mount Olive Township Board of Education (Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Joann Lynch, Esq., appearing for Respondent Randolph Township Board of Education (Kenney, Gross, Kovats & Campbell, attorneys)

Allison C. Eck, Deputy Attorney General, appearing for Respondent State Department of Education (Peter C. Harvey, Acting Attorney General of New Jersey, attorney)

Record Closed: April 14, 2003 Decided: April 15, 2003

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

This matter was transmitted to the Office of Administrative Law (OAL) from the Department of Education on June 18, 2002 for hearing as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

A hearing was scheduled for March 3, 2003 at the OAL, 33 Washington Street, Newark, New Jersey. At the hearing, settlement discussions were held and a settlement was reached. The parties having agreed and stipulated, as indicated by their signatures on the attached Stipulation of Dismissal, that this matter should be dismissed.

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

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

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

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the dismissal should be approved. I approve the dismissal and, therefore, it is hereby **ORDERED** that this matter be and hereby is **DISMISSED**.

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

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

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

April 15, 2003
DATE

MARGARET M. HAYDEN, ALJ

Receipt Acknowledged:

April 21, 2003
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 22 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

jb

PORZIO, BROMBERG & NEWMAN, P.C.
100 Southgate Parkway
Morristown, NJ 07962-1997
(973) 538-4006
Attorneys for Petitioner Roxbury Township Board of Education

ROXBURY TOWNSHIP BOARD OF EDUCATION, Petitioner, v. NEW JERSEY DEPARTMENT OF EDUCATION, MOUNT OLIVE TOWNSHIP BOARD OF EDUCATION AND RANDOLPH BOARD OF EDUCATION, Respondents.	BEFORE THE COMMISSIONER OF EDUCATION AGENCY DOCKET NO. 59-3/02 OAL DOCKET NO. EDUOT 05473-02N **STIPULATION OF DISMISSAL WITHOUT PREJUDICE**

The matter in difference in the above-entitled action having been amicably adjusted by and between petitioner Roxbury Township Board of Education, and respondents, New Jersey Department of Education, Mount Olive Township Board of Education and Randolph Board of Education, it is hereby stipulated and agreed by and between these respective parties, that this action, including all claims asserted herein, be and is hereby dismissed without prejudice and without costs as against or in favor of any party.

By: _____
Thomas O. Johnston, Esq.
PORZIO, BROMBERG & NEWMAN, P.C.

Attorneys for Petitioner
Roxbury Board of Education

Dated: 4/10, 2003

By: _____
Marc H. Zitomer, Esq.
SCHWARTZ SIMON EDELSTEIN CELSO & KESSLER, LLP
Attorneys for Respondent Mt. Olive Township Board of Education

Dated: 7/25/, 2003

Per telephone Hearing, Acting Attorney General of the State of New Jersey

By: _____
Allison Colsey Eck, Esq.
NEW JERSEY DEPARTMENT of LAW and PUBLIC SAFETY – DIVISION of LAW
Attorneys for Respondent New Jersey Department of Education

Dated: 4/3/03, 2003

By: _____
Joann Lynch, Esq.
KENNEY GROSS KOVATZ & CAMPBELL

Attorneys for Respondent Randolph Board of Education

Dated: 3/28/03, 2003

OAL DKT. NO. EDU 5473-02
AGENCY DKT. NO. 59-3/02

BOARD OF EDUCATION OF THE TOWNSHIP OF ROXBURY, MORRIS COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MOUNT OLIVE, MORRIS COUNTY, BOARD OF EDUCATION OF THE TOWNSHIP OF RANDOLPH, MORRIS COUNTY, AND THE NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENTS.	:	

The Commissioner has reviewed the record of this matter, Initial Decision and Stipulation of Dismissal Without Prejudice, indicating that this matter has "been amicably adjusted by and between" the parties. Noting, however, the absence of any document containing the terms of the parties' agreement so as to permit his review under *N.J.A.C.* 1:1-19.1, the Commissioner shall, instead, consider this matter a withdrawal pursuant to *N.J.A.C.* 1:1-19.2. The Commissioner, therefore, approves the withdrawal, and determines that this matter shall be dismissed with prejudice.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 5|19|03

Date of Mailing: 5|19|03

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*

250-05

IN THE MATTER OF THE TENURE	:	
HEARING OF VANESSA ALLEN (HART),	:	
SCHOOL DISTRICT OF THE TOWNSHIP	:	COMMISSIONER OF EDUCATION
OF IRVINGTON, ESSEX COUNTY.	:	DECISION
_____	:	

May 15, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 3880-01
AGENCY DKT. NO. 114-5/01

IN THE MATTER OF THE TENURE HEARINGOF VANESSA ALLEN, SCHOOL DISTRICT OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY

Raymond L. Hamlin, Esq., for petitioner (Hunt, Hamlin & Ridley, attorneys)

Nancy I. Oxfeld, Esq., for respondent (Oxfeld Cohen, attorneys)

Record Closed: April 14, 2003 Decided: April 15, 2003

BEFORE **BARRY N. FRANK,** ALJ:

This matter was transmitted to the Office of Administrative Law on May 25, 2001 for a hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

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

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that the agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. Accordingly, I approve the settlement and

ORDER that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

April 15, 2003
DATE

BARRY N. FRANK, ALJ

Receipt Acknowledged:

April 21, 2003
DATE

M. Kathleen Duncan Esq
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 22 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

pb

J-1

OXFELD COHEN, PC
50 Commerce Street
Newark, New Jersey 07102
(973) 642-0161
Attorneys for Respondent

BEFORE THE COMMSSIONER OF EDUCATION
OF THE STATE OF NEW JERSEY
OAL DKT. NO. EDU 38880-01
AGENCY DKT. NO. 114-5/01

IN THE MATTER OF THE TENURE HEARING	:	
OF VANESSA HART, SCHOOL DISTRICT OF	:	SETTLEMENT AGREEMENT
THE TOWNSHIP OF IRVINGTON, ESSEX	:	
COUNTY.	:	

WHEREAS, Vanessa Hart and the Irvington Board of Education, ("the Board") have amicably agreed to resolve their differences, and hereby stipulate and agree that the matter entitled In the Matter of the Tenure Hearing of Vanessa Hart, School District of the Township of Irvington, Docket Number EDU-03880-01N, Agency Ref. No. 114-5/01, shall be settled upon the terms and conditions stated herein;

WHEREAS, the Irvington Board of Education has agreed after due consideration to settle all claims related to the employment of Vanessa Hart in connection with her duties and responsibilities as Lead Secretary and the decision to prefer tenure charges against Vanessa Hart pursuant to N.J.S.A. 18A:6-11 and the Irvington Board of Education and Vanessa Hart have determined that it would be in the best interests of the Irvington Board of Education and Vanessa Hart to enter into such settlement.

NOW THEREFORE, the parties mutually covenant and agree as follows:

1. Vanessa Hart was hired as a secretary for the Irvington Board of Education on or about February 23, 1993.

2. On April 26, 2001, the Board of Education voted to prefer Tenure Charges against Vanessa Hart pursuant to N.J.S.A. 18A:6-11.

3. The Irvington Board of Education and Vanessa Hart, through discussions between their respective counsel determined that it would be most beneficial to the parties involved to enter into the within agreement.

4. In furtherance of the within settlement, the following shall be agreed by and between Vanessa Hart and the Irvington Board of Education:

a. The Irvington Board of Education shall withdraw the tenure charges which were filed against Vanessa Hart.

b. The Irvington Board of Education shall transfer Vanessa Hart from the position of Lead Secretary at Irvington High School to another lead secretary position, or to another secretarial position while maintaining Vanessa Hart on the lead secretary salary guide, at another school within the Irvington School District. As of the date of this agreement, Vanessa Hart will be transferred to Berkeley Terrace School. However, nothing regarding this transfer shall be construed to eliminate the Irvington Board of Education's managerial prerogative to transfer Vanessa Hart to any other school within the district in the event it determines in its sole discretion that another transfer would be warranted.

c. The Irvington Board of Education and Vanessa Hart agree that she will waive any claim which she may have for back pay which was lost as a result of her

suspension without pay, a period of 120 days, as well as any claim for pay after December 2001. The Board will pay to Hart back pay for the period from September 2001 through December 2001 ~~less mitigation~~ in the gross amount of $5,000.00.

d. The Irvington Board of Education and Vanessa Hart agree that her employment and adjustment increment shall be withheld during the year 2001/2002 academic year. She will return to work at the same salary she received in the 2000-2001 school year.

e. Hart will receive credit for four unused sick days for the months of September through December 2001, to be added to those days accumulated as of the date of certification of charges, as well as credit for one week of vacation.

5. The Irvington Board of Education, after fully considering this matter, has concluded that it is in the best interests of the Irvington Board of Education to settle the within matter involving Vanessa Hart in view of the potential escalation of substantial legal and administrative costs, personnel time and that the parties' interest would be better served in resolving this matter through the within settlement which resolves all issues involving the Irvington Board of Education and Vanessa Hart which are currently in dispute.

6. The within settlement agreement shall satisfy the matter entitled; In the Matter of the Tenure Hearing of Vanessa Hart, EDU-03880-01N, Agency Ref. No. 114-5/01.

7. Both parties acknowledge that should anyone inquire about whether Vanessa Hart was ever the subject of tenure charges, the parties will acknowledge same and

advise that the matter was settled. There shall be no comment from any employee or agent of the Irvington Board of Education which casts a negative light upon Vanessa Hart. Any deviation from this provision by the Irvington Board of Education, its employees, agents and/or servants shall subject the Board of Education to penalties as determined by a court of competent jurisdiction, which may include damages, plus attorney's fees and cost of suit.

8. It is understood that neither the execution of this Agreement or any other action taken by the Irvington Board of Education in connection with this settlement constitutes an admission by the Board of any violation of any law, duty or obligation or that any decision or action with respect to Vanessa Hart was unwarranted, unjustified, retaliatory, discriminatory or otherwise unlawful. The Board specifically disclaims any liability to Vanessa Hart.

9. The parties have entered into this Settlement Agreement solely to compromise the disputed claims. No findings of any kind have been made or issued by any court regarding the merits of the claims of this action and neither party purports to be the prevailing party in this action.

10. Both parties to this Agreement and their counsel participated in the negotiation and drafting of this Agreement as equals. No particular party shall be deemed to be the drafter or provider of this Agreement and the parties agree that the Agreement shall not be construed against any particular party.

11. This Agreement sets forth the entire agreement between Vanessa Hart and the Irvington Board of Education and supersedes all prior agreements or

understandings, if any, between the parties regarding the subject matter of this Agreement. This Agreement shall be construed in accordance with the laws of the State of New Jersey.

12. The parties acknowledge that they have consulted with their respective attorneys regarding this Agreement and that the terms of this Agreement have been explained to them and that they have represented to their attorneys that they have read this Agreement and agree to be bound by them.

13. Vanessa Hart and the Irvington Board of Education shall not release any claims that either may have for the enforcement of this Agreement and both maintain all rights to enforce this Agreement should there be a breach by either party.

IN WITNESS WHEREOF the parties hereunder have signed this Agreement as their voluntarily act and agree to be bound thereby.

Witness 4/3/03

VANESSA HART 4/3/03

Witness

, President
Irvington Board of Education

Dated: 4/10/03

Raymond L. Hamlin, Esq.
Board of Education
Attorney

OAL DKT. NO. EDU 3880-01
AGENCY DKT. NO. 114-5/01

IN THE MATTER OF THE TENURE	:	
HEARING OF VANESSA ALLEN (HART),	:	
SCHOOL DISTRICT OF THE TOWNSHIP	:	COMMISSIONER OF EDUCATION
OF IRVINGTON, ESSEX COUNTY.	:	DECISION
	:	

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

Upon review, the Commissioner approves the settlement terms of the Board and respondent, a tenured secretary, since the record reflects that such terms comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *See In re Cardonick*, 1990 *S.L.D.* 842, 846, decided by the Commissioner of Education April 7, 1982, *aff'd* State Board April 6, 1983; and *N.J.A.C.* 6A:3-5.6(a). The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 5/15/03

Date of Mailing: 5/19/03

253-03

253-03

J.G., ON BEHALF OF A.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST DEPTFORD, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning grandmother challenged the Board's refusal to reinstate A.S. into the regular education program at West Deptford High School following a disciplinary suspension. The matter was consolidated with special education dispute – the Board claimed J.G. would not consent to have A.S. evaluated. The Board sought dismissal of the petition because J.G. lacked standing; custody of A.S. had been transferred to his father, C.S. Moreover, the Board alleged the appeals were filed untimely.

The ALJ granted summary decision to the Board and ordered the consolidated matter dismissed. The ALJ determined that when A.S. refused to cooperate on the special education evaluation, the Board acted expeditiously for the benefit of the larger student population. The ALJ found that petitioner lacked standing since the appeal was made seven months after the child was expelled and J.G. no longer had custody at that time. In addition, seven months was well beyond the 90-day limitations period for filing.

The Commissioner, even assuming *arguendo* that petitioner had standing to bring the appeal, concurred with the ALJ that the petition was untimely filed. The matter was dismissed.

May 20, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION and DECISION

OAL DKT. NOS. EDU 8370-02

AND EDS 8369-02

AGENCY DKT. NOS. 379-11/02

AND 2003 7144

CONSOLIDATED

J.G. o/b/o A.S.,

Petitioner,

v.

WEST DEPTFORD TOWNSHIP BOARD OF EDUCATION,

Respondent.

Lee Ginsburg, Esq., on behalf of petitioner (Camden Regional Legal Services, Inc., attorneys)

Robert A. Muccilli, Esq., on behalf of respondent (Capehart and Scatchard, attorneys)

Record Closed: February 24, 2003 Decided: April 4, 2003

BEFORE **SOLOMON A. METZGER**, ALJ:

This matter arises out of complaints filed by petitioner with the Bureau of Controversies and Disputes, pursuant to *N.J.S.A.* 18A:6-9, and with the Director of the Office of Special Education, pursuant to the Individuals with Disabilities Education Act (IDEA), 20 *U.S.C.*

§§ 1400-87. The matters were separately referred to the Office of Administrative Law as contested cases, pursuant to *N.J.S.A.* 52:14B-1 to -15. Respondent has filed a motion for summary decision pursuant to *N.J.A.C.* 1:1-12.5; *Brill v. Guardian Life Ins. Co. of America*, 142 *N.J.* 520 (1995), and the cases were consolidated for purposes of decision. Although the transmittal includes a request for expedited/emergent relief, the parties agreed that it was more practical to proceed directly to the summary decision issues. The last papers in this regard were received on February 24, 2003.

The basic facts are undisputed. In April 2002, A.S. was sixteen years old and he attended tenth grade in West Deptford High School. On April 8, 2002, a teacher observed A.S. and another student pass items in a suspicious manner and she notified Howard Cohen, the principal. Mr. Cohen and an assistant principal met with A.S. and asked him to open two bags in his possession. When he declined, attempts were made to contact his grandmother, J.G., who had residential custody of him, and when that failed, his mother L.S. was called and she came to school. L.S. instructed her son to open the two bags and the contents included eight cellophane packets of what appeared to be marijuana, some money and a utility knife. Mr. Cohen gave A.S. an opportunity to explain his conduct, but he said nothing. The school police officer later confirmed that the cellophane packets contained marijuana.

A disciplinary hearing before the Board of Education was first scheduled on April 15, 2002, and was adjourned to April 22, 2002, to amend the charges. Notice of the charges, of the right to appear with counsel, of potential witnesses, of the right to examine and cross-examine, and of the time, date and place of hearing were provided to petitioner. Resp't Br. Ex. E.

Principal Cohen also referred the matter to the Child Study Team (CST) for evaluation and J.G. received notice of this in a letter of April 9, 2002. Included with the notice was a Department of Education pamphlet entitled "Parents Rights in Special Education" (PRISE). Resp't Br. Ex. C. The CST scheduled a meeting for April 11, 2002, which petitioner cancelled. The meeting was rescheduled for April 30, 2002, but was also cancelled. The affidavit of Joyce Feder, director of special education for the District, relates that the meeting was cancelled because petitioner informed the CST on April 29, 2002, that "she would not put A.S. through the special education process." In her affidavit J.G. denies saying any such thing; to the contrary, she

claims to have wanted this evaluation. She merely told the CST that she feared the process would be rushed just to have results available for the Board disciplinary hearing. She wanted a fair and comprehensive set of evaluations.

On April 22, 2002, the Board of Education convened to review the charges against A.S. L.S. and J.G. spoke on his behalf and indicated that he would not testify, on the advice of counsel. They agreed that it was not necessary to proceed with the liability phase of the hearing as the conduct giving rise to the charges was not being challenged. After receiving A.S.'s disciplinary history, which reflects a number of prior infractions, the Board voted to expel A.S. from school. This decision was confirmed in a letter dated April 24, 2002. The Board offered to place A.S. in the Gloucester County Alternative School for the 2002/03 school year. A.S. was accepted by the Alternative School and the Board made a tuition payment and arranged for transportation. J.G. rejected the placement.

There is something of a dispute about the special education discussion at the Board hearing. The minutes reflect that L.S. and J.G. informed the Board that they would not consent to have A.S. classified. Resp't Reply Br. Ex. A. This version of events is supported by affidavits from George Faunce, superintendent of schools, and Alan Schmoll, Esq., attorney to the Board, both of whom were present that evening. J.G. asserts that she said no such thing. Rather, she simply repeated her earlier statement to the CST that she did not believe the evaluation should be hurried to accommodate the disciplinary proceedings.

After the expulsion petitioner sought to have her grandson admitted to the Paulsboro school district, where she has some contacts. These efforts continued for a few months, but ultimately proved unsuccessful. Petitioner then decided to transfer residential guardianship for A.S. to his father, C.S., who rented an apartment in Deptford Township, in the hope that A.S. could attend school there. The Chancery Division effected this change on October 31, 2002. On October 30, 2002, J.G. withdrew A.S. from West Deptford High School and authorized the release of records to Deptford High School. C.S. registered A.S. in the Deptford Township public schools, but they in turn placed A.S. at the Gloucester County Alternative School pending further evaluation. At this writing A.S. continues in the Alternative School. This is the substance of the record for purposes of the motion.

The motion papers raise a number of legal issues. Initially, respondent argues that Camden Regional Legal Services must be removed from the case. Regulations governing legal services to the poor prohibit representation in fee-generating litigation unless certain specified requirements are met, particularly, as relates here, that the matter has been rejected by at least two private attorneys, 45 *C.F.R.* § 1609.3 (2002). J.G.'s affidavit asserts that she contacted eight attorneys who were either unwilling to represent her under any circumstances, or required advance payments that she could not afford. This declaration in the absence of contrary facts is adequate to defeat respondent's argument.

Respondent next argues that the matter must be dismissed because J.G. lacks standing. The petitions were both filed on or about November 26, 2002, and at that point residential custody had already been transferred to C.S. I agree.

J.G. was given temporary residential custody of A.S. by order of the Chancery Division, Family Part, dated August 17, 2000. When custody was transferred back to C.S. on October 31, 2002, J.G. lost the necessary status to bring an action. Only a parent or person acting in the place of a parent with whom the child lives has standing under the IDEA to bring a due process action for a minor child, 20 *U.S.C.* § 1415(f)(1). A like standard applies in regular education proceedings, *N.J.A.C.* 6A:3-1.3(a)(2).

Petitioner believes that the Chancery Division orders are unclear regarding custody. The August 17, 2000, order makes J.G. "[the] primary residential guardian with both plaintiff and defendant having joint custody rights." The subsequent Chancery Division order grants "residential custody" to the father effective October 31, 2002. Resp't Br. Ex. H. Counsel infers that the failure to restate the word "primary" in the second order reserves that status in J.G. and that she still controls questions of residence. The argument is strained. The Chancery Division's two orders are fairly straightforward. On August 17, 2000, J.G. was given residential guardianship with both parents retaining joint custody. This residential guardianship terminated on October 31, 2002, by agreement of all parties and went to the father. When read in context, the silence of the second order regarding the word "primary" cannot be seen as a reservation of control in the grandmother. Moreover, A.S. enrolled in the Deptford Township schools and

petitioner's brief concedes that the transfer of residential custody was undertaken to effectuate this purpose.

Petitioner argues also that if standing is denied then respondent will have benefited from its violations because the transfer of residential guardianship was only undertaken to avoid the delays associated with vindicating a student's rights. This argument forgets that emergent relief proceedings were available to J.G. in April 2002. It is not acceptable to file an appeal some seven months after a child has been expelled and then argue that delays in adjudicating such matters forced an alternative course. Although delays do occur, matters are regularly reviewed in the OAL and before the Commissioner on an expedited basis.

Finally, with respect to the standing issue, counsel for petitioner argues that if she does not have standing, the matter should be held in abeyance to give the father an opportunity to file a motion to intervene, or to substitute himself for her. This position is speculative and, worse, it proposes a wasteful course of action. If petitioner had some cure for the obvious standing problem presented by these facts then counsel ought to have moved to affect this before time and money were spent to analyze the issue. This is not an academic exercise.

Respondent argues next that pursuant to *N.J.A.C.* 6A:3-1.3(d) appeals must be filed no later than ninety days following receipt of the final order, ruling or other action complained of. There is no dispute that petitioner was verbally informed of the expulsion on April 22, 2002, and that this was confirmed by letter of April 24, 2002. Thus, petitioner had until the latter part of July to file and did not do so until November 26, 2002. Petitioner counters that the ninety-day limitations period does not apply to IDEA claims under *Bernardsville Board of Education v. J.H.*, 42 *F.*3d 149 (3d Cir. 1994), and that the thrust of her claims relates to respondent's failure to treat A.S. as a child with a potential disability.

While petitioner argues, for purposes of defeating the ninety-day rule, that her claims fall predominantly under the IDEA and are inextricably linked to it, she nonetheless also filed a petition with the Bureau of Controversies and Disputes. These issues relate to perceived inadequacies in notice and the opportunity to be heard before the Board, and with a little care, they can be disengaged from the IDEA claims. The ninety-day limitations period does apply to

these issues, the filing was clearly untimely, and the rule is generally applied with some strictness, *Kaprow v. Berkeley Township Bd. of Educ.*, 131 *N.J.* 572 (1993); *Riely v. Hunterdon Central High School Bd. of Educ.*, 173 *N.J. Super.* 109 (App. Div. 1980). Thus, the matter filed with the Division of Controversies and Disputes alleging procedural defects in notice and the opportunity to be heard should be dismissed for this reason alone. Moreover, these issues are also substantively bogus. The minutes of the Board meeting in question note that A.S. did not speak, on the advice of counsel, nor did his mother or grandmother present a defense. In his affidavit Mr. Schmoll certifies that he explained petitioner's procedural rights to her, and that she agreed to proceed to the penalty phase of hearing without presenting a defense. Petitioner has acknowledged in her own affidavit that she said little at the expulsion hearing because factually A.S. was caught with the items the school asserted he had. Given these circumstances the Board's action fell well within its broad discretionary authority, *Thomas v. Morris Bd. of Educ.*, 89 *N.J. Super.* 327, 332 (App. Div. 1965); *Kopera v. West Orange Bd. of Educ.*, 60 *N.J. Super.* 288, 294 (App. Div. 1960).

Regarding the IDEA issues, it is true that the court in *Bernardsville* would not apply the ninety-day rule to a request for reimbursement filed two years after a unilateral placement. The court preferred to apply a rule of reason to such applications and then held that two years was too long. The instant matter is highly time sensitive and the public interest, as well as the individual interests of the parties, demands that such questions be brought to repose quickly. Seven months is a very long time to delay bringing an action of this type. The school semester in which the events occurred was over, the summer had passed and A.S. was well into the next semester in another district. I would suggest that a delay of this length is unreasonable under *Bernardsville.*

Finally, it is insufficient, under *Brill, supra*, 142 *N.J.* 520, to meet substantive assertions in a summary decision motion with bald opposing statements; rather, the response must raise a genuine fact question. Here, it is undisputed that Mr. Cohen sent petitioner notice that he had referred the matter to the CST, that the PRISE pamphlet accompanied this letter, and that two meetings were scheduled to discuss the referral. The director of special education for the District adds that petitioner refused to participate in this process and the meetings were cancelled for this reason. The referral was raised again at the Board meeting convened to hear the disciplinary

charges and petitioner's affidavit recalls that this was because one of the Board members inquired. The minutes then reflect that petitioner informed the Board that she would not pursue this avenue.

It is clear from this recitation that respondent stood ready to evaluate A.S. in order to determine whether any disability drove his conduct. For a legitimate fact question to arise I must find reasonably plausible the assertion that all of this stopped when petitioner insisted that the work be done professionally. There are no contemporaneous papers from petitioner affirming a desire for evaluation, or explaining that her comments were being misunderstood. The PRISE pamphlet that she received describes the process at some length and in plain English; if she had wanted to proceed with evaluation it would have been relatively easy to make this wish known. Thus, I find that petitioner was unwilling to have A.S. considered for classification and she then went on to pursue alternatives, first in Paulsboro and then in Deptford. As it happens, A.S. was ultimately placed in the Gloucester County Alternative School, an option first offered by respondent.

The IDEA contemplates that each side will cooperate in the evaluation process, in the development of an individualized education program (IEP), and in placement, *see, e.g.*, *Patricia P. v. Oak Park Bd. of Educ.*, 203 *F.*3d 462 (7th Cir. 2000). Absent basic cooperation the process can bog down. Respondent was here faced with a student found to have marijuana and a knife on school premises. Given petitioner's opposition to evaluation for special education purposes, respondent acted expeditiously for the benefit of the larger student population. I perceive no error in this.

Based on the foregoing, summary decision is granted in favor of respondent and it is ordered that both petitions be dismissed.

Those portions of the decision that bear on the IDEA are final pursuant to 20 *U.S.C.A.* § 1415(i)(1)(A) and 34 *C.F.R.* § 300.510 (2001) and are appealable by filing a complaint and bringing a civil action either in the Superior Court of New Jersey or in a district court of the United States. 20 *U.S.C.A.* § 1415(i)(2); 34 *C.F.R.* § 300.512 (2001). If either party feels that this decision is not being fully implemented, this concern should be communicated in writing to the Director, Office of Special Education Programs.

I hereby **FILE** the portions of this opinion subject to the Commissioner's review with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

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

4/4/03
DATE

SOLOMON A. METZGER, ALJ

Receipt Acknowledged:

April 9, 2003
DATE

M. Kathleen Duncan (for)
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 10 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

OAL DKT. NOS. EDU 8370-02 AND EDS 8369-02 (CONSOLIDATED)
AGENCY DKT. NOS. 379-11/02 AND 2003 7144

J.G., ON BEHALF OF A.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST DEPTFORD, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Upon careful and independent review of the record, and assuming, *arguendo*, petitioner had standing to bring the within appeal, the Commissioner concurs with the Administrative Law Judge that, to the extent petitioner seeks relief pursuant to *N.J.S.A.* 18:6-9, the Petition of Appeal was untimely filed. *N.J.A.C.* 6A:3-1.3(d). The Commissioner additionally finds there is nothing in this matter to warrant relaxation of the 90-day filing requirement. Accordingly, the matter is dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 5|20|03

Date of Mailing: 5|21|03

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

256-03

256-03R

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

PETITIONER,

V.

UNITY CHARTER SCHOOL, MORRIS COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION ON REMAND

SYNOPSIS

In earlier proceeding, petitioning District alleged enrollment of Charter School was racially imbalanced; prior to development of a case record, the District and Charter School mutually agreed to establishment of a racially tiered lottery system for selection of new Charter School students. The Commissioner rejected the proposed agreement as a remedy not sufficiently supported by the underlying record, remanding the matter to the Office of Administrative Law for further fact-finding and argument without precluding the possibility of settlement through a remedy narrowly tailored to address demonstrated deficiencies.

On remand, the ALJ recommended approval of the parties' original agreement based on briefs and stipulations of fact submitted to the record in response to the Commissioner's directive.

Considering the record on remand, the Commissioner again rejected the proposed agreement, and, further, dismissed the District's petition. The Commissioner found that the proposed settlement, without any basis on record sufficient to warrant remedy, established an admissions system impermissibly relying upon race as the sole determinant of student eligibility. In dismissing the petition altogether, the Commissioner held that the District's allegations of racial imbalance were based on an inapplicable standard and an erroneous understanding of the Charter School Program Act and relevant decisional law.

May 22, 2003

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
REMAND SETTLEMENT
OAL DKT. NOS.: EDU 1797-02
ORIGINAL DKT. NO. : EDU 7310-01

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

Petitioner,
v.

UNITY CHARTER SCHOOL, MORRIS COUNTY,

Respondent.

John Geppart, Esq., for petitioner

David Gantz, Esq., for respondent

Record Closed: January 6, 2003 Decided: January 13, 2003

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

STATEMENT OF CASE

This matter was transmitted to the Office of Administrative Law (OAL) on February 4, 2002 as a result of a remand of a settlement rejected by the Commissioner of Education.

During the penancy of the remand the parties settled their differences in accordance with the instructions contained in the Commissioner's decision of January 11, 2002.

Having reviewed the stipulated facts, certifications submitted, and exhibits attached to both I **FIND** (a) that they are consistent with law, (b) that they fully disclose of all the issues in controversy and (c) that they were voluntarily entered into by the parties.

I note further that the stipulations of facts was accompanied by a verbal representation from both sides at the time of a concluding conference that no further factual findings were necessary from the Office of Administrative Law and that in the of opinion of the petitioner and respondent the proposed stipulation of facts completely support the original consent order submitted.

Accordingly, I **CONCLUDE** that the consent order supported by the stipulation of facts and briefs submitted meet the requirements of *N.J.A.C.* 1:1-19.1 after hereby approves same.

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

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

1/13/03
DATE

JEFFREY A GERSON, ALJ

Receipt Acknowledged:

1-13-03
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 14 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

WILEY, MALEHORN AND SIROTA
250 MADISON AVENUE
MORRISTOWN, NEW JERSEY 07960
(973)539-1313
Attorneys for Petitioner Morris School District

MORRIS SCHOOL DISTRICT BOARD OF EDUCATION,
Petitioner,

v.

UNITY CHARTER SCHOOL,
Respondent.

BEFORE THE COMMISSIONER
OF EDUCATION OF NEW JERSEY
Agency Docket No. 157-6/01

OFFICE OF ADMINISTRATIVE LAW
Docket No. EDU OT 07310-01N

STIPULATION OF FACTS

1. Unity Charter School ("Unity"), a public charter school created under the Charter School Programs Act, opened in September 1998. Unity is located at 340 Speedwell Avenue, Morristown, New Jersey, which is within the boundaries of the Morris School District ("District").

2. The individuals comprising Unity's student population change throughout the school year as a result of a parent's decision to withdraw their child from Unity. Once a student leaves Unity, he or she is then replaced with a student from Unity's waiting list. Consequently, the racial/ethnic composition of Unity's student population may change as old students leave and new students enroll.[1] For this same reason, the number of District students attending Unity may fluctuate throughout the school year depending on whether the student who leaves, or the student from the waiting list, comes from the District.

[1] Because the student body at Unity does change throughout the school year, the percentages contained in the Stipulation of Facts concerning majority/minority representation at Unity do not necessarily reflect percentages for the entire school year. Rather they represent a percentage or range of percentages for a certain period of time during the particular school year identified.

3. During the 1997-98 school year, grades K-8 of the District were comprised of 60% white students and 40% minority students.

4. In the 1998-99 school year, Unity conducted its registration for the first time. Unity's overall student population fluctuated between 86.11% to 88.5% white students and 11.5% to 13.89% minority students. During that year, Unity enrolled at any given time, approximately 35 and then 36 District students, of whom 31 and then 32 were white. The percentages varied between 86.5% to 88.6% white students to 11.4% to 13.5% minority students. Many of these students who left the District to attend Unity came from the Hillcrest-Hamilton school attendance area. The student population in the Morris School District for grades K-8 in the 1998-99 school year was 58.6% white students and 41.4% minority students.

5. Recognizing shifts in residential demographics over the past three decades, the District established and opened a seventh school, a Multiage Magnet School, and implemented intra-district choice for the 1999-2000 school year. This program initiative was designed to create additional space in each of the six neighborhood schools for a growing student population and increase flexibility for the assignment of students to balance enrollment composition.

6. For the 1999-2000 school year, Unity's enrollment consisted of 79% white students, and 21% minority students. The Morris School District student population at the Unity Charter school was 91.4% white students and 8.6% minority students. The District's K-8 enrollment for the same school year was 56.8% white students, and 43.2% minority students.

7. In the 2000-2001 school year, Unity had ninety students enrolled; fifty-two of who were from the District. Overall, Unity had 15, and at times, 17 minority students, which made the minority population vary between 16.67% and 19% and the white population vary between 81% and 83.3%. Of the thirty-eight students who were not from the District, three to

four were minority. Of the fifty-two students from the District, twelve to thirteen were minority. The District student population at Unity fluctuated between 75% to 77% white students and 23% to 25% minority students. The District's overall K-8 student population was 57.4% white students and 42.6% minority students.

8. In the spring of 2001, the District contacted the Office of Charter Schools in an effort to resolve the racial balancing issues. The District and Unity met with the head of the Office of Charter Schools to discuss the racial balance issues. The matter was not resolved through the efforts of the Office of Charter Schools.

9. In the 2001-2002 school year, Unity had ninety-six students enrolled, fifty of whom were from the District. The overall Unity student population consisted of 15.6% minority students and 84.4% white students. Of the fifty District students, eleven were minority and thirty-nine were white. Of the remaining forty-six students who were not from the District, four were minority and forty-two were white. The total population of District students at Unity consisted of 78% white students and 22% minority students. The District's total K-8 student population in the 2001-2002 school year was 57.1% white students and 42.9% minority students.

10. For the 2002-2003 school year, Unity currently has ninety-six students enrolled; forty-three of who are from the District. The overall Unity student population consists of 17.7% minority students and 82.3% white students. Of the forty-three students from the District, seven are minority and thirty-six are white. Of the fifty-three students at Unity who are not from the District, ten are minority and forty-three are white. The total population of District students at Unity is 83.7% white students and 16.3% minority students. The overall Morris School District student population for grades K-2 is 57% white students and 43% minority students, which is comprised of the population of Alfred Vail School (57% white students and 43% minority

students); Hillcrest School (52% white students and 48% minority students), Woodland School (59% white students and 41% minority students); Normandy School (59% white students and 41% minority students). The overall Morris School District population for grades 3-5 is 57% white students and 43% minority students, which represents the population of Sussex School (57% white students and 42% minority students), Hamilton School (55% white students and 45% minority students), Jefferson School (57% white students and 43% minority students), and Normandy School (57% white students and 42% minority students). The student population in grades 6-8 is 57% white students and 43% minority students. The fall enrollment reports of the Morris School District for grades K-8 and the fall enrollment statistics for the District on the New Jersey Department of Education website for the years 1998 through 2002 are incorporated herein by reference.

11. In conclusion the following chart demonstrates the racial composition of the District and Unity since 1997-98:

School Year	Morris School District K-8 (White/Minority)	Unity Charter School (White/Minority)	Morris School District Students at Unity Charter School (White/Minority)
1997-98	60%/40%	Not Yet Open	Not Yet Open
1998-99	58.6%/41.4%	86.11% to 88.5%/ 11.5% to 13.89%	86.5% to 88.6%/ 11.4% to 13.5%
1999-2000	56.8%/43.2%	79%/21%	91.4%/8.6%
2000-20001	57.4%/42.6%	81% to 83.3%/ 16.67% to 19%	75% to 77%/ 23% to 25%
2001-2002	57.1%/42.9%	84.4%/15.6%	78%/22%
2002-2003	57%/43%	82.3%/17.7%	83.7%/16.3%

John G. Geppert, Jr., Esq.
Wiley, Malehorn and Sirota
Attorneys for Petitioner
Morris School District
Dated: 12/11/02

David Ganz, Esq.
Collier, Jacob & Mills, PC
Attorneys for Respondent
Unity Charter School
Dated: 12/11/02

OAL DKT. NO. EDU 1797-02 (EDU 7310-01 ON REMAND)
AGENCY DKT. NO. 157-6/01

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

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL), recommending that the Commissioner approve a previously rejected Consent Order in light of the briefs and stipulation of facts submitted by the parties on remand, have been reviewed.[1]

Upon such review, the Commissioner is once again compelled to reject the proposed Order, and, further, to dismiss the Petition of Appeal.

In his prior decision, the Commissioner had commended the parties' cooperative efforts toward seeking increased student diversity in the charter school's student population, but was unable to accept the parties' proposed Order because it established a system employing race as a paramount factor in student admissions notwithstanding an absence of proofs that the school did not reflect a racial cross-section of the community's school-age population, *N.J.S.A.* 18A:36A-8(e), or that the school's existence created a negative impact on the racial

[1] The record also includes a supplemental Certification of William Feldman, brought to the record by the parties' mutual request subsequent to issuance of the Initial Decision. The certification describes both the actual results of the lottery conducted on January 16, 2003, and the results as they would have been had the proposed Consent Order been in effect at the time of the drawing.

composition of District public schools. The Commissioner further observed that the parties had failed to identify the cause(s) of the school's enrollment disparity, leaving him unable to determine whether the proposed remedy was narrowly tailored to address such cause(s).[2] Consequently, the Commissioner remanded the matter to the OAL for development of a factual record, with legal analysis as necessary, so as to permit him to make an informed determination on the appropriateness of any proposed agreement, or, alternatively, for proceedings on the merits if a conforming settlement could not be reached.[3]

In response to the Commissioner's directive, the parties submitted to the record on remand before the Administrative Law Judge (ALJ) a Stipulation of Facts setting forth the respective enrollments, broken down by percentage into "white" and "minority" groupings, of the Morris School District (District), and of the Unity Charter School (Unity), as well as the number of District students at Unity for 1997-98 through 2002-03. Additionally, the District submitted a letter brief in support of the Consent Order together with a Certification of Dr. Dennis Clancy with exhibits, while Unity submitted a letter brief and Certification of Susan Lausell, to which the District replied with additional statistics further breaking down the previously stipulated "minority" numbers into "Black" and "National Origin" categories.

In his Initial Decision on Remand, the ALJ recommended approval of the original Consent Order for reasons reproduced in their entirety below:

> During the penancy [*sic*] of the remand the parties settled their differences in accordance with the instructions contained in the Commissioner's decision of January 11, 2002.

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[2]The Commissioner noted by way of example that disparities caused by insufficient outreach would likely be addressed through remedies quite different from those addressing inability to retain minority students once admitted.

[3] The Commissioner additionally clarified that an approvable Consent Order could not include a provision for indefinite extension by the parties without assessment of the agreement's effectiveness, and that any proposed Order concerning recruitment, enrollment or wait-listing of students was tantamount to an application for charter amendment, *N.J.A.C.* 6A:11-2.6, so that any Order ultimately approved by the Commissioner would be deemed to have amended Unity's charter. On this point, see Note 5 below.

> Having reviewed the stipulated facts, certifications submitted, and exhibits attached to both I FIND (a) that they are consistent with law, (b) that they fully disclose [*sic*] of all of the issues in controversy and (c) that they were voluntarily entered into by the parties.
>
> I note further that the stipulations [*sic*] of facts was accompanied by a verbal representation from both sides at the time of a concluding conference that no further factual findings were necessary from the Office of Administrative Law and that in the opinion of the petitioner and respondent the proposed stipulation of facts completely support [*sic*] the original consent order submitted.
>
> (Initial Decision at 2)

Thus, notwithstanding the Commissioner's prior directive, the Initial Decision offers neither analysis nor explication as to why the parties' proposed order is acceptable under the facts pled. This is particularly troublesome because the arguments and statistical analyses presented by the parties on remand reiterate or, at best, slightly elaborate, facts and positions already set forth in the pleadings and accompanying documents filed at the initiation of this matter in 2001, and because the Consent Order provides for precisely the relief requested by the District in its petition alleging violations of law, a request to which Unity is clearly acquiescing solely because it views increased student diversity as a desirable goal, not because it in any way credits the District's allegations against it or the District's interpretation of controlling law. Thus, there has been not even a facial showing, in satisfaction of the Commissioner's specific directive, that a remedy is warranted because Unity does not reflect a racial cross-section of "the community's school age population," *N.J.S.A.* 18A:36A-8(e), or its existence creates a negative impact on the racial composition of the student body in the District. Indeed, the Initial Decision does nothing more than memorialize the parties' own agreement that their originally-submitted Consent Order was adequately supported for purposes of acceptance by the Commissioner.

It is, therefore, necessary for the Commissioner here to review both the provisions of the proposed settlement and the positions of the parties with respect to it.

The proposed Order establishes an admissions system providing for Unity students to be selected by lottery from separate White, Black and National Origin tiers, with new students to be selected, according to the number of seats available, from the tier(s) needed to bring the proportionate number of Unity students in each category to the same level as exists in the Morris School District; separate waiting lists are to be maintained for the purpose of filling, with an applicant from the proportionally lacking tier, any vacancy later created by a departing student.[4] The Order would remain in effect for two years from the date of its approval by the Commissioner, but the parties may extend it "for an additional period of time by providing written notice of their mutual consent to the office of the New Jersey Commissioner of Education prior to the expiration of the original two years." (Consent Order at 4)[5]

In support of the Order, the District alleges that Unity is not "racially balanced with its district of residence, the Morris School District***, in violation of the Charter School Program Act (CSPA) and the *State Guidelines on the Desegregation and Integration of Public Schools* (*Guidelines*)." (Petition of Appeal at 2) It contends that *Jenkins v. the Township of Morris Sch. Dist. and the Bd. of Educ.*, 58 *N.J.* 483 (1971) and *In the Matter of the Charter Sch. Application of Englewood on the Palisades Charter Sch.*, 164 *N.J.* 316 (2000), act to require Unity to achieve racial balance with the District pursuant to the *Guidelines*. (*Id.* at 5) The

[4] In the submission referenced at Note 1 above, the parties represented that, had this system been in effect when Unity conducted its January 2003 lottery, all five minority applicants (of 13 total) would have been selected for Unity's seven kindergarten vacancies instead of only one; both minority applicants (of 29 total) would have been selected for Unity's five first-grade vacancies instead of none; and half the minority applicants (4 of 21 total) would have been selected for Unity's two second-grade vacancies instead of none. Thus, under the current "blind" lottery, with 14 slots available, only one minority student was selected; whereas, if the proposed tiered system had been in effect, that number would have risen to nine.

[5] The District objects to the Commissioner's prior characterization of this language (see Note 3 above) as creating an agreement of potentially indefinite duration, claiming that it "actually provides for an initial two-year duration after which the parties must agree in writing to continue the terms of the Order and again obtain approval from the Commissioner of Education." (District Brief at 4, 12) The Commissioner observes that the clause at issue provides solely for *notice* to the Commissioner of the *parties'* intention to continue the Order.

District further contends that Unity adversely impacts the District by accepting a large number of white students from the District while the percentage of Unity minority students is "much lower" than the minority population of the District, and that Unity's sibling preference policy materially exacerbates the situation. (*Id.* at 6-7) As relief, the District seeks an order implementing a three-tiered lottery system, selection of minority students from a tiered waiting list, "possibly abolishing the sibling selection process" and any other relief the Commissioner deems "equitable and just to effectuate racial balancing under the *Guidelines*." (*Id.* at 7) In support of its allegations of *de facto* segregation and its prayer for relief, the District offers the Certification of Dr. Dennis Clancy, describing the respective racial compositions of various grade levels in Unity as compared to those in the District, together with a proposed calculation of the appropriate balance for Unity under the *Guidelines* and a memorandum of law more fully setting out the District's position. In its brief on remand, the District essentially reiterates these same arguments, additionally stressing its unique status as the only district in New Jersey expressly created to address racial imbalance (District's Brief on Remand at 2, 5), and noting the Department's response to the District's comment on rules proposed in August 2002 by the State Board of Education to address racial balance in charter schools: "*To achieve the requisite racial balancing between the charter school and the district of residence, the Department will implement procedures consistent with the existing Guidelines.*" (emphasis in text) (*Id.* at 3, quoting 34 *N.J.R.* 3806(a))

In addition to denying the conclusions of law imbedded in the District's petition, Unity counters that the charter school law does not require it to be in racial balance with the actual student enrollment of the District, and that the District has not made an adequate showing of adverse impact on the racial balancing of the District's student population. (Answer to

Petition at 5 and *passim*) Unity's answer also incorporates a letter from the Vice President of the Board of Trustees, setting out Unity's position with regard to the allegations made by the District. In that letter, Unity contends that it has, as already demonstrated through prior litigation and required annual reports, "aggressively" attempted to recruit students from all segments of the Morristown and Morris Township communities; however, it also concedes that "its student body unfortunately does not adequately mirror the community in which it is located." Therefore, Unity does not oppose – indeed, it endorses – the District's request for a multi-tiered or weighted lottery to select students to fill charter school openings with the aim of attaining greater diversity. (Letter of David A. Bolson at 1) Unity further states:

> Two additional points need to be clarified. First, MSD [Morris School District] has alleged in its Petition, on more than one occasion, that Unity has had an adverse impact upon racial balancing at MSD. However, the evidence provided by MSD proves the contrary. MSD cannot show how a school of 90 children, only 52 of whom are drawn from MSD, can adversely impact a school population of more than 4,000. According to Dr. Clancy's own certification, the racial composition of the K-8th grade student body at MSD is 58.91% white and 41.09% minority. Also, according to the statistics contained in the same certification, if Unity were to cease operations and all its MSD students returned to the various schools within MSD, the K-8th grade racial makeup at MSD would only go to 59.24% white and 40.76% minority – less than a 0.4% change. Clearly, Unity has virtually no impact on MSD's racial balance.
>
> Secondly, since, as Dr. Clancy describes, MSD has the means and mechanism to balance its schools, it will never be "out of balance" with itself. MSD rues, however, that MSD is out of balance with Unity. It is the position of Unity that it has no legal or moral obligation to be in racial balance with MSD. We believe that it is the legal and moral obligation of Unity to be in racial balance with the community in which we reside. This is an important distinction. First of all, although MSD applicants get preference in admission, Unity receives numerous applicants from out-of-district students and is required to accept them if space is available. Currently, approximately 45% of Unity students are from out-of-district. Additionally, Unity is attracting students who were not even part of the public school system. Currently, approximately 10% of Unity students were home-schooled prior to attending Unity and an additional 10% came to Unity from private schools. There is no rational argument to be made, nor reasonable formula to be concocted, that would attain "balance" with MSD under these circumstances. (Letter of David A. Bolson at 2)

Unity reiterates and elaborates these arguments in its brief on remand, additionally contesting the District's interpretation of *Englewood* and the accuracy of its calculations based on the *Guidelines*, since those calculations, even presuming for purposes of settlement proceedings that the *Guidelines* apply to Unity, do not fully address all the categories of students and grade-level organizations required in their application.[6] (Unity Brief on Remand at 3-5) Unity concludes by noting that although it and the District "may disagree on the law, the two sides do agree on one thing: that the representation of minorities at Unity should increase" and that "entry of the Consent Order will help make that goal a reality." (*Id.* at 5)

Thus, in the District's case because it seeks a remedy for alleged violations of law and in Unity's case because it would like to have more minority enrollees than the existing "blind" lottery has thus far generated, the parties have agreed to an admissions mechanism based on predetermined ratios, with the assignment of specified numbers of seats to students of corresponding racial categories.

However, notwithstanding the motivation of the parties and their commendable cooperation in attempting to achieve their goal, the Commissioner cannot issue an Order granting absolute preference to certain charter school applicants solely on the basis of race or national origin merely because the parties agree he should do so. Although it is beyond dispute that the State has a compelling interest in preventing segregation, and that maintenance of diverse student populations is critical to provision of a thorough and efficient system of public education, it is also true that, as a general proposition, conditioning student admission *exclusively* on membership in a particular racial or ethnic group, as the proposed lottery does, is unlikely to withstand legal scrutiny except, possibly, under the narrowest and most compelling of

[6] It was in response to this objection that the District subsequently submitted the more refined breakdown of student enrollments referenced at page 5 above.

circumstances; certainly, such conditioning cannot be adopted simply as a means of increasing student diversity, particularly when it takes the form of a "quota" system of a type already found impermissible in various jurisdictions based upon federal law.[7] Accordingly, the Commissioner must look to the arguments and proofs presented in support of the District's claim that Unity is in violation of law prohibiting segregation.

The District's claim rests on two prongs, one pertaining to the composition of Unity itself and the other to its impact on the District. As expressed by the State Board in a prior proceeding challenging the Commissioner's initial approval of Unity's charter:

> There are two distinct aspects to the District's claims of racial imbalance. Its central claim is that the Commissioner could not properly approve the charter because such approval permitted the operation of a segregated school. The focus of this claim is the racial composition of the pupil population of Unity Charter School. However, the District is also contending that the Commissioner's approval was improper because the availability of the option of enrolling in the Charter School may result in a negative impact on the racial composition of the student population that continues to attend the District's schools. (*In the Matter of the Final Grant of a Charter for the Unity Charter School, Morris County,* State Board decision of July 7, 1999, Slip Opinion at 13)

On the composition of Unity's student population, the District relies on two contentions, the first relating to the role of the *Guidelines*, and the second to the population on which the calculations therein are to be based. Specifically, the District contends that the New Jersey Supreme Court, in its decision in *Englewood, supra,* held the CSPA "[to require] that a charter school's admission policy 'seek a pupil population similar to the pupil population that the *Guidelines* seek for New Jersey school districts,'" so that, when the *Guidelines* are applied to Unity, Unity's percentages of white/minority/national origin students must be comparable to

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[7] Black, Watt Lesley, Jr., Ph.D. and Frank R. Kemerer, Ph.D., "Legally Defensible Approaches to Racial Diversity in Charter School Enrollments," *West's Education Law Reporter*, Vol. 172, No.2, February 27, 2003, 575-609. In light of the State Board's decision in *IMO Final Grant, infra*, the Commissioner is unpersuaded by the District's contention that existence of a desegregation order for the District renders inapposite any ruling where such an order was not in place. (District's Brief at 3-5)

those of the public schools of the District (District's Brief at 6); in other words, if Unity's student percentages do not "match" the *Guidelines*, the school is, by definition, segregated. (District's Brief on Remand at 11) A reading of the cited passage in context, however, yields an altogether different result. At the conclusion of a discussion reviewing New Jersey's long and vigorous State policy against discrimination and segregation, the Court pointed to the *Guidelines* as the State's model for ensuring consistency between the percentages for various racial groups within a district's overall pupil population and the percentages for the same pupil groups in a district's various schools, so as to promote learning environments in which students are educated among a mix of children reflective of the overall district composition for that organizational level. Turning to charter schools, the Court opined that:

> With charter schools, the Legislature *sought to achieve a comparable result.* Balancing the desire to prevent discrimination on the basis of race in admission policies with a concomitant desire to prevent racial segregation in the charter school, the Act provides:
>
> > The admission policy of the charter school shall, to the maximum extent practicable, seek the enrollment of a cross section of the community's school age population, including racial and academic factors. [N.J.S.A. 18A:36A-8e.]
>
> ***
>
> As a result of the comments elicited from the joint hearing,***[the language cited quoted above] was added, reflecting the importance that the legislators placed on the need to maintain racial balance in the charter schools. *In using, as the pertinent reference, "a cross section of the community's school age population including racial and academic factors," the Act requires that a charter school's admission policy seek a pupil population similar to the pupil population that the Guidelines seek for New Jersey's school districts.* We see nothing in the Act or its history that is discordant with the State's policy of maintaining nonsegregated public schools in our communities.*** (emphasis supplied) (*Englewood, supra,* at 325-27)

Thus, the Court found *not* that the percentage calculations set out in the *Guidelines* control charter school enrollments based on comparison to enrollments at the school's district of residence, as claimed by the District, but that the CSPA and the *Guidelines* are analogous in

purpose, both seeking for each individual school a broad representation of students from the larger community; in other words, that the CSPA was specifically and successfully structured to accomplish for charter schools what the *Guidelines* accomplish for public school districts.

On this point, the Court's holding in *Englewood* is entirely consistent with the prior holding of the State Board of Education, affirmed by the Appellate Division of Superior Court, in a related matter involving the very parties and issues appearing herein. In its July 7, 1999 decision entitled *In the Matter of the Final Grant of a Charter for the Unity Charter School, Morris County*, the State Board of Education held:

> In [finding that the District failed to establish the validity of its claims of racial imbalance], *we reject the District's argument that the question of whether Unity Charter School is segregated should be resolved by application of the Department's desegregation guidelines.* Those guidelines were designed to ensure that the student populations attending school within a district were not segregated as a result of their assignment by the district to specific schools. *This is not the situation confronting a charter school, which may recruit students from more than one district and which does not distribute its students by assigning them to different schools.*
>
> *In point of fact, in the case of a charter school, the student makes the "assignment" by choosing to enroll in the charter school. Moreover, the conceptual foundation of the charter school program rests on the policy determination to provide students and their parents with the opportunity to make this choice.*
>
> This does not mean that, from an educational policy perspective, having a diverse student population is not important in the context of a charter school. *In addition to prohibiting discrimination, N.J.S.A. 18A:36A-7; N.J.S.A. 18A:36A-11, the Legislature recognized the significance of achieving such diversity by requiring charter schools to have an admission policy that "...to the maximum extent practicable, seek[s] the enrollment of a cross section of the community's school age population, including race and academic factors." N.J.S.A.* 18A:36A-8(e). In this respect, we stress that the District has not questioned the efforts that Unity has made to attract such a student population. Nor has the District alleged that Unity has in fact discriminated in either its recruitment efforts or its admissions. (emphasis supplied) (Slip Opinion at 14-15)

That the Appellate Division shared the understanding of *Englewood* set forth by the Commissioner above is indicated by its affirmance, in a ruling purposely delayed until the Supreme Court had ruled in *Englewood, supra,* of the State Board expressly "for the reasons stated in *Englewood* decided on June 28, 2000 and the State Board's 22-page opinion of July 7, 1999." *In the Matter of the Final Grant of a Charter for the Unity Charter School, Morris County*, Superior Court, Appellate Division, A-6212-98T1, Slip Opinion at 3. Therefore, at this juncture, there can be no question the District's interpretation of *Englewood*, on which its claim of racial imbalance within Unity rests, is unsustainable. The specific formulas of the *Guidelines* do not apply in the present circumstance,[8] and even to the extent that the *Guidelines* may be viewed as a general gauge of desirable mixes of children for particular types of communities, the student population for purposes of comparison with a charter school is not the public school enrollment of the district of residence, but "the community's school age population," a group for which no comparison can here be made, since the present record is virtually devoid of information about it.

Nor is the tenuousness of the District's position altered by its claim that, in recently adopting amendments to the regulations governing charter schools, the State Board of Education endorsed the District's view by stating, in response to comments submitted by the District, that it would "*implement procedures consistent with the existing Guidelines*" in order to "*achieve the requisite racial balancing between the charter school and the district of residence.*" (emphasis in text) (District's Brief on Remand at 3, Certification of Dr. Dennis Clancy at 5-6)

[8] Also worth noting in this context is that the Guidelines (at 14) prohibit creating or sustaining other discrimination in efforts to correct imbalanced enrollments, and that, had the parties' proposed lottery been carried out, as set forth in their own submission (see Note 4 above), no non-minority student would even have been *eligible* to enter the *drawing* for a second-grade seat, in clear contravention of *N.J.S.A.* 18A:38-5.1 (no child to be excluded from any school on basis of race).

The referenced exchange reads in its entirety as follows:

> 3. COMMENT: At proposed N.J.A.C. 6A:11-4.4, the commenter recommends that the rule be amended to provide a procedure whereby racial balancing between the charter school and the district of residence is to be considered and achieved under the existing New Jersey State Guidelines on the Desegregation and Integration of Public Schools (Guidelines). (3) [Identifying commenter as Mr. John G. Geppert, Jr., Attorney, Wiley, Malehorn and Sirota]
>
> RESPONSE: The Department acknowledges the commenter's concern. In accordance with N.J.A.C. 6A:11-2.2(c), the Commissioner will assess the composition of a charter school and the segregative effect that the loss of the students may have on its district of residence. To achieve the requisite racial balancing between the charter school and the district of residence, the Department will implement procedures consistent with the existing Guidelines.
> (34 *N.J. Reg.* 3806(a))

Contrary to the District's representation, in this response, the State Board is not agreeing that the *Guidelines* will be specifically applied to conform a charter school's student enrollment to the racial balance of its district of residence. Rather, the State Board "acknowledges the commenter's concern" by reiterating the principles of *Englewood* with respect to the Commissioner's obligation to ensure that a charter school is not itself segregated and that it does not have a segregative effect on its district of residence,[9] and, in that context, assuring that racial balance assessments will be undertaken "consistent with" the *Guidelines*, that is, with a recognition of the common purpose of the CSPA and the *Guidelines* as held by the *Englewood* Court.

The first prong of the District's attack on Unity, therefore, must fail. The CSPA addresses, in a way that has withstood scrutiny by New Jersey's highest Court, the equally important but potentially competing interests of racial balance and neutrality in admissions by requiring that a charter school solicit an applicant pool reflective of a cross-section of the larger community, but then finally select its students from that pool on a random basis; that is, by

[9] See discussion at 16-17 below.

creating, to the fullest extent possible, a diverse applicant pool from which each applicant then has an equal opportunity to compete for the limited number of seats available:

> A charter school shall be open to all students on a space available basis and shall not discriminate in its admission policies or practices on the basis of intellectual or athletic ability, measures of achievement or aptitude, status as a handicapped person, proficiency in the English language, or any other basis that would be illegal if used by a school district***. (*N.J.S.A.* 18A:36A-7)
>
> ***If there are more applications to enroll in the charter school than there are spaces available, the charter school shall select students to attend using a random selection process.***The admission policy of the charter school shall, to the maximum extent practicable, seek the enrollment of a cross section of the community's school age population including racial and academic factors. (*N.J.S.A.* 18A:36A-8a and 36A-8e)

Just as the law distinguishes the applicant pool from the results of the selection process, with diversity attained through the former and not the latter, so it is by the former, evidenced by the charter school's recruiting methods, that compliance with the law must in the first instance be gauged. As stated by the *Englewood* Court:

> ***The Department's Guidelines require continuing assessment of a school district's efforts to maintain racial balance among its schools. Continuing assessment of the charter school's pupil population and impact on the district of residence must also occur. Obviously, *if a charter school were to recruit systematically only pupils of a particular race or national origin, the Commissioner would be obliged to stop that activity* and, if necessary, to revoke the approval of a charter school engaging in such tactics.*** (emphasis supplied) (*Englewood, supra,* at 328)

In the present matter, there is neither evidence nor allegation that Unity is *not* seeking a diverse, representative applicant pool (indeed, quite the contrary); nor is there evidence or allegation that Unity is not retaining minority students once admitted.

Additionally, reported experience has shown that the method of combining a "blind" lottery with a diverse applicant pool may not necessarily produce the mix of students desired in a particular charter school, but neither is it likely to result in a segregated school.

(Black and Kemerer at 600, Note 7 *supra*) That experience appears to have been borne out by Unity. Since the first year of its operation in 1998-99, Unity has maintained a white/minority balance of about 82-85% white to about 15-18% minority:

Year	White	Minority
1998-1999	86.11% - 88.5%	11.5% - 13.89%
1999-2000	79%	21%
2000-2001	81% - 83.3%	16.67% - 19%
2001-2002	84.4%	15.6%
2002-2003	82.3%	17.7%

(Stipulation of Facts at 4)

This balance, while it may not reflect the level of diversity ideally sought by the parties, is clearly sufficient to ensure that Unity students are not attending an unlawfully segregated school, and that they are in a position to enjoy the benefits of a diverse student body.

Turning to the second prong of the District's claim, the question of negative impact on the racial composition of the student population of the District, the Court has clearly stated:

> The Commissioner must consider the impact that the movement of pupils to a charter school would have on the district of residence. That impact must be assessed when the Commissioner initially reviews a charter school for approval to open, and on an annual basis thereafter. The Department's Guidelines require continuing assessment of a school district's efforts to maintain racial balance among its schools. Continuing assessment of the charter school's***impact on the district of residence must also occur. Obviously, ***the Commissioner [must] be prepared to act *if the de facto effect of a charter school were to affect a racial balance precariously maintained in a charter school's district of residence.* The Commissioner's obligation to oversee the promotion of racial balance in our public schools to ensure that public school pupils are not subjected to segregation includes any type of school within the rubric of the public school designation. (emphasis supplied) (*Englewood, supra,* at 328)

Similarly, the State Board has held:

> In this respect, we emphasize that, as the Appellate Division stated in *Patrick Douglas Charter School, supra,* Slip Op. at 12:

> [I]f and when the charter school in any particular district results in a skewed or undesirable racial mix in the existing district, the Commissioner has the power – independently of the powers granted by the Charter School Program Act – to take remedial action.

(*In the Matter of the Final Grant of a Charter for the Unity Charter School, Morris County, supra,* Slip Opinion at 15, *citations omitted*)

Thus, there is no question here of whether the Commissioner has the obligation or authority to act in the face of demonstrated segregation, only the question of whether the present record supports the District's claim.

In this regard, as it did with its challenge based on application of the *Guidelines*, the District previously made its claim to the State Board in the context of challenging the Commissioner's initial approval of Unity's charter. On that occasion, the State Board held:

> ***After carefully reviewing the District's claims of racial imbalance on the basis of the record as supplemented, we find that it has failed to establish the validity of these claims.
>
> ***
>
> We recognize that the parties are not in agreement as to the proportion of Unity students that are minority. Nor is there agreement as to the racial composition of the Morris School District and the proper unit within the District by which to measure its racial balance in relation to Unity's. Nonetheless, even accepting the District's view on these questions,[13] it has not provided minimal substantiation for its claims. Given the opportunity that we have afforded the District in these proceedings to pursue its claims and to provide adequate support for them,***we deny its claims of improper racial imbalance.
>
> ***
>
> [T]here is no indication that the option of attending Unity has had any impact on the racial composition of the District's student population. Given the number of students from the Morris School District who are enrolled in the Charter School, and based on the District's statistics, we cannot discern even a minimal impact on the racial composition of the District.
>
> [13]The District contends that only 14% of Unity's student population is minority as compared to the District's overall enrollment of 40% minority. In its last submission, the District urges the State Board to use its K-2 minority enrollment of 46% as the basis for measuring the adequacy of the diversity achieved by Unity. However, we cannot discern any basis for evaluating the racial composition of the District's student population and any impact thereon solely by reference to its K-2 enrollment.
>
> Moreover, a 46% minority enrollment, in and of itself, does not represent a concentration of minority students in the District such that remedial measures would be required and, as set

> forth above, the District has not shown that the small number of students from the District who are attending Unity have had any impact on the racial composition of the District's student population.
>
> (*In the Matter of the Final Grant of a Charter for the Unity Charter School, Morris County, supra,* Slip Opinion at 13-15, *citations omitted*)

The Appellate Division, in the decision referenced at pages 13-14 above, upheld the State Board's opinion without prejudice to the District's ability to make a "new presentation within the Guidelines of *Englewood*" so as to provide a "more suitable vehicle for effective consideration of [its] claims." *In the Matter of the Final Grant of a Charter for the Unity Charter School, Morris County, supra*, Slip Opinion at 3. For the District to prevail herein, then, it must demonstrate that the *de facto* effect of Unity is to affect a racial balance precariously maintained in the District. (*Englewood, supra,* at 328)

The evidence submitted by the District in support of its claim is fully incorporated into the Petition of Appeal, the pertinent portions of which read as follows:

> 5. In order to demonstrate a continuing *de facto* segregation effect, the District herein provides information on the racial composition of Unity and the MSD [the District] from the time Unity opened in 1998 to the present.
> 6. Attached as Exhibit B to the Certification of Dr. Dennis Clancy is a true copy of the enrollment data for Unity and the MSD in the 1998-1999 school year. In the 1998-99 school year, Unity conducted its registration for the first time. Many of the 35 students that left the MSD to attend Unity came from the Hillcrest-Hamilton school attendance area as set forth below. Seven of the eight kindergarten students were white. As a result, the kindergarten class at Hillcrest School, from which a large amount of MSD students were removed to enroll in Unity, was nearly a fifty-fifty split of white and minority students. *See* Exhibit B, charts #2 and #3. Five of the seven first grade students who went to Unity were white. Of the four second graders, three students were white and one was minority. The only third grade student that went to Unity was white. Three fourth grade students attended Unity and all were white. Of the two fifth grade students attending Unity, one was white and one was minority. All ten middle school students were white.
> 7. District-wide for the 1998-99 school year, the Unity Charter School enrolled 35 MSD students of which 32 or 91% were white. The minority population of District students at Unity was 9%, with only 3% African-American and 6% National Origin. *See* Exhibit B to Certification of Dr. Dennis Clancy, chart #1. These percentages are in stark contrast to those within the District for

grades K-8, which was approximately 59% White, 20% African-American, and 21% National Origin. *See* Exhibit B to Certification of Dr. Dennis Clancy, chart #2.

8. Recognizing shifts in residential demographics over the past three decades, the District established and opened a seventh school, a Multiage Magnet School, and implemented intra-district choice for the 1999-2000 school year. This program initiative was designed to create additional space in each of the six neighborhood schools for a growing student population and increase flexibility for the assignment of students to balance enrollment composition.

9. For kindergarten through second grade in the 1999-2000 school year, the District was comprised of 55% white students, 17% African-American students and 28% National Origin students. *See* Exhibit B to Certification of Dr. Dennis Clancy. Unity's enrollment consisted of 79% white students, and 21% minority students, which was in sharp contrast to the District's percentages. *See* Exhibit B to Certification of Dr. Dennis Clancy, chart #4. Of the eight kindergarten students who were enrolled in Unity from the District in the 1999-2000 school year, all eight were white and six came from Hillcrest. Unity enrolled seven first grade MSD students, 86% of whom were white. Unity enrolled four second grade students from the District, three of whom were white. There was one MSD third grader enrolled in Unity who was white. All three fourth grade students that went to Unity were white. Two fifth graders from MSD went to Unity, one was white and one minority. For the sixth grade, nine MSD students were enrolled in Unity and all of them were white. Only one MSD seventh grader enrolled in Unity and was white.

10. In the 2000-2001 school year, the ethnic composition of the students Districtwide in the grades K-2 was 55% white and 45% minority. In addition, the District-wide composition in grades 3-5 the racial composition is 56% white and 44% minority. *See* Exhibit C to Certification of Dr. Dennis Clancy. Overall, the racial composition of the District is approximately 60% white and 40% minority. During the same year, Unity enrolled 90 students, 52 of whom were from the District. Only 12 of the 52 students are minority. Overall, Unity had only 15 minority students, making its population comprised of just over 83% white students. *See* Exhibit E to Certification of Dr. Dennis Clancy. This is under the lower deviation limits, which requires that Unity have a minimum minority population of 30.8%. *See* Exhibit D to Certification of Dr. Dennis Clancy.

11. Under the *New Jersey State Guidelines on the Desegregation and Integration of Public Schools* ("*Guidelines*") the districtwide student percentages for MSD of 56% White, 17% African-American and 27% National Origin. *See* Exhibits D and E to Certification of Dr. Dennis Clancy. Under the *Guidelines* for racial balancing the upper limit of white students is to be 62.6%, which Unity exceeds by over 20%. The lower deviation limit for African-American students is 11.9%, which Unity is under by over seven percent (7%). Likewise, Unity is over six percent (6%) short of the lower deviation percentage for National Origin students. *See* Exhibit D to Certification of Dr. Dennis Clancy.

(Petition of Appeal at 3-5)

As is apparent from the above-quoted excerpt, and as is additionally borne out by the District's initial brief at 7-9, its brief on remand, and both certifications of Dr. Clancy, the District's claim of "adverse impact" is, in actuality, nothing more than a variation of its complaint regarding the disparity between the District's proportional levels of minority enrollment and those of the charter school, in other words, a veiled version of its now-discounted claim that Unity is compelled to achieve racial balance with District schools in accordance with the *Guidelines*. Although the District notes the fact that more white students than minority have left the District to attend Unity and the fact that some schools and grades in District have been affected more than others, it has made no demonstration whatsoever that the loss of these students has affected the District's overall racial balance. On the contrary, the record[10] instead supports Unity's contention that

> [the District] cannot show how a school of 90 children, only 52 of whom are drawn from [the District], can adversely impact a [K-12] school population of more than 4,000. According to Dr. Clancy's own certification, the racial composition of the K-8th grade student body at [the District] is 58.91% white and 41.09% minority. Also, according to the statistics contained in the same certification, if Unity were to cease operations and all its [District] students returned to the various schools within [the District], the K-8th grade racial makeup at [the District] would only go to 59.24% white and 40.76% minority – less than a 0.4% change. Clearly, Unity has virtually no impact on [the District's] racial balance. (Letter of David A. Bolson at 2)

Unity reiterates and updates this point in its brief on remand:

> The fact remains that Unity simply does not adversely impact [the District's] student population. It cannot. Unity presently enrolls 96 students, only 43 of whom come from the District. These 43 students represent **less than 1.5%** of the more than 2,900 children in grades K through 8 attending public schools in the District. To suggest that Unity has any impact on [the District's] racial balancing, let alone an adverse impact, is simply disingenuous. (emphasis in text) (Unity Brief on Remand at 4)

---

[10] It is noted that the parties incorporated into the record by reference the District's fall enrollment reports for grades K-8 and the fall enrollment statistics on the New Jersey Department of Education website for the years 1998-2002. (Stipulation of Facts at 4)

The Commissioner agrees, and, indeed, he finds the State Board's assessment of the District's earlier claim of "adverse impact" to be equally applicable here:

> [T]here is no indication that the option of attending Unity has had any impact on the racial composition of the District's student population. Given the number of students from the Morris School District who are enrolled in the Charter School, and based on the District's statistics, we cannot discern even a minimal impact on the racial composition of the District.
>
> (*In the Matter of the Final Grant of a Charter for the Unity Charter School, Morris County, supra,* Slip Opinion at 15)

The District, therefore, has failed to show that Unity has had a *de facto* effect on the racial balance of its district of residence, just as it failed to show that the school was itself segregated. *Englewood, supra,* at 328.[11]

In conclusion, then, even assuming, *arguendo*, that the arrangement sought by the Morris School District and the Unity Charter School might be found lawful under circumstances sufficiently narrow and compelling, the Commissioner cannot find any such circumstance on the present record. To the contrary, the record submitted by the parties shows that Unity is in full compliance with applicable provisions of the CSPA as to recruitment and selection of students, that the school is not segregated, and that the school's existence has not negatively affected the racial balance of its district of residence. Thus, despite Unity's sincere desire to increase the level of student diversity produced by operation of the CSPA, and its acquiescence on that basis to the Morris School District's requested relief, the Commissioner cannot sanction, or, indeed,

[11] In its Petition, the District additionally alleged that Unity's sibling preference policy exacerbated the situation with respect to the school's racial balance. However, no evidence whatsoever was brought to the record as to effect of this policy; rather, the District relies solely on the general assertion that "the impact of the current enrollment on future registrants will further compound the adverse effect on racial balancing in the district." (Petition of Appeal at 7) This bare assertion alone cannot suffice as a basis for the Commissioner to direct that Unity's policy, which is expressly permitted by the CSPA at *N.J.S.A.* 18A:36A-8c, must be revised or repealed.

even permit, establishment of an admissions mechanism that relies upon race as the sole determinant of a student's opportunity to attend the school.

Accordingly, for the reasons set forth above, the Initial Decision recommending approval of the proposed Consent Order of the parties is rejected, and the Petition of Appeal is dismissed.

IT IS SO ORDERED.[12]

COMMISSIONER OF EDUCATION

Date of Decision: 5|22|03

Date of Mailing: 5|22|03

[12] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

257-03

257-03

M.B. and C.B., on behalf of minor children, A.B. and A.B.,

PETITIONERS,

V.

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

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

May 22, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 3568-02
AGENCY DKT. NO. 38-2/02

M.B. and C.B. ON BEHALF OF MINOR CHILDREN, A.B. and A.B.,

Petitioners,

v.

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

Respondent.

Gary A. Bundy, Esq., for petitioners (LaCorte, Bundy, Varady & Kinsella, attorneys)

Joanne Butler, Esq., for respondent (Schenck, Price, Smith & King, attorneys)

Record Closed: April 29, 2003 Decided: April 30, 2003

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

This matter involves an appeal by petitioners M.B. and C.B. on behalf of A.B. and A.B. from a residency determination by respondent Board of Education of the Township of Union (the Board). The Department of Education, Bureau of Controversies and Disputes, transmitted the matter to the Office of Administrative Law (OAL) where, on April 23, 2002, it was filed for a hearing and determination as a contested case. Following a prior adjournment of the hearing scheduled for July 5, 2002 at the Board's request, the hearing was scheduled for September 23, 2002, which was adjourned at the joint request of the parties. By letter dated October 21, 2002, counsel for petitioners advised the undersigned that a settlement had been reached. Counsel for the Board subsequently submitted the attached Stipulation of Settlement and Mutual Dismissal of Petition and Counterclaim setting forth the terms of agreement, along with a Resolution adopted by

the Board approving the aforesaid Stipulation of Settlement, which the undersigned received on April 29, 2003.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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

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

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

April 30, 2003
DATE

Margaret M. Monaco
MARGARET M. MONACO, ALJ

Receipt Acknowledged:

5-2-03
DATE

M. Kathleen Duncan/CR
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 5 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

pb

SCHENCK, PRICE, SMITH & KING
10 Washington Street
P. O. Box 905
Morristown, New Jersey 07963-0905
(201) 539-1000
Attorneys for Union Board of Education

M.B. and C.B. o/b/o A.B. & A.B.,

Petitioner,

v.

UNION BOARD OF EDUCATION,

Respondent/Counterclaimant.

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
OAL DKT NO. EDUOS 03568-02N

Agency Ref. No. 38-2/02

STIPULATION OF SETTLEMENT AND MUTUAL DISMISSAL OF PETITION AND COUNTERCLAIM

Petitioners Maria and Carlos Beirao and Respondent/Counterclaimant Board of Education of the School District of Union, herein stipulate as follows:

1. This settlement is being made without any admission of liability or wrongdoing on the part of any party and is for the purpose of amicably resolving this dispute. The parties specifically deny any wrongdoing or liability relating to any other party's claim.

2. The parties agree that, Petitioners payment to the Respondent/Counterclaimant of the sum of $3,000 represents full and final settlement of this matter.

3. The pupils A.B. and A.B. will continue in District schools so long as they are domiciled in the district. In the event that the Board of Education has reason to believe that either the domicile or affidavit pupils requirements are no longer satisfied, Petitioners will be notified, and the hearing procedures of N.J.S.A. 18A:38-1 will be invoked.

4. The parties waive any and all claims which were or could have been asserted in the within action, and any and all claims arising out of or related to these claims, including attorneys fees and damages pursuant to any federal or State constitutional or civil rights claims, including 42 U.S.C. 1983, and specifically release the other parties from any and all claims which were or could have been asserted in the within action and any claims arising out of or related to these claims.

5. James D'Amato, Board Secretary and General Counsel, is authorized to enter into this Stipulation of Settlement and Mutual Dismissal on behalf of the Respondent Union Board of Education, and the Board accepts and acknowledges the terms of settlement set forth herein.

6. As a result of the foregoing, Petitioners hereby withdraw the Petition filed pursuant to N.J.S.A. 18A:38-1, with prejudice, and Respondent/Counterclaimant Board hereby withdraws its Counterclaim pursuant to N.J.S.A. 18A:38-1, with prejudice,

Maria Beirao (POA) — 03-27-03
Carlos Beirao, Petitioner — Date

Witness — 3/27/03
Witness — Date

Maria Beirao — 03-27-03
Maria Beirao, Petitioner — Date

Witness — 3/27/03
Witness — Date

UNION TOWNSHIP BOARD OF EDUCATION

James D'Amato, Esq. — 3/27/03
James D'Amato, Esq. — Date
Board Secretary/General Counsel

I move that the Board approve Stipulation of Settlement and Mutual Dismissal of Petition and Counterclaim in the matter of M.B. and C.B. o/b/o A.B and A.B. vs. Union Board of Education in accordance with the information in the hands of each board member and appended to the non-public portion of the minutes of this meeting.

I CERTIFY THAT THE ABOVE RESOLUTION WAS ADOPTED BY THE TOWNSHIP OF UNION BOARD OF EDUCATION AT ITS ORGANIZATION MEETING ON APRIL 22, 2003.

JAMES J. DAMATO
BOARD SECRETARY

OAL DKT. NO. EDU 3568-02
AGENCY DKT. NO. 38-2/02

M.B. and C.B., on behalf of minor children, A.B. and A.B.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 5|22|03

Date of Mailing: 5|22|03

260-03

260-03SEC

IN THE MATTER OF MARY ADAMS,	:	
FAIRFIELD BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
CUMBERLAND COUNTY.	:	DECISION
	:	

SYNOPSIS

The School Ethics Commission determined that respondent Board member violated *N.J.S.A.* 18A:12-24(c) of the School Ethics Act for voting on three separate occasions on bill lists containing bills that were submitted by Adams Printing, which was owned by her husband and where she was an employee. After considering the nature of the charge and respondent's submission, the Commission recommended a penalty of reprimand.

Upon review of the record, the Commissioner, whose decision was restricted solely to a review of the Commission's recommended penalty, concurred with the Commission's recommendation and, thus, ordered respondent reprimanded as a school official found to have violated the School Ethics Act.

May 30, 2003

IN THE MATTER	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
OF	:	
	:	**Docket No.: C44-02**
MARY ADAMS	:	
FAIRFIELD BOARD OF EDUCATION	:	**DECISION**
CUMBERLAND COUNTY	:	
	:	

PROCEDURAL HISTORY

The above matter arises from a complaint filed by Fairfield Board of Education (Board) member, Benjamin Dagostino, on October 25, 2002 alleging that fellow Board member, Mary Adams, violated N.J.S.A. 18A:12-24(c) of the School Ethics Act when she voted on bill lists containing bills submitted by Adams Printing, which is owned by her husband. Mr. Dagostino specifically alleged that the above conduct constitutes a violation of N.J.S.A. 18A:12-24(c) of the Act.

Ms. Adams did not file an answer to the complaint until December 30, 2002, after having been sent two notices by the Commission on November 25, 2002 and December 18, 2002 that the time that she had to answer the complaint had expired. In her answer, she denied voting on the bills and asserted that she abstained, but her abstentions were not recorded.

The Commission invited the parties to its January 28, 2003 meeting to present witnesses and testimony to aid in the Commission's investigation, but did not require that they be present. Neither party appeared. Ms. Adams requested that the matter be rescheduled on the morning of January 28, 2003, but the Commission denied her request in light of its prior correspondence to Ms. Adams informing her that she should advise the Commission of her intent to appear by January 21, 2003. The Commission voted at its public meeting to find probable cause to credit the allegation that Ms. Adams' conduct was in violation of N.J.S.A. 18A:12-24(c). The Commission determined that there were no material facts in dispute and invited Ms. Adams to submit a written statement, setting forth why the Commission should not find her in violation of N.J.S.A. 18A:12-24(c).

Ms. Adams submitted a timely response by way of counsel, Vincent J. Pancari, Esq., which was considered by the Commission at its meeting of March 25, 2003. At its public meeting on March 25, 2003 the Commission concluded that Ms. Adams violated N.J.S.A. 18A:12-24(c) of the School Ethics Act for acting in a matter in which she and her husband had a direct or indirect financial involvement that might reasonably be expected to impair her objectivity or independence of judgment, when she voted on bill lists containing bills from her husband's company. The Commission adopted this decision at its meeting of May 1, 2003.

FACTS

Mary Adams was elected to the Fairfield Board of Education in April 2000. Her husband is the owner of Adams Printing. She works part-time for the business and receives a salary. The minutes for the Board's November 15, 2001 meeting reflect that she voted in favor of a bill list on that date that contained a bill submitted by Adams Printing in the amount of $103.00. The minutes from the Board meeting of January 24, 2002 reflect that on that date she voted in favor of a bill list that contained a bill submitted by Adams Printing in the amount of $611.00. The minutes from the July 25, 2002 Board meeting reflect that on that date she voted in favor of a bill list that contained a bill submitted by Adams Printing in the amount of $686.00.

Board member Kevin Fox, the previous president of the Board, advised Ms. Adams of the need to abstain on matters concerning Adams Printing. The minutes of the meetings of November 2001 and January 2002 note that Board member Fox abstained from an item on each of the bill lists.

ANALYSIS

Complainant alleged that Ms. Adams' conduct on November 15, 2001, January 24, 2002 and July 25, 2002 violated N.J.S.A. 18A:12-24(c), which provides:

> No school official shall act in his official capacity in any matter in which he, a member of his immediate family, or a business organization in which he holds an interest, has a direct or indirect financial involvement that might reasonably be expected to impair his objectivity or independence of judgment. No school official shall act in his official capacity in any matter where he or a member of his immediate family has a personal involvement that is or creates some benefit to the school official or member of his immediate family.

In her answer, Ms. Adams set forth, despite the Board minutes to the contrary, that at three separate meetings, the Board Secretary not only did not hear her abstain from voting on bills submitted by Adams Printing, but erroneously heard Ms. Adams vote "yes." Ms. Adams further set forth that on three separate occasions, she reviewed the minutes, but did not see that she had been recorded as voting "yes" when she had actually abstained because she did not have enough time to review the minutes and assumed them to be accurate. Ms. Adams admitted that she was aware that it is a violation of the School Ethics Act to vote on a bill payment to her husband's company.

In its decision finding probable cause, the Commission referred to the Open Public Meetings Act (OPMA) which provides:

> Each public body shall keep reasonably comprehensible minutes of all its meetings showing the time and place, the members present, the subjects considered, the action taken, the vote of each member, and any other

information required to be shown in the minutes by law, which shall be promptly available to the public to the extent that making such matters public shall not be inconsistent with [N.J.S.A. 10:4-12]. [N.J.S.A. 10:4-14].

The Commission pointed to the plain language of the statute which clearly shows that the minutes of public bodies are to demonstrate the action taken and the vote of each member. The Commission noted that if a board member argues that she did not vote in the way that the minutes indicate after the minutes are approved and made available to the public, the OPMA would be undermined.

In her response to the Commission's finding of probable cause, Ms. Adams set forth that she accepts responsibility for the violation alleged due to her failure to correct the minutes of the above-referenced Board meetings.

The Commission now finds that since Ms. Adams' husband is a member of her immediate family pursuant to N.J.S.A. 18A:12-23, and owns of Adams Printing, he has a direct financial involvement in matters concerning Adams Printing that might reasonably be expected to impair her objectivity or independence of judgment. The Commission further finds that since Ms. Adams is an employee of Adams Printing, she has an indirect financial involvement in matters concerning the company that might reasonably be expected to impair her objectivity. The Commission therefore finds that Ms. Adams' votes to approve a payment to her husband's company constitutes acting in her official capacity in a matter in which she or a member of her immediate family has a direct or indirect financial involvement in violation of N.J.S.A. 18A:12-24(c).

DECISION

For the foregoing reasons, the Commission finds Mary Adams in violation of N.J.S.A. 18A:12-24(c) of the School Ethics Act for voting on bill lists on November 15, 2001, January 24, 2002 and July 25, 2002 containing payments to Adams Printing.

PENALTY

The Commission has considered the nature of the offense and notes that in her response, Ms. Adams acknowledges that she acted in violation of the Act and has taken action to ensure that she reviews in detail the minutes of each meeting in advance of any vote for approval of the minutes submitted. The Commission finds that the appropriate penalty for Ms. Adams' violation in this case is a reprimand.

This decision, having been adopted by the School Ethics Commission, shall now be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction only, pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, the respondent may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments

on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Paul C. Garbarini
Chairperson

Resolution Adopting Decision – C44-02

Whereas, the School Ethics Commission has considered the pleadings filed by the parties and the documents submitted in support thereof; and

Whereas, the Commission found probable cause to credit the allegations that Ms. Adams violated N.J.S.A. 18A:12-24(c) of the School Ethics Act; and

Whereas, the Commission reviewed the written submissions of Ms. Adams in response to the finding of probable cause; and

Whereas, the Commission now finds that respondent violated the School Ethics Act and believes that a reprimand would be the appropriate penalty;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter finding Mary Adams in violation of the Act and recommends that the Commissioner of Education impose a penalty of reprimand.

Paul C. Garbarini, Chairman

I hereby certify that the School
Ethics Commission adopted this decision
at its public meeting on May 1, 2003.

Lisa James-Beavers
Executive Director

AGENCY DKT. NO. 145-5/03

IN THE MATTER OF MARY ADAMS,	:	
FAIRFIELD BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
CUMBERLAND COUNTY.	:	DECISION
	:	

The record of this matter and the decision of the School Ethics Commission ("Commission"), including the recommended penalty of reprimand, have been reviewed.

This matter comes before the Commissioner to impose a sanction upon Respondent Mary Adams, member of the Fairfield Board of Education, based upon findings of fact and conclusions of law by the Commission that she violated *N.J.S.A.* 18A:12-24(c) of the School Ethics Act by voting on three separate occasions on bill lists containing bills that were submitted by Adams Printing, which is owned by her husband and where she is an employee.

Upon issuance of the decision of the Commission, respondent was provided 13 days from the mailing of the decision to file written comments on the recommended penalty for the Commissioner's consideration. However, no comments were submitted by respondent, or on her behalf.

Initially, it must be emphasized that, pursuant to *N.J.S.A.* 18A:12:12-29(c) and *N.J.A.C.* 6A:3-9.1, the determination of the Commission as to violation of the School Ethics Act is **not reviewable by the Commissioner herein**. Only the Commission may determine whether a violation of the School Ethics Act occurred. The Commissioner's jurisdiction is limited to reviewing the sanction to be imposed based upon a finding of a violation by the Commission.

Therefore, this decision is restricted solely to a review of the Commission's recommended penalty.

Upon a thorough review of the record, the Commissioner determines to accept the Commission's recommendation that reprimand is the appropriate penalty in this matter for the reasons expressed in the Commission's decision.

Accordingly, IT IS hereby ORDERED that Mary Adams shall be reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 5|30|03

Date of Mailing: 5|30|03

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

261-03

261-03

IN THE MATTER OF THE APPLICATION	:	
OF THE BOARD OF EDUCATION OF THE	:	COMMISSIONER OF EDUCATION
TOWNSHIP OF CLARK, UNION COUNTY,	:	DECISION
FOR AN ORDER DIRECTING ISSUANCE OF	:	
BONDS PURSUANT TO *N.J.S.A.* 18A:7G-12.	:	
	:	

SYNOPSIS

Having unsuccessfully sought voter approval for construction of school facilities twice within a three-year period, petitioning Board of Education sought an order, pursuant to *N.J.S.A.* 18A:7G-12, directing issuance of bonds for proposed projects in the total amount of $31.4 million on grounds that these were necessary for provision of a thorough and efficient system of education (T&E) in the District.

Following a hearing at the Office of Administrative Law pursuant to *N.J.S.A.* 52:14F-5(o), the ALJ issued a report recommending that the Commissioner order issuance of bonds totaling $19.2 million to fund renovations and repairs to the Board's high school. The ALJ found the Board's proofs insufficient to warrant a recommendation ordering issuance of bonds for the remaining $12.2 million to construct additions to the Board's two elementary schools.

The Commissioner determined that renovations and repairs to the high school were necessary for T&E and directed the Board to prepare for issuance of bonds covering the local share of the project cost and to submit detailed plans and specifications to the Office of School Facilities, where the project will proceed as an Authority project pursuant to *N.J.S.A.* 18A:7G-12 and applicable provisions of *N.J.A.C.* 6A:26-3. The Commissioner concurred with the ALJ, even after clarification of the ALJ's Report with respect to the present state of the District's "unhoused student" situation, that the Board had not demonstrated the necessity of its requested elementary school additions in order to provide T&E.

June 2, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

REPORT AND RECOMMENDATION
OAL DKT. NO. EDU 9431-02
AGENCY DKT. NO. 223-7/02

IN THE MATTER OF THE APPLICATION OF THE BOARD OF EDUCATION OF THE TOWNSHIP OF CLARK, UNION COUNTY, FOR AN ORDER DIRECTING ISSUANCE OF BONDS PURSUANT TO *N.J.S.A.* 18A:7G-12

Francis J. Campell and **Michael J. Gross**, Esq., for petitioner
(Kenney, Gross, Kovats, Campbell & Pruchnik, attorneys)

Record Closed: February 24, 2003 Decided: April 10, 2003

BEFORE **KEN R. SPRINGER**, ALJ:

Statement of the Case

This is an application by the Clark Township Board of Education ("Board") seeking an order by the Commissioner of Education ("Commissioner") directing issuance of school bonds for certain capital projects said to be necessary to fulfill the constitutional mandate of providing a thorough and efficient education. Pursuant to the Educational Facilities Construction and Financing Act ("EFCFA" or "Act"), *N.J.S.A.* 18A:7G-1 to 44, effective as of July 18, 2000, a school district that has unsuccessfully sought to obtain voter approval for school facilities construction twice within a three year

period may apply to the Commissioner for approval to issue school bonds for the local share of the project. Specifically, *N.J.S.A.* 18A:7G-12 authorizes the Commissioner to order issuance of such bonds if "the project is necessary for the provision of a thorough and efficient system of education in the district." The sole issue is whether the Board has satisfied this heavy burden.

Procedural History

By notice dated November 9, 2000, the New Jersey Department of Education ("Department") granted a waiver approving an application for a school facilities project prior to filing of a long-range facilities plan.[1] Originally, the Board held a public referendum on December 12, 2000 to authorize the issuance of bonds totaling approximately $31.4 million to pay for essential repairs to its high school and various renovations and improvements to three other school buildings in the district.[2] Voters of Clark Township defeated this proposal by a narrow margin of only 22 votes. Two months later, on February 27, 2001, an identical public question again was presented to the voters. At the second public referendum, the proposal was rejected by around 1,000 votes.

Thereafter, a newly constituted Board reduced the requested bond amount to approximately $19.2 million, representing repairs deemed necessary to alleviate numerous health and safety issues existing in the several schools, but omitting the cost of adding new classrooms anticipated to be needed for increased enrollment.[3] Clark

[1] In granting the waiver, the Department determined that portions of the project were "necessary to meet the health or safety of occupants" or were "related to a school facility in which the functional capacity is less than 90% of the facilities efficiency standards (FES) based on current school enrollment[.]" *N.J.S.A.* 18A:7G-4(b).
[2] Of the $31.4 million, roughly $21.6 million would have been raised out of local taxes and the remaining $9.8 million would come from state grants.
[3] Of the $19.2 million, the local share would be some $11.4 million and state grants would make up the difference of $7.8 million.

voters defeated the bond question at a third school election held on September 25, 2001.[4]

On July 17, 2002, the Board petitioned the Commissioner for appropriate relief under the statute. At the outset, the Commissioner solicited written comments from any interested person to be filed by October 14, 2002.[5] Approximately 650 residents of Clark and Garwood wrote letters or signed petitions to the Commissioner, the vast majority of which expressed support for the Board's position.[6] Subsequently, on November 8, 2002, the Commissioner forwarded the matter to the Office of Administrative Law ("OAL") for hearing as an "uncontested case."[7] The OAL held a public hearing in the Municipal Building in Clark New Jersey on February 24, 2003.[8] Commencing at 9:00 a.m., the Board offered sworn testimony on the constitutional need for the bond issue. Once the Board's proofs were completed, the hearing was opened to comments from the general public. Later that evening, at 7:30 p.m., the hearing was reconvened for comments by members of the general public unable to attend during the day.

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[4] The record does not reflect the vote tally.

[5] In accordance with the Commissioner's instructions, the Board caused notice soliciting written comments to be published in a newspaper of statewide circulation, *The Star-Ledger*, on September 20, 2002 and in a newspaper of local circulation, *The Home News Tribune*, on September 23, 2002, and to be announced at its public meeting on September 24, 2002.

[6] A breakdown prepared by the Board reflects that roughly 640 correspondents were in favor of the bond issue and ten were opposed.

[7] An "uncontested case" is a proceeding designed to afford interested parties the opportunity to present their views and includes rule-making and investigative hearings. *N.J.S.A.* 52:14F-5(o). *N.J.A.C.* 1:1-21.1 to 21.5. STEVEN L. LEFELT, *Administrative Law & Practice*, N.J. PRACTICE SERIES, §5.15 (2d. ed. 2003).

[8] Again, the Board arranged for notice of the hearing to be published in *The Star-Ledger* on February 3, 2003, in *The Eagle* on January 23, 2003 and in *The Home News Tribune* on January 17, 2003, and to be announced at its public meeting on January 23, 2003.

Findings of Fact

1. General Background Information

Until 1997, the Clark public school system had existed as a K-8 school district serving elementary and middle school students. Clark students enrolled in ninth through twelfth grades attended the Union County Regional High School District No.1 ("Union Regional"), a limited-purpose regional district serving secondary students from six separate municipalities, namely Berkeley Heights, Clark, Garwood, Kenilworth, Mountainside, and Springfield. Students living in Clark were assigned to the Arthur L. Johnson High School ("Johnson High School"), one of four high school buildings then owned and operated by the regional district. Johnson High School is situated on Westfield Avenue within Clark Township, adjacent to the Municipal Building where this hearing was held.

On May 14, 1996, the six constituent communities held a public referendum on whether to dissolve the regional school district.[9] Clark residents were overwhelmingly opposed to deregionalization and voted eight-to-one against dissolution. Nonetheless, four of the six municipalities and a majority of overall votes cast in the entire regional district were in favor of dissolving Union Regional.[10] As a result, Union Regional was dissolved as of June 30, 1997 and the Board assumed control of Johnson High School,

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[9] Events leading to the vote for deregionalization were characterized by a certain degree of rivalry among the constituent school districts. For a flavor of the contentiousness of this preceding period, see the litigation involving a plan to close of one of Union Regional's four high schools. *Glynos v. Union Cty. Reg. High Sch. Dist. No. 1*, 93 *N.J.A.R.*2d (EDU) 673 (Comm'r Aug. 31, 1993), 1993 *W.L.* 470278 (N.J. Adm.)

[10] Statutory procedures for dissolving a limited-purpose regional school district require "an affirmative vote in a majority of the individual constituent districts and . . . an affirmative vote of a majority of the overall votes cast in the entire regional district." *N.J.S.A.* 18A:13-59. For a thorough discussion of these procedures, see *In re Distribution of Liquid Assets Upon Dissolution of the Union Cty. Reg'l. High School Dist. No. 1*, 168 *N.J.* 1 (2001)("*Distribution of Liquid Assets*").

its staff, buildings and grounds.[11] Garwood School District, which does not have a high school building of its own, entered into a ten-year sending-receiving relationship with the Clark authorizing Garwood to send its secondary students to Johnson High School.

(2) Renovations to Johnson High School and Other School Buildings

When the Board took possession of Johnson High School on July 1, 1997, it received the building in an advanced state of disrepair. Superintendent Paul J. Ortenzio of the Clark public schools, a professional educator with thirty-seven years of experience, testified that he was "appalled" by the physical condition when he first toured the facility. Although the outside "façade" of the high school appeared to be well maintained, the interior was in disarray. Describing the "health hazard" existing in the cafeteria, Dr. Ortenzio explained that machinery was hooked up with makeshift extension cords, electric panels lacked circuit breakers, and vermin infested the food-serving area. During the first month of occupancy, a gas pipe sprung a leak and the district had to expend more than $100,000 to enclose and shield the pipe. Reportedly, the existence of a gas smell had been known "for several years," but Union Regional never appropriated the money required to correct the problem.[12]

Built in the 1950s, the high school was set below grade in order to preserve an adjacent level field for athletic activities. Raw sewage from the school does not flow by gravity, but rather is conveyed by a series of injection pumps to a sewer line on Westfield Avenue. According to Dr. Ortenzio, the stench emanating from the pump room is "not for the faint hearted." Ceilings in many high classrooms leak as a result of a decaying roof. Water leakage contributes to an unpleasant smell. Staff members place buckets around the school to collect water when it rains or when snow melts.

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[11] Each host community was deeded the school buildings physically located within its boundaries. Total value placed on the real property deeded to Clark was appraised at $30,119,535. *Distribution of Liquid Assets*, 108 *N.J.* at 5, Table B.

[12] When the regional district owned the building, municipal construction and health officials considered Johnson High School as falling outside their jurisdiction and did not inspect the facilities for compliance with health and safety codes.

Another major repair item at the high school concerns the obsolete heating system. Dr. Ortenzio compared the boiler room to "a Hollywood set for a disaster movie." Mud walls holding the bottom of the boilers had "collapsed" and the entire system had "disintegrated." Underground tunnels used for the passage of hot air were obstructed "by stalactites and stalagmites" and "impassable." Maintenance workers managed to restore the heat by installing two portable boilers outside the building. Dr. Ortenzio complained that these temporary tanks "sit on a tarmac and look like Cape Canaveral at night."

An electrical-panel room sitting below the level of the mud walls brings electrical power into the school. Sump pumps mounted on wooden pallets have been positioned on the floor of this room to prevent flooding. Wooden pallets have "rotted" and electric equipment has "rusted" to the point where the main switch has "frozen in place" and "no one dares touch [it]." It does not take an electrical engineer to realize that the dangerous combination of water and electricity poses a serious safety risk to those occupying the premises.

School officials discussed various efforts made to reduce costs and the draining effect of piecemeal repairs on money available for other priorities. In order to cut costs, the Board has eliminated offerings in several curricular areas, including home economics, industrial arts, auto body shop and photography. Early retirement of older, more senior, teachers enabled the Board to hire newer, less expensive, teachers at considerable savings.[13] In addition, the Board is in the process of selling the District's administration building and intends to utilize the proceeds to reduce the financial burden on taxpayers. Meanwhile, the District's "rainy-day fund" or surplus has been depleted to pay for day-to-day repairs. William Takacs, the school business manager, advised that the District had to devote more than $4.5 million dollars out of current operating expenses to pay for emergency repairs. Superintendent Ortenzio noted that it is "unwise and unsound" to pay for large repairs out of current funds because the tax burden "is too cyclic for project planning." Due to the disastrous condition of the high

[13] Between 2001-2002 and 2002-2003, average teacher's salaries in Clark fell from $70,000 to $50,000.

school, more routine but equally necessary repairs required in the middle school and the elementary schools have had to be deferred.

Nearly everyone who spoke at the public hearing corroborated the accuracy of Dr. Ortenzio's portrayal of dire conditions at the high school. Joseph Papetti, current Board president, is a retired assistant superintendent of schools who served twenty-six years in the City of Elizabeth school system. In his long educational career, Mr. Papetti has never seen "a school in such desperate need of rehabilitation as our high school." Although Elizabeth is one of the Abbott "special needs" districts, Mr. Papetti ventured that all of the public school buildings in Elizabeth are in "better physical condition" than Clark's high school. Board member Michael Timoni, an expert in commercial real estate appraisal, agreed that the high school is in "an advanced state of wear and tear" and threatens the district's "ability to deliver education to students." Speaking in favor of repairing the high school, Clark Mayor Salvatore Bonaccorso presented a resolution of the Township's Governing Body urging approval of a bond issue in the amount of $19.2 million for rehabilitation purposes.

Many of the speakers had personal horror stories of their own or their children's exposure to physical hazards at the high school. Sheila Whiting, a Board member, told of the time that the boiler blew a gasket, resulting in the loss of "hours of classes and academic instruction." Karen Alalfe, another Board member, recalled the time that a high school drama student brought her backstage to show her the "jerry-rigged" electrical wiring. Maria Cutinello, parent of two daughters, complained that the stench in the high school was so sickening that she "had to hold her breath." She noted that morale at the high school was low among "students, teachers and parents alike." Colleen Nemeth, a school employee whose office is located near the boiler, warned that fumes "overcome the children." Barbara White added that wind blows so forcefully through the windows that "students and teachers wear coats." Similarly, Angela Kurek stated that her daughter must frequently change clothes because one room is too cold and another too hot. Robert Kircher, a mechanical engineer, cautioned that placement of electric wires under the boiler is like "putting a match to a flame." A common thread running throughout these comments was that the safety of the children should come

first and that mechanical problems in the high school interfere with students' ability to concentrate on their studies.

Even some Township residents opposed to the bond issue recognize that major repairs to the high school are absolutely essential. William Caruso, a building inspector, favored repairing immediate safety hazards in the high school, although he felt that the amount requested is excessive and believed that less urgent repairs "should be done moderately over the next couple years." Marge Berson, a property manager, acknowledged that repair work needs to be done, but protested the bond issue because "it's too much money." She suggested that the Board "should do a better job" of handling public funds. Bill Gruss, a licensed master plumber, also felt that the Board had misspent money on unnecessary items. Nevertheless, he endorsed expenditures for repair of the high-school facility. Bill Kuchar, a former member of the Township Council, agreed that repairs were necessary, but expressed alarm at the escalating amounts the Board is seeking for this purpose.

One year after taking over the high school, the Board commissioned The Thomas Group, architectural and engineering consultants, to conduct a facilities survey of Johnson High School and all other district buildings. In August 2000, The Thomas Group presented a facilities evaluation report, designed as a planning tool and framework "for maintaining and upgrading the facilities."[14] The report was divided into six categories: (1) general construction; (2) site work; (3) plumbing systems; (4) mechanical systems; (5) electrical systems; and (6) technology systems. Robert J. Kady, a licensed architect knowledgeable about school construction, who served as senior manager for the project, personally attested to the accuracy of the contents of the report. Among other considerations, The Thomas Group conducted a

[14] Beginning in the 1999-2000 school year, EFCFA required school districts "to prepare and submit to the [C]ommissioner a long-range facilities plan that details the district's school facilities needs and the district's plans to address those needs for the ensuing five years." *N.J.S.A.* 18A:7G-4(b). On November 9, 2000, the Department's Office of School Facilities Financing approved the District's application for a school facilities project prior to submission of a long-range facilities plan because "this school facility project is necessary to meet the health or safety of occupants." Thereafter, the District filed its long-range facilities plan on April 5, 2001.

comprehensive survey to ensure compliance with applicable construction codes, fire and safety regulations, sanitary standards, and other legal requirements.

The Thomas Group made detailed recommendations regarding the necessity and cost of correcting numerous health and safety violations, including rehabilitation of dead-end corridors, creation of fire barriers, replacement of unrepaired roofing, provision of handicapped access, elimination of a tripping hazard, installation of a new heating system, addition of fire sprinklers and hydrants, upgrading of emergency lighting, revamping of the electrical wiring and preparation of a study for the presence of asbestos. Similar proposals were made for each school building in the district, namely C.J. Kumpf Middle School, Frank K. Hehnly Elementary School and Valley Road Elementary School, which are in relatively better physical shape than the high school. As part of its presentation, the Board produced a fifteen-minute videotape vividly depicting serious deficiencies at the high school, such as unshielded electrical junction boxes, exposed wiring, rusted or rotted electrical panels, broken ceilings, cracked walls and tiles, water-soaked tiles, structural fissures and suspected asbestos in the boiler room.

Significantly, the Board did not accept every suggested repair or improvement recommended by The Thomas Group. Instead, the Board made "hard choices" and prioritized items totaling $19.2 million for rehabilitation of existing facilities and an additional $12.2 million to accommodate expected growth. On October 11, 2000, the Board made a schematic submission to the Commissioner requesting authorization to conduct an election for voter approval of the original bond issue in the amount of $31.4 million. In its approval letter dated November 9, 2000, the Office of School Facilities Financing expressly determined that the construction project fully "complies with the facilities efficiency standards" promulgated by the Department.[15]

[15] EFCFA directs the Commissioner to develop facilities efficiency standards that are "educationally adequate to support the achievement of the core curriculum content standards." *N.J.S.A.* 18A:7G-4(h).

I **FIND** that issuance of bonds for construction work costing $19.2 million is necessary to protect the health and safety of school children implicit in the concept of a thorough and efficient education. Furthermore, that amount is necessary to provide a suitable environment conducive to learning so that students in the Clark school system will receive the thorough and efficient education to which they are entitled. Compelling evidence establishes that Johnson High School has numerous deficiencies that constitute an unacceptable risk of injury or illness, including unsafe electrical wiring, faulty plumbing, an obsolete heating system and widespread water damage. Such deficiencies not only threaten the physical well being of students attending school in the district, but also seriously impede their ability to benefit from their education and to achieve core curriculum objectives. Despite lingering resentment over being saddled with expenses not shared by the defunct regional district, the Clark community appears to have reached a broad consensus that extensive renovation of the deteriorating high-school facility has become unavoidable. Stopgap measures to fix emergent conditions in the high school have drained financial resources available for other school buildings in the district, so that they too are fast becoming substandard and poorly maintained.

(3) Expansion of the Capacity of the Elementary Schools

A more difficult question is whether the Commissioner should also order issuance of bonds for proposed new construction twice rejected by the voters. Again, the superintendent of schools, Dr. Ortenzio, expressed concern that severe overcrowding at both elementary schools is preventing the district from delivering a thorough and efficient education. In particular, Dr. Ortenzio mentioned that area used to house special education is already "subdivided into six classrooms." Without adequate space in its own schools, the Board has had to send special education students outside of district, at an annual cost of $30,000 to $40,000 per student. Libraries in the two elementary schools are only 1,600 square feet and 1,700 square feet respectively, compared to the Department's facilities efficiency standard of 4,000 square feet. If enrollment increases as predicted and the district fails to build additional classrooms, the only recourse, in Dr. Ortenzio's opinion, would be "to dismantle the

computer laboratories in the two elementary schools." Summarizing his view of the practicalities of the situation, Dr. Ortenzio explained that, "Without having the plant, however, the programs cannot exist."

Several speakers echoed Dr. Ortenzio's emphasis on overcrowding at the elementary schools. Diane Lanigan, a member of the Board who no longer has young children in the lower grades, described the elementary schools as "bursting at the seams." Angela Kurek, a resident of Clark for ten years, reported that her son's classes at Valley Road School are "jammed." Another long-time resident, Martin Mogensen, had initially been against expansion of the facilities, but after viewing the school buildings he changed his mind. Mr. Mogensen deplored the absence of suitable space for art classes, saying that School had replaced dedicated classrooms with "art in a cart." Wendy Griffin was equally distressed "at the loss of art and music rooms in the elementary schools" and feared that loss of computer rooms would be "soon to follow."

Fewer people seemed to care deeply about overcrowding, however, when contrasted to the strong public sentiment for repairing immediate health and safety hazards. Bill Kuchar, for example, sought to hold the line at "what the Board really needs and what the taxpayers can afford." Notwithstanding its vote in favor of necessary repairs amounting to $19.2 million of debt, the Clark Township Council asked the Commissioner "to postpone any new construction to the school buildings which can be presented to the public at some future time."

Before seeking voter approval of new construction, the Board arranged for an independent consultant, Applied Data Services, Inc, to conduct a demographic study of likely future enrollment.[16] Utilizing birth records and three years of enrollment data,

[16] Statistical projections of future enrollment have been generally accepted as scientifically reliable. For a description of the "cohort survival ratio" method, one of the common tools used to plan future educational needs, see *Englewood Cliffs Bd. of Educ. v. Englewood Bd. of Educ.*, 12 *N.J.A.R.* 566, 592 (Comm'r July 11,1988), *modified on other grounds,* 12 *N.J.A.R.* 663 (St. Bd. April 4, 1990), *aff'd* 257 *N.J. Super.* 413 (App. Div. 1992), *aff'd* 132 *N.J.* 327 (1993), *cert. den.* 510 *U.S.* 991 (1993).

Applied Data made a five-year projection of anticipated enrollment. Board witnesses predicted that, by the year 2005-2006, Clark elementary schools would have 877 "unhoused students" in Kindergarten through grade 5. The Board's demographic study, however, contradicts this supposition. On the contrary, the report suggests that "[t]he and Valley elementary schools clearly indicate a 'flat' growth – from 504 students to 529 in 2005/06 for Hehnly and from 424 to 399 students for Valley. * * * This represents no increase in the elementary schools." Indeed, the study predicts that "[m]ost of the growth during the next five years occurs in the high school," for which no additional classrooms are being sought. Unfortunately, the record also lacks reliable information on average class size in the Clark elementary schools, presently or in the foreseeable future, or any empirical research on the maximum class size at which meaningful learning can be achieved. Thus, it is difficult to quantify the effect that potential overcrowding might have on student performance.

I **FIND** that the proofs are insufficient to show that students in Clark will be deprived of a thorough and efficient education unless new elementary classrooms are built. Such objective evidence as does exist indicates that enrollment at the elementary level is likely to remain stable over the next five years. While it may well be shortsighted and more costly in the long run for Clark to put off expanding its facilities, failure to expand cannot be said to pose an immediate threat to the overall quality of education in the district. Absent an adequate showing that students in the district will be unable to attain satisfactory mastery of core curriculum content, that their learning will be seriously compromised or that their health and safety will be jeopardized, the need for improved facilities cannot justify overturning the will of the electorate as expressed at the polls.

Conclusions of Law

Long before adoption of EFCFA, New Jersey courts declared the State's responsibility to ensure that children receive the "thorough and efficient system of free public schools" guaranteed under the state constitution. *N.J. Const.*, Art VIII, §IV, para. 1. As early as 1966, our highest court recognized the Commissioner's broad authority

to review local budgetary decisions and ascertain whether the amount fixed is sufficient to satisfy minimum educational standards for the mandated thorough and efficient education. *Board of Educ., East Brunswick Twp. v. Township Council*, 48 *N.J.* 94 (1966) (Commissioner has power to reject annual school budget and direct an increase over the amount fixed by the governing body). *See also, Board of Educ. of Elizabeth v. City Council of Elizabeth*, 55 *N.J.* 501 (1970) (Commissioner has power to reject operating budget and restore cuts where the budget proposed by the school board was rejected by voters).[17]

In the leading case of *In re Upper Freehold Reg. Sch. Dist.*, 86 *N.J.* 265 (1981), the New Jersey Supreme Court dealt with the specific issue of the Commissioner's affirmative duty to order issuance of school bonds to alleviate unsafe or unhealthy building conditions. Deteriorating conditions found to exist at the high school in *Upper Freehold*, among which were sagging roof planks, water leakage onto ceiling tiles, short-circuited electrical systems, slippery floors and danger from shattering glass, are strikingly reminiscent of similar conditions present in Clark. Citing *Robinson v. Cahill*, 62 *N.J.* 473 (1973), the Court reiterated that the obligation of the State to fulfill its constitutional duty extends to capital expenditures as well as current operating expenses. *Upper Freehold*, at 275. Since deteriorating building conditions made delivery of minimally acceptable education "inadequate and inefficient, if not impossible," the Court held that "[t]hose conditions contravene the constitutional right of the students to a thorough and efficient education and justify invocation of the power of the Commissioner to vindicate that right." *Upper Freehold*, at 278. Consequently, the Court concluded that, "after voter rejection, the Commissioner may authorize the issuance of bonds for a capital project for a public school." Abundant precedent, therefore, allows the Commissioner to intervene in local budgetary affairs when necessary to protect school children from unsafe or dangerous building conditions.

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[17] Pointing to low voter turnout at school budget elections, the fact that voters do not have a direct say in any other use of public funds for current operating expenses, and the advent of budget caps, one perceptive commentator has called for eliminating voter participation in the school budget process. Robert P. Glickman, *Eliminate Public Voting on New Jersey School Budgets*, 115 *N.J.L.J.* 720 (June 20, 1985).

Recently, the Court had opportunity to reassert these fundamental principles. Confronted with crumbling and obsolete school buildings in such grave state of disrepair as not only to prevent children from receiving a thorough and efficient education but also to threaten their health and safety, the Supreme Court upheld an ambitious state plan to finance the construction and repair of school facilities.[18] *Abbott v. Burke*, 153 *N.J.* 480 (1998) (*"Abbott V"*). While *Abbott V* arose in the context of disadvantaged school districts with special needs, the basic right to a thorough and efficient education belongs to every child attending public school in this state.

Against this backdrop, the Legislature enacted EFCFA to help school districts finance construction costs of providing a through and efficient education, including "ensuring that children are educated in physical facilities that are safe, healthy, and conducive to learning." *N.J.S.A.* 18A:7G-2a. EFCFA represents "the largest, most comprehensive school construction program in the nation." *Lonegan v. State*, 174 *N.J.* 435, 458 (2002), *aff'd in part*, *Lonegan v. State*, 2003 *WL* 1824837 (N.J. April 9, 2003). Realizing that "[e]ducational infrastructure inadequacies are greatest in the Abbott districts," the Legislature nevertheless acknowledged that,

> In other districts, the State must also identify need in view of anticipated growth in school population, and must contribute to the cost of renovation and construction of new facilities to ensure the provision of a through and efficient education in those districts. *N.J.S.A.* 18A:7G-2c.

To effectuate its goals, the Act designated the New Jersey Economic Development Authority ("EDA") as the state agency responsible "for the financing, planning, design, construction management, acquisition, construction, and completion of school facilities projects." *N.J.S.A.* 18A:7G-13a. *Lonegan*, at 459. Moreover, the

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[18] School buildings in the Abbott districts exhibited the following deficiencies:

> Windows, cracked and off their runners, do not open; broken lighting fixtures dangle precipitously from the ceilings; fire alarms and fire detection systems fail to meet even minimum safety code standards; rooms are heated by boilers that have exceeded their critical life expectancies and are fueled by leaking pumps; electrical connections are frayed; floors are buckled and dotted with falling plaster; sinks are inoperable; toilet partitions are broken and teetering; and water leaks through patchwork roofs into rooms with deteriorating electrical insulation
> *Abbott V*, at 519

Act established a formal mechanism for the Commissioner to review school facilities projects rejected by voters at two elections. *N.J.S.A.* 18A:7G-12 provides, in pertinent part, that:

> A district . . . that sought approval . . . of a school facilities project without excess costs but failed to receive that approval, and within the three years prior to that, sought and failed to receive approval of that school facilities project with or without excess costs, may submit the project to the commissioner and request that the commissioner approve the project and authorize the issuance of school bonds for the local share of the project. Upon receipt of the request, the commissioner shall review the school facilities project and determine whether the project is necessary for the provision of a thorough and efficient system of education in the district. If the commissioner concludes that the project is necessary, the commissioner may approve the project without excess costs and authorize the issuance of school bonds to fund the local share.

As expressly stated, the Commissioner can only approve a construction project "without excess costs." The Act defines "excess costs" to mean "the additional costs, if any, which shall be borne by the district, of a school facilities project which result from design factors that are not required to meet the facilities efficiency standards[.]" *N.J.S.A.* 18A:7G-3. Effective November 21, 2000, the Commissioner adopted facilities efficiency standards constituting the characteristics of instructional spaces, specialized instructional areas, and administrative spaces that are educationally adequate to support the achievement of the core curriculum content standards. 32 *N.J.R.* 4473(a) (Dec. 18, 2000). Since all of the renovations proposed by The Thomas Group comply with, but do not exceed, the parameters set by the facilities efficiency standards, the project does not involve any "excess costs." Insofar as the Commissioner accepts the recommended findings that repairs and renovations to existing school facilities are necessary for Clark students to receive a thorough and efficient education, the district should be ordered to issue bonds in the amount of $19.2 million.

It is more difficult to estimate *future* construction needs than to demonstrate deficiencies in *existing* plant and equipment. Certainly, the New Jersey Supreme Court

is equally concerned with potential overcrowding in the Abbott districts as with the condition of substandard buildings. Illustrative of such concern, the Court commented:

> Besides facing these decrepit and dangerous conditions, children in Abbott districts must also contend with gross overcrowding. Some class sizes hover around forty. Due to insufficient space, up to three different classes may be conducted simultaneously within the confines of one room. Libraries and hallways have been pressed into service as general classrooms. Some "classrooms" are no more than windowless closets converted by necessity into instructional areas. For children in these huddled spaces, "art" consists of coloring and "music" consists of singing. *Abbott V*, at 519.

Responsive to this analysis, the Legislature directed every school district to calculate the number of "unhoused students" for the ensuing five-year period, *N.J.S.A.* 18A:7G-4(f), -8, and established a functional capacity of less than 90% of existing enrollment as the benchmark for approving a construction project prior to development of a long-range facilities plan.[19] *N.J.S.A.* 18A:7G-4-(b). Applying this methodology, the Department determined that the functional capacity was 68% of the facilities efficiency standard at Hehnly School and 64% at Valley Road School.

Distinguishing the present situation from earlier cases where courts "went to great lengths to describe dangerous conditions at school facilities," the Board argues that the criteria embodied in the "facilities efficiency standards" represents "the *minimum* standards required for public school facilities in order to support core curriculum content standards." Given the shortage in functional capacity, the Board urges that these standards must be used to measure the adequacy of instructional space and supersede the Commissioner's discretion to determine what facilities are necessary for a thorough and efficient education.

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[19] "Functional capacity" is "the number of students that can be housed in a building in order to have sufficient space for it to be educationally adequate for the delivery of programs and services necessary for student achievement of the core curriculum." The difference between the projected enrollment and the functional capacity is "the unhoused students that are the basis upon which the additional costs of space to provide educationally adequate facilities for the entire projected enrollment are determined." *N.J.S.A.* 18A:7G-3.

While it is understandable to want to reduce a flexible term like "thorough and efficient education" to certain hard and fast rules, rigid application of an absolute formula to a non-Abbott school district goes beyond the intended usefulness of such device. Facilities efficiency standards "shall not be construction design standards;" rather, "[t]he design of the project may eliminate spaces in the facilities efficiency standards, include spaces not in the facilities efficiency standards, or size spaces differently than in the facilities efficiency standards upon a demonstration of the adequacy of the school facilities project to deliver the core curriculum content standards[.]" *N.J.S.A.* 18A:7G-4h As the statute provides, the facilities efficiency standards must be "educationally *adequate* to support the achievement of core curriculum standards," *N.J.S.A.* 18A:7G-4, but not necessarily the only means to achieve that result. (Emphasis added.) Consistent with this approach, the New Jersey Supreme Court has acknowledged that square footage guidelines adopted by the Commissioner are sufficient, but not necessary, for a thorough and efficient education and that local districts "should have the discretion to decide initially whether specialized rooms for art, music, and science instruction are required at the elementary level." *Abbott V*, at 522.

Nothing in EFCFA, which sets higher standards for *new* construction, evidences a legislative intent to retrofit all existing school facilities in this state to conform to newer, more stringent, building requirements. *Cf. Dresner v. Carrara*, 69 *N.J.* 237 (1976) (zoning ordinance imposing new off-street parking requirement inapplicable to building constructed long before the ordinance was passed.) Many New Jersey school districts may have antiquated school buildings, but it does not automatically follow that such districts are incapable of providing a quality education to students. Instead, the relevant inquiry is whether the existing configuration of school facilities is inadequate to afford students a through and efficient education.

An additional drawback of the Board's statutory interpretation is its contention that the Commissioner lacks discretion to deny issuance of school bonds whenever the project does not have excess costs. But this argument, if accepted, would render

nugatory the provisions of *N.J.S.A.* 18A:7G-12, since the discretion vested in the Commissioner to rule on such applications would thereby be effectively eliminated. *Board of Educ. of East Windsor Reg. Sch. Dist. v. State Bd. of Educ.*, 172 *N.J. Super.* 547, 554 (App. Div. 1980). *N.J.S.A.* 18A:7G-12 provides that the Commissioner "may approve the project without excess costs" if he or she concludes that the project is necessary for provision of a thorough and efficient system of education in the district. If the Legislature had intended to require approval of all projects that do not have excess costs, it could easily have said so without adding extra language mandating that the Commissioner determine whether such project was "necessary."

In sum, potential overcrowding of existing school facilities is a legitimate factor for the Commissioner to consider in determining whether to order issuance of school bonds. Mere failure to adhere to the newly enacted facilities efficiency standards, however, is not dispositive of that issue. Evidence of future overcrowding in the Clark school district is ambiguous at best, with the Board's own demographic study suggesting enrollment trends at the elementary level will be stable for the foreseeable future. Failure to include dedicated classrooms for art and music in an elementary school is less than ideal, but not indicative of a genuine inability to satisfy core curriculum content standards. In the event that enrollment rises dramatically, there should be sufficient lead-time to return to the voters for authorization to construct new facilities. Under the present circumstances, however, there is insufficient evidence of overcrowding for the Commissioner to substitute his judgment for that of the voters.

Finally, the Board seeks instructions on the local share of the bonded debt. In particular, the Board contends that the tax burden borne by local taxpayers cannot exceed the amount previously placed before them at the two elections and that state aid must make up any inflationary increases during the interim. In due course, appropriate Department officials will decide how much state aid to grant the Clark School District. That issue lies outside the limited scope of this proceeding. Hence, this report does not express any view on the amount of state aid to which the Board may be entitled.

Recommendation

It is recommended that the Commissioner order issuance of bonds totaling $19,204,980 to fund renovations and repairs necessary to provide a through and efficient education to the students of the Clark School District.

I hereby **FILE** my report and recommendation with **COMMISSIONER, DEPARTMENT OF EDUCATION** for consideration.

April 10, 2003
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

April 16, 2003
DATE

M. Kathleen Dunncault
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 17 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

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APPENDIX

List of Witnesses

Testimonial Witnesses:

1. Dr. Paul J. Ortenzio, Superintendent of Schools
2. Robert J. Kady, Architect, Senior Project Manager of The Thomas Group
3. William Takacs, School Business Administrator for Clark Public Schools
4. James P. Nichols, Architect, The Thomas Group
5. Kathleen Borden, Former President of the Clark School Board
6. Joseph Papetti, President, Clark School Board
7. Michael J. Timoni, Former President of the Clark School Board

Opportunity for Public Comment

1. Mayor Sal Bonaccorso
2. Sheila Whiting, Vice President, Board of Education
3. Karen Amalfe, Board of Education
4. Maria Cutinello
5. Martin Mogensen
6. Marge Berson
7. Bruce Best
8. Fred Hagen
9. William Caruso
10. Bill Gruss
11. Jill Curran
12. Barbara White
13. Natalie Belverio
14. Bill Kuchar
15. Robert Kircher
16. Dr. Murphy, Superintendent of Schools of Garwood
17. Tom Belverio

18. Wendy Griffin
19. Laura Caliguire
20. Diane Lanigan
21. Carmen Brocato
22. Colleen Nemeth
23. David Wechsler
24. Angela Kurek

List of Exhibits

No.	Description
OAL-1	Affidavit of Publication, dated February 24, 2003
OAL-2	Affidavit of Publication, dated September 24, 2002
P-1	Written statement of Paul J. Ortegio, Superintendent
P-1 (a)	Videotape depicting conditions of the high school
P-1 (b)	Explanation of the videotape
P-2	Curriculum vitae of Robert J. Kady, Architect, The Thomas Group
P-3	Outline prepared by Robert J. Katy, Architect
P-3(a) to (j)	Photographs depicting conditions of the two elementary schools
P-4	Clark School Board's Schematic Submission to NJDOE for Frank K. Hehnly School
P-5	Clark School Board's Schematic Submission to NJDOE for Valley Road School
P-6	Clark School Board's Schematic Submission to NJDOE for Kumpf Middle School
P-7	Clark School Board's Schematic Submission to NJDOE for A.L. Johnson High School
P-8 Id.	Excerpt from Clark School Board's long-range facilities plan
P-9	Facilities Evaluation of Clark Public Schools by The Thomas Group

P-9	(a)	Facilities efficiency standards
P-10		Outline prepared by William Takacs, School Business Administrator
P-11		Curriculum vitae of James P. Nichols, Architect, The Thomas Group
P-12		Outline prepared by James P. Nichols, Architect
P-13		Outline prepared by Kathleen Borden, former president Clark Board of Education
P-14		Outline prepared by Joseph Papetti, President, Clark Board of Education
P-15	(a)	Curriculum vitae of Nichol J. Timoni
P-15	(b)	Letter to Michael Timoni from Mitchell S. Elias, dated January 22, 1996
C-1		Referendum of the Township of Clark, dated February 18, 2003
C-2		Typewritten notes of Sheila Whiting
C-3		Typewritten notes of Maria Cutinello
C-4		Typewritten notes of Bruce Best
C-5		Letter from the Clark Civic & Taxpayers Committee, Inc., dated February 7, 2003
C-6		Videotape of public meeting of the Clark Board of Education
C-7		Typewritten notes of Bill Gruss
C-8		Typewritten notes of Jill Curran
C-9		Typewritten notes of Barbara White
C-10		Typewritten notes of Natalie Belverio
C-11		Handwritten notes of Bill Kuchar
C-12		Typewritten notes of Dr. Bill Murphy
C-13		Typewritten notes of Tom Belverio
C-14		Handwritten notes of Wendy Griffin
C-15		Photographs depicting water damage at the high school
C-16		Handwritten notes of Diane Lanigan

OAL DKT. NO. EDU 9431-02
AGENCY DKT. NO. 223-7/02

IN THE MATTER OF THE APPLICATION	:	
OF THE BOARD OF EDUCATION OF THE	:	COMMISSIONER OF EDUCATION
TOWNSHIP OF CLARK, UNION COUNTY,	:	DECISION
FOR AN ORDER DIRECTING ISSUANCE OF	:	
BONDS PURSUANT TO *N.J.S.A.* 18A:7G-12.	:	
	:	

The record of this matter, and the Report and Recommendation (Report) of the Administrative Law Judge (ALJ) issued by the Office of Administrative Law following hearing pursuant to *N.J.S.A.* 52:14F-5(o), have been reviewed. Comments on the Report were filed by the petitioning Board of Education (Board) in accordance with procedures established by the Department of Education (Department) on behalf of the Commissioner.

In its comments, the Board examines the ALJ's Report in detail and raises objections to a number of the statements and analyses therein. The great majority of these objections are, in essence, specific applications of the Board's overarching position, reflected in the Initial Decision, that the facilities efficiency standards (FES) adopted in conjunction with the Educational Facilities Construction and Financing Act (EFCFA), *N.J.S.A.* 18A:7G-4(h), are the *minimum* State standards that public school buildings must meet in order to support the provision of a thorough and efficient system of public education (T&E), and that the Commissioner *must* order issuance of bonds where a district appearing before him pursuant to *N.J.S.A.* 18A:7G-12 has established that those standards will not be met absent completion of its proposed capital project(s). In this regard, the Board views the ALJ's

Report as "tantamount to a repudiation" of the FES, and it decries the Report's "refusal to recognize and apply the criteria defining the minimum standards of public school buildings adequately designed and spatially sufficient" to support T&E in the District. (Board's Comments at 2, 9, 10, 11) The Board contends that the ALJ inappropriately held it to a burden of proof that may have applied previously, but has now been superseded by enactment of EFCFA and establishment of the FES. (*Id.* at 2-4) It further contends that the ALJ failed to acknowledge and credit the Department's recognition, in granting a waiver from the requirement for submission of the long-range facilities plan otherwise required by EFCFA prior to permitting a local district to conduct facilities referenda, of "functional capacity [of] less than 90% of the [FES]" in the Board's two elementary schools, a recognition that was determinative of the Department's allowing those projects to be included in the Board's application under *N.J.S.A.* 18A:7G-12. (*Id.* at 4-6) The Board alleges that the ALJ failed to consider sufficiently the Superintendent's testimony about inadequate space for special education and the absence of library/media centers that are "anywhere near the minimum size set forth in the FES" (*Id.* at 6-7), instead giving undue credence to the few witnesses who spoke against issuance of bonds for the elementary school additions and inappropriately weighing "the existence of unsafe and hazardous conditions found in the Clark Township Schools, which require immediate repairs and renovations as a first priority, with the issues of inadequate space and non-existent facilities to which the students of Clark Township are entitled" under the FES. (*Id.* at 7)

The Board also contends that the ALJ misconstrued the District's situation with respect to "unhoused" students. Specifically, the Board argues that the ALJ did not recommend issuance of bonds for its two proposed elementary school additions because he

erroneously believed that the Board was claiming need based on *projected* enrollment increases rather than *current* conditions of overcrowding, and because he did not appear to understand that a district's number of "unhoused students" does not refer to students without a place in a school building, but rather serves as an "inadequacy index" in relation to the FES. Thus, the Board claims, because its elementary schools evince 64% and 68% functional capacities as determined under the FES and recognized by the Department in granting a five-year-plan waiver as noted above, and because FES formulas identify over 300 "unhoused students" in the District right now, the Board has demonstrated that its proposed additions are necessary under FES criteria. (Board's Comments at 6, 7-9, 10-11)

Upon careful review of the ALJ's Report, the underlying record including Exhibits and the Board's Post-Hearing Brief, and the Board's comments on the ALJ's Report, the Commissioner fully concurs with the ALJ's assessment of the Board's application. On the necessity for repairs and renovations to the District high school, as demonstrated on this record, there can be no two opinions; clearly, in the absence of the proposed project, the District will be unable to provide T&E due to significant health and safety issues. On the question of expanding elementary school facilities, however, as found by the ALJ, the Board has developed a record demonstrating little more than that its current functional capacity is less than the 90% established as a threshold by the FES, and that it lacks certain specialized rooms conforming to FES standards; even granting that the ALJ's Report may at times suggest that the schools' alleged overcrowding is prospective rather than current (the record supports the Board's request for clarification in this regard), the Board has made no demonstration as to how these alleged shortcomings have affected student performance or compromised the Board's ability to provide T&E. As stated by the ALJ:

> Unfortunately, the record***lacks reliable information on average class size in the Clark elementary schools, presently or in the foreseeable future, or any empirical research on the maximum class size at which meaningful learning can be achieved. Thus, it is difficult to quantify the effect that potential overcrowding might have on student performance.
>
> I **FIND** that the proofs are insufficient to show that students in Clark will be deprived of a thorough and efficient education unless new elementary classrooms are built.***Absent an adequate showing that students in the district will be unable to attain satisfactory mastery of core curriculum content, that their learning will be seriously compromised or that their health and safety will be jeopardized, the need for improved facilities cannot justify overturning the will of the electorate as expressed at the polls. (ALJ's Report at 12)

This finding reaches to the heart of the Board's position, which is its contention, noted above, that, as a matter of law, the FES are the *minimum* State standards that public school buildings must meet in order to support T&E, and that the Commissioner *must* order issuance of bonds where a district appearing before him pursuant to *N.J.S.A.* 18A:7G-12 has established that those standards will not be met absent completion of its proposed capital project(s). In the Board's view, then, if it has demonstrated that its schools are below the FES threshold for functional capacity and that they lack specialized instructional spaces as set forth in the FES, that demonstration is, *per se*, equivalent to a finding that the Board cannot provide T&E without construction of its proposed projects.

For the reasons well and thoroughly set forth by the ALJ in his discussion of the law underlying the Board's application (ALJ's Report at 12-18), the Commissioner rejects this view. As stated by the ALJ:

> While it is understandable to want to reduce a flexible term like "thorough and efficient education" to certain hard and fast rules, rigid application of an absolute formula to a non-Abbott school district goes beyond the intended usefulness of such device. Facilities efficiency standards "shall not be construction design standards;" rather, "[t]he design of the project may eliminate spaces in the facilities efficiency standards, include spaces not in the facilities efficiency standards, or size spaces differently than in the facilities efficiency standards upon a demonstration of the adequacy of the school

facilities project to deliver the core curriculum content standards[.]" *N.J.S.A.* 18A:7G-4h As the statute provides, the facilities efficiency standards must be "educationally *adequate* to support the achievement of core curriculum standards," *N.J.S.A.* 18A:7G-4, but not necessarily the only means to achieve that result. (Emphasis added.) Consistent with this approach, the New Jersey Supreme Court has acknowledged that square footage guidelines adopted by the Commissioner are sufficient, but not necessary, for a thorough and efficient education and that local districts "should have the discretion to decide initially whether specialized rooms for art, music, and science instruction are required at the elementary level." *Abbott V*, at 522.

Nothing in EFCFA, which sets higher standards for *new* construction, evidences a legislative intent to retrofit all existing school facilities in this state to conform to newer, more stringent, building requirements. (citation omitted) Many New Jersey school districts may have antiquated school buildings, but it does not automatically follow that such districts are incapable of providing a quality education to students. Instead, the relevant inquiry is whether the existing configuration of school facilities is inadequate to afford students a through and efficient education.

An additional drawback of the Board's statutory interpretation is its contention that the Commissioner lacks discretion to deny issuance of school bonds whenever the project does not have excess costs. But this argument, if accepted, would render nugatory the provisions of *N.J.S.A.* 18A:7G-12, since the discretion vested in the Commissioner to rule on such applications would thereby be effectively eliminated. (citation omitted) *N.J.S.A.* 18A:7G-12 provides that the Commissioner "may approve the project without excess costs" if he or she concludes that the project is necessary for provision of a thorough and efficient system of education in the district. If the Legislature had intended to require approval of all projects that do not have excess costs, it could easily have said so without adding extra language mandating that the Commissioner determine whether such project was "necessary." (ALJ's Report at 17-18, emphasis in text)

Contrary to the Board's assertions, then, the ALJ's Report is not a "repudiation" of the FES, but rather a recognition of their appropriate role in a proceeding to determine whether proposed facilities projects *must* be ordered despite voter disapproval because they are necessary to meet the constitutional mandate for T&E. Moreover, as recognized by the ALJ, previously applicable standards for the issuance of such an order have *not* been superseded by enactment of EFCFA and establishment of the FES; rather, these have

served to set legislative and administrative parameters to guide the Commissioner's case-by-case determinations in assessing a proposed project's constitutional necessity.[1]

Accordingly, the Commissioner concurs with the Report and Recommendation of the ALJ as clarified with respect to the current applicability of the Board's "unhoused student" argument. The Commissioner finds that insufficient evidence exists to warrant a directive for issuance of bonds to fund the Board's proposed elementary school projects, but that its proposed renovations and repairs to the high school are necessary for provision of a thorough and efficient system of education in the District. The Commissioner, therefore, authorizes the Board to prepare for issuance of bonds in the amount necessary to fund the local share of the high school project[2] and directs it to submit detailed plans and specifications for that project to the Office of School Facilities, where the project shall proceed forthwith as an Authority project pursuant to *N.J.S.A.* 18A:7G-12 and applicable provisions of *N.J.A.C.* 6A:26-3.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 6|02|03

Date of Mailing: 6|02|03

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[1] Arguably, they have actually *narrowed* boards' ability to apply to the Commissioner for issuance of bonds, since, prior to enactment of EFCFA, there were no preconditions on such applications as are now set forth in *N.J.S.A.* 18A:7G-12.

[2] The ALJ's final recommended order directs issuance of $19.2 million in bonds, reflecting the entire cost of the project; however, as noted on page 2 of the Initial Decision (Note 3), the local share is actually less and will be finally determined pursuant to applicable rules governing Authority projects.

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

262-03

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

PETITIONER,

V.

MARY LOU MARGADONNA,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

June 2, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 2409-03

AGENCY DKT. NO. 123-4/03

BOARD OF EDUCATION
OF THE TOWNSHIP OF WALL,

Petitioner,

v.

MARY LOU MARGADONNA,

Respondent.

Douglas J. Kovats, Esq., for petitioner (Kenny, Gross & Kovats, attorneys)

Richard B. Stone, Esq., for respondent (Stone Mandia, attorneys)

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

Record closed: April 24, 2003 Decided: April 25, 2003

STATEMENT OF THE CASE

The basic issue here is whether respondent Mary Lou Margadonna may hold office as a member of the petitioner Board of Education of the Township of Wall (BOE).

The case is complicated, but can be summarized. N.J.S.A. 18A:12-2 states, "No member of any board of education shall be interested directly or indirectly in any contract with or claim

against the board." N.J.S.A. 19:60-5 states that each nominating petition for election to a school board shall state "That the person so endorsed is legally qualified to be elected to the office." For several school years, the BOE employed respondent as a non-tenured teacher, but, in 2002, it declined to offer her another contract to continue that employment. Thereafter, in 2002, respondent served the BOE with a New Jersey Tort Claims Act notice of claim, alleging wrongful loss of employment, damage to her good name, etc. N.J.S.A. 59:8-4. Thereafter, in 2002 also, she petitioned the Commissioner of Education, naming the BOE and its employees and agents as respondents; claiming that the BOE should afford her a public hearing relative to whether it should have offered her another contract of employment; and claiming that the BOE should offer her a contract as a teacher, which by statute would result in tenure. N.J.S.A. 18A:6-9; N.J.S.A. 18A:28-5. In 2002 the Commissioner dismissed her petition, the State Board of Education affirmed, and she has appealed to the Superior Court, Appellate Division. R. 2:2-3(a)(2). In 2003 she submitted to the BOE her nominating petition for the BOE's April 15, 2003, election, wherein, despite her claim that the BOE should employ her and despite N.J.S.A. 18A:12-2, she certified that she was "legally qualified" to be a member of the BOE. P-1(5). She appeared on the April 15, 2003, election ballot and received the second highest number of votes. Consequently, absent disqualification, she could begin as a BOE member at the BOE's April 29, 2003, reorganization meeting required by N.J.S.A. 18A:10-3(b). The BOE requested that respondent notify it as to (1) whether she agreed to withdrawal and/or dismissal with prejudice of her claims against the BOE or (2) whether she would decline a seat on the BOE. She refused withdrawal and/or dismissal of her claims, so the BOE filed the petition resulting in this case. The BOE requested that respondent be ordered to choose between the dismissal of her claims or declining office and the BOE requested that, if she declined office, the matter be referred to the county superintendent of schools for filling the membership of the BOE. N.J.S.A. 18A:12-15. On the record made April 24, 2003, respondent agreed to dismissal of her claims with prejudice, except for a claim still pending before the Appellate Division, i.e., that the BOE must afford her the public hearing relative to whether it should have offered her another contract of employment. Respondent's attorney argues that this would not constitute a disqualifying claim within the intent of N.J.S.A. 18A:12-2. However, the BOE submits that respondent is continuing a claim and that, consequently N.J.S.A. 18A:12-2 prohibits her service as a BOE member. I agree with the BOE and enter orders accordingly.

PROCEDURAL HISTORY

On April 22, 2003, the BOE filed its verified emergent petition with the Department of Education. N.J.S.A. 18A:6-9. The Department transmitted the contested case to the Office of Administrative Law (OAL), where it was filed on April 23, 2003. N.J.S.A. 52:14B-2(b). On April 24, 2003, in the OAL, Trenton, the respondent's opposition papers were filed and the case was argued.

FINDINGS OF FACT

During the 1999-2000, 2000-01, and 2001-02 school years, the BOE employed respondent as a non-tenured teacher. Consequently, if the BOE had employed her for the 2002-03 school year, pursuant to N.J.S.A. 18A:28-5, she would have obtained tenure.

Late in the 2001-02 school year, respondent began to receive reviews that she alleges were inconsistent with her excellent performance and, in April 2002 the BOE notified her that it would not offer her a contract for the 2002-03 school year. The respondent requested a statement of the BOE's reasons for not offering a contract and the BOE provided such a statement and notified her that in that regard she had an opportunity for an informal appearance before the BOE. P-1; see N.J.S.A. 18A:27-3.2, -4.1.

On June 11, 2002, respondent had her informal appearance before the BOE and, thereafter, the BOE notified her that it had not taken action to offer her a contract. Thereafter, members of the public appeared before the BOE to urge it to offer respondent another contract; but the BOE declined to do so.

On June 18, 2002, respondent requested a public hearing before the BOE and the BOE denied her request. P-1(3).

On July 17, 2002, respondent served the BOE with a New Jersey Tort Claims Act notice of claim, wherein she claimed that the BOE had wrongfully denied her rights of due process and wrongfully denied her a public hearing, causing "loss of employment [and] damage to [her] good

name and reputation," etc., and wherein she demanded damages for "loss of salary and benefits," etc. P-1(2); N.J.S.A. 59:8-4.

On or about July 18, 2002, respondent filed a petition with the Commissioner of Education, captioned as Margadonna v. Wall BOE et al., Agency Dkt. No. 225-7/02, wherein she alleged that the BOE had denied her the "right to a public hearing" on the matter of whether it should employ her as a teacher for the 2002-03 school year and wherein she demanded relief, including continued employment as a BOE teacher with tenure. P-1(1); N.J.S.A. 18A:6-9.

On October 29, 2002, in Margadonna v. Wall BOE et al., Agcy Dkt. No. 225-7/02, the Commissioner concluded that respondent's (petitioner in that case) petition failed to state a claim on which relief could be granted and he dismissed it. P-1(3). The Commissioner cited Board of Regents of State Colleges v. Roth, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972), as holding that a non-tenured teacher does not have a protected interest in continued employment and, if the school declines to continue his or her employment the United States Constitution's Fourteenth Amendment does not guarantee due process in that regard. The Commissioner cited Donaldson v. Board of Education of North Wildwood, 65 N.J. 236 (1974), holding that a board of education need not base its declining to continue employment of a teacher on unsatisfactory performance and the board's action or inaction may be based on another valid reason; although a board may not decline to continue employment because of a teacher's membership in a union or exercise of a constitutional right and the teacher has a right to a statement of reasons from the board for declining to continue the employment. The Commissioner cited Lydia Anderson v. State-operated School District of the City of Newark, State Board (February 7, 2001), as holding that, under the New Jersey Constitution, a non-tenured teacher has limited rights to due process in that regard. The Commissioner cited Angelo Velasquez v. Board of Education of the Borough of Brielle, State Board (August 6, 1997), as holding that, when a board of education declines to continue a non-tenured teacher's employment, the teacher may appear for an informal meeting with the board; but he or she does not have a right to a vote by the board on whether another contract should be offered. The Commissioner cited Dore v. Bedminster Township Board of Education, 185 N.J. Super. 447, at 453 (App. Div. 1982), holding that a district board of education's decision not to continue employment of a non-tenured teacher may be based on a broad range of factors, including factors other than the teachers' evaluations and boards have

"virtually unlimited discretion in hiring or renewing non-tenured teachers." The Commissioner also cited Guerriero v. Board of Education of the Borough of Glen Rock, State Board (February 6, 1986), aff'd, No. A-3316-85T6 (App. Div. 1986), as holding that, where a non-tenured teacher challenges a board's declining to offer another contract on the grounds that facts do not support the board's reasons, the non-tenured teacher is entitled to litigate the matter only if the facts he or she alleges are true would constitute a violation of a constitutionally or statutorily conferred right. Given the above, the Commissioner agreed with the BOE that Rice v. Union County Regional High School District, 155 N.J. Super. 64 (App. Div. 1977), cited by respondent as requiring the public hearing relative to the BOE's declining to offer her another contract, did not require such a hearing.

The respondent appealed the Commissioner's decision in Margadonna v. Wall BOE et al., Agency Dkt. No. 225-7/02, to the State Board of Education, which, on February 5, 2003, affirmed the Commissioner. P-1(4); N.J.S.A. 18A:6-27, -28

On February 24, 2003, respondent submitted to the BOE her nominating petition relative to the April 15, 2003, election for membership on the BOE. Her petition certified that she was "legally qualified under the laws of the State to be elected a member of the [BOE]" and included sufficient signatures for placement of her name on the ballot. P-1(5); N.J.S.A. 19:60-5d.

On March 7, 2003, respondent filed an appeal from the State Board's decision in Margadonna v. Wall BOE et al., Agency Dkt. No. 225-7/02, with the Superior Court, Appellate Division, A-3338-02T2. P-1(6); R-2; R. 2:2-3(a)(2).

In the April 15, 2003, BOE election, the respondent's vote total was the second highest, i.e., sufficient for election to the BOE, absent disqualification. P-1.

By letter dated April 15, 2003, the BOE notified respondent that she had obtained sufficient votes to take a seat on the BOE; that, given her claims against the BOE, N.J.S.A. 18A:12-2 prohibited her from holding office as a member of the BOE; that, by April 21, 2003, she should notify the BOE of whether she would withdraw or dismiss the claims with prejudice; and that, if she failed to do so, the BOE would petition for relief. P-1(7).

By letter dated April 16, 2003, respondent's attorney responded that, due to the "complexity of this matter and a pre-planned vacation, a proper response [could not] be provided by . . . April 21, 2003" and he requested a two-week extension to respond. P-1(8).

By letter dated April 16, 2003, the BOE notified respondent that (as required by N.J.S.A. 18A:10-3(b)), on April 29, 2003, it would hold its reorganization meeting and it could not consent to the two-week delay in her response. P-1(9).

By way of respondent's attorney's April 23, 2003 letter brief, respondent represented that she "will withdraw her Notice of Tort Claim under [N.J.S.A. 59:1-1 et seq.]." R-1; emphasis added. On the record made April 24, 2003, respondent agreed to dismissal with prejudice of her claims against the BOE, except for her demand in Margadonna v. Wall BOE et al., No. A-3338-02T2, before the Appellate Division, that the BOE afford her a public hearing relative to whether it should have offered her another contract of employment. Her attorney argued that this does not constitute a claim within the intent of the laws cited above and that, if the BOE decides to offer her employment, she may then decide whether to accept the employment or reject it and continue as a member of the BOE.

CONCLUSIONS OF LAW

"No member of any board of education shall be interested directly or indirectly in any contract with or claim against the board." N.J.S.A. 18A:12-2. Consistent with N.J.S.A. 18A:12-2, the petition of a candidate for nomination for election to a board of education must state that he or she "is legally qualified to be elected to the office." N.J.S.A. 19:60-5.

From July 17, 2002, when respondent served the BOE with her New Jersey Tort Claims Act notice of claim, until April 24, 2003 (during the argument of this case), the respondent asserted a claim that the BOE had wrongfully denied her rights of due process and wrongfully denied her a public hearing, causing "loss of employment [and] damage to [her] good name and reputation," etc., and she demanded damages for "loss of salary and benefits," etc. P-1(2); N.J.S.A. 59:8-4.

On or about July 18, 2002, respondent filed the petition with the Commissioner of Education, Margadonna v. Wall BOE et al., Agency Dkt. No. 225-7/02, wherein she alleged that the BOE had denied her the "right to a public hearing" on the matter of whether it should employ her as a teacher for the 2002-03 school year and wherein she claimed relief, including continued employment as a BOE teacher with tenure. P-1(1). She continued her claim until April 24, 2003 (during the argument of this case), when she agreed to dismissal with prejudice of her petition's claims (now in the Appellate Division), except that she continues her claim that the BOE must afford her a public hearing relative to whether it should have offered her another contract of employment.

Given the above, on February 24, 2003, when the respondent submitted her petition, and on April 15, 2003, at the time of the election, she was directly interested in claims against the BOE that related to a contract and employment.

Howell Township Board of Education v. Suchcicki, 93 N.J.A.R.2d (EDU) 157, where an employee of the board of education submitted a petition for nomination for election to the board, applied N.J.S.A. 18A:12-2 and N.J.S.A. 18A:14-10 (repealed). N.J.S.A. 18A:14-10, like N.J.S.A. 19:60-5 which replaces it, required that petitions for nomination for election to a board of education state that the proposed candidate "is legally qualify to be elected" and the decision states:

> Public policy demands that one who holds public office discharge his duties with undivided loyalty and from this policy the concept of "incompatibility" has evolved. Consistent with this concept, one may not hold two public offices, each of which has an interest which competes with the other, and one cannot hold two public offices where his performance in one office would be subordinate to the other, or subject to its control, or requires him to choose the obligation of one office over another. In such circumstances, it is not enough for the office holder to abstain from participation when an area of conflict arises; holding both the public offices is prohibited. See Jones v. MacDonald, 33 N.J. 132 (1960); Dunn v. Froehlich, 155 N.J. Super. 249 (App. Div. 1978); Kaufman v. Pannuccio, 121 N.J. Super. 27 (App Div. 1972);

Visotcky v. City Council of City of Garfield, 113 N.J. Super. 263 (App. Div. 1971).

Consistent with the concept of "incompatibility," N.J.S.A. 18A:12-2 provides that "No member of any board of education shall be interested directly or indirectly in any contract with or claim against the board." Also, a nominating petition, such as that filed by the respondent, must state that the proposed candidate "is legally qualified to be elected" to the board . . . ." N.J.S.A. 18A:14-10 (Emphasis added.) [repealed and replaced by N.J.S.A. 19:60-5].

Surely the respondent's employment contract, if not his union responsibilities, give him the kind of "interest" which N.J.S.A. 18A:12-2 speaks of. Compare Visotcky v. City Council of Garfield, supra, wherein it was decided that holding the position of teacher is "incompatible" with membership on the Board of Education in the same school district and where membership on the board would be invalid in such circumstances.

During the hearing, respondent represented that it was and is his intention, conditioned upon his election, to resign as an employee and union representative. However, as quoted above, in N.J.S.A. 18A:14-10, the Legislature speaks in the present tense of legal qualification for election to the Board, i.e., there must be qualification at the time of execution of the petition and its accompanying certificate. (This is a reasonable and practical condition intended to assure that a candidate will not later reconsider and decide not to give up his disqualifying employment, etc.) Therefore, I **FIND** and **CONCLUDE** that, despite the respondent's petition's statement and accompanying certification wherein he is described as "qualified," he was and is not qualified.

During the hearing, the respondent also stated that he was unaware of his lack of qualification. This statement is somewhat inconsistent with the respondent's representation that he intended to resign his position as a Board employee if elected, but, in any event, it is the proposed candidate's responsibility to learn applicable laws before certifying his qualification for election. See Graham v. N.J. Real Estate Comm'n, 217 N.J. Super. 130, 138 (App. Div. 1987), and In re Krah, 130 N.J. Super. 366 (App. Div. 1974), for the proposition that everyone is conclusively presumed to know the law, statutory and otherwise, and, in the absence of statutory or constitutional requirements, an agency is not required to give actual notice of the law.

> Given the above facts and circumstances, I **FIND, CONCLUDE** and **DECLARE** as follows: (1) The respondent is not legally qualify for election to the Board; (2) The respondent's nominating petition is invalid, null and void; and (3) The respondent's name as a candidate for election to the Board must be removed from the ballot relative to the April 7, 1992 election.
>
> [Howell Township v. Suchcicki, supra, 93 N.J.A.R.2d at 157-58.]

Since respondent was continuing all of her claims against the BOE at the time she submitted her petition for nomination for election to the board, pursuant to N.J.S.A. 18A:12-2 she was not qualified to serve on the BOE; her petition and her presence on the ballot violated N.J.S.A. 19:60-5; and her election may be voided.

Respondent's attorney argues that her petition in Margadonna v. Wall BOE et al., No. A-3338-02T2, does not constitute a "claim" within the intent of N.J.S.A. 18A:12-2. However, in that case, as the "petitioner" she is "requesting relief or action." N.J.A.C. 1:1-2.1 "Petitioner"; see also N.J.A.C. 6A:3-1.3. See also N.J.A.C. 1:1-1.3(a) and R. 4:5-2, stating that a claim contains a "statement of the facts . . . [purportedly] showing that [she] is entitled to relief." The respondent's petition alleges facts and sets forth a demand for relief: an order commanding the BOE to afford her the public hearing. (It is similar to a mandamus action. Compare R. 4:69.) Consequently, respondent's petition contains a "claim" and N.J.S.A. 18A:12-2 prohibits her holding office as a member of the BOE.

Further, in respondent's case in the Appellate Division, she continues her claim that an order should be entered requiring the BOE to hold a public hearing relative to whether it should have offered her another contract of employment.

The respondent's attorney also contends that N.J.S.A. 19:60-5 and N.J.S.A. 18A:12-2 violate her constitutional rights. In these statutes, the Legislature has articulated important policies to avoid conflicts of interest for public officials and statutes are presumed to be lawful. In any event, this administrative case has not been transmitted here for a decision on such an issue and, as the BOE's attorney has pointed out, respondent has not notified the Attorney General of this challenge to State statutes. N.J.S.A. 52:14B-2(b).

To summarize, the respondent (represented by counsel) brought and maintained claims against the BOE and, contrary to N.J.S.A. 18A:12-2 and despite the requirements of N.J.S.A. 19:60-5, she certified in her nominating petition that she was qualified to serve as a BOE member. Despite the opportunity to do so, she has again refused to dismiss her claim against the BOE. Her real claim and interest is in a contract of employment with the BOE and N.J.S.A. 18A:12-2 prohibits a BOE member from maintaining such a claim. Consequently, although frustrating the will of her voters, her actions require the results ordered below.

ORDER

Consistent with the above, (1) I **ORDER** the respondent disqualified from holding office as a member of the BOE and (2) I refer to the county superintendent of schools the decision relative to the filling the membership of the BOE. N.J.S.A. 18A:12-15.

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

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

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

April 25, 2003
DATE

JOHN R. TASSINI, ALJ

Receipt Acknowledged:

April 25, 2003
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 25 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

EXHIBITS

For Petitioner:

P-1 Verified Emergent Petition & Verification, April 22, 2003

P-1(1) Petition, Margadonna v. Wall BOE et al., Agency Dkt. No. 225-7/02, July 8, 2002

P-1(2) Letter from Stone Mandia, July 12, 2002, with notice of claim under the New Jersey Tort Claims Act, July 12, 2002

P-1(3) Letter/decision from Commissioner of Education, dismissing petition, Margadonna v. Wall BOE et al., Agency Dkt. No. 225-7/02, October 29, 2002

P-1(4) Decision of State Board of Education, affirming Commissioner's Margadonna v. Wall BOE et al., Agency Dkt. No. 225-7/02, decision, February 5, 2003

P-1(5) Nominating Petition for April 15, 2003, Annual School Election for Margadonna, February 24, 2003

P-1(6) Notice of Appeal to the Superior Court, Appellate Division, from the Decision of State Board of Education, affirming Commissioner's Margadonna v. Wall BOE et al., Agency Dkt. No. 225-7/02, decision, February 5, 2003, March 5, 2003

P-1(7) Letter from BOE's attorney, April 15, 2003

P-1(8) Letter from respondent's attorney, April 16, 2003

P-1(9) Letter from BOE's attorney, April 16, 2003

For Respondent:

R-1 Letter brief, April 23, 2003

R-2 Statement of Issues, Margadonna v. Wall BOE et al., App. Div. No. A-3338-02T2, with exhibits

OAL DKT. NO. EDU 2409-03
AGENCY DKT. NO. 123-4/03

BOARD OF EDUCATION OF THE TOWNSHIP OF WALL, MONMOUTH COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
MARY LOU MARGADONNA,	:	
RESPONDENT.	:	

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

By letter dated April 29, 2003, respondent notified petitioner of her intent to dismiss, with prejudice, her remaining claims against the Board of Education and provided petitioner with a signed Stipulation of Dismissal addressed to the Superior Court of New Jersey, Appellate Division, confirming the same.[1] Having done so, the Commissioner finds there is no present issue with respect to respondent maintaining an inconsistent interest, as prohibited by *N.J.S.A.* 18A:12-2 , and no relief to be granted herein.

[1] The Superior Court issued an Order of Dismissal on April 30, 2003 in the matter entitled *Mary Lou Margadonna v. Wall Township Board of Education et al.*, New Jersey Superior Court, Appellate Division, A-3338-02T2.

Accordingly, the Commissioner dismisses the Petition of Appeal, without reaching to the Initial Decision issued by the Administrative Law Judge.[2]

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 6/2/03

Date of Mailing: 6/2/03

[2] The Commissioner clarifies only that *N.J.S.A.* 18A:12-2, "by its express terms, applies only to board members, prohibiting a '*member* of any board' (emphasis added) from having an interest in a contract with [or claim against] the board. A candidate for a seat on a board is not a board 'member' within the express prohibition of the statute. Given the clear and unambiguous language of the statute, it is evident that a victorious school board candidate who cured any conflicts prior to commencement of his or her term of office would *not* be disqualified from board membership by operation of that statute. Thus, *N.J.S.A.* 18A:12-2 cannot be read to disqualify individuals with inconsistent interests from being *candidates* for board membership.***" *Thomas v. Edwards*, 93 *N.J.A.R.*2d EDU 369, *aff'd in part, rev'd in part*, State Board of Education, November 3, 1993, Slip Opinion at 3.

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

264-03

CYNTHIA MC DAY,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF WOODBRIDGE, MIDDLESEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

June 2, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 02987-96S

AGENCY DKT. NO. 112-3/96

CYNTHIA McDAY,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WOODBRIDGE, MIDDLESEX COUNTY,

Respondent.

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

Elizabeth Farley Murphy, Esq., for the respondent (Wilentz, Goldman & Spitzer, attorneys)

Record Closed: May 12, 2003 Decided: May 14, 2003

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

This matter arises from the filing of a Petition of Appeal with the Commissioner of Education on March 19, 1996, by Cynthia McDay ("petitioner") requesting consideration of allegations against the Woodbridge Township Board of Education ("respondent") relative to a denial of salary and sick leave time for absences arising from a work-related injury. The matter was transmitted to the Office of Administrative Law on April 30, 1996, for a hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to settle the matter and prepared a Stipulation of Settlement and Dismissal attached hereto.

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

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

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

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

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

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

May 14, 2003
DATE

JEFF S. MASIN, ACTING CHIEF ALJ

Receipt Acknowledged:

May 15 2003
DATE

M. Kathleen Duncan (for)
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 10 2003

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

mjm
Attachment

WILENTZ, GOLDMAN & SPITZER
A Professional Corporation
90 Woodbridge Center Drive
Post Office Box 10
Woodbridge, New Jersey 07095
(732) 636-8000
Attorneys for Respondent,
Woodbridge Township Board of Education

CYNTHIA McDAY, Petitioner, v. WOODBRIDGE TOWNSHIP BOARD OF EDUCATION, MIDDLESEX COUNTY, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY AGENCY DOCKET NO. 112-3/96 OAL DOCKET NO. EDU 02987-96S **STIPULATION OF SETTLEMENT AND DISMISSAL**

The Woodbridge Township Board of Education ("Board"), with principal offices located at School Street, Box 428, Woodbridge, New Jersey 07095, and Cynthia McDay, residing at 76 West Willow Street, Colonia, New Jersey 07067, agree as follows:

W I T N E S S E T H:

WHEREAS, Cynthia McDay was employed by the Board as a school nurse between September 1, 1989 and April 30, 1997, the effective date of her retirement; and

WHEREAS, on February 28, 1995, Ms. McDay was injured in school when she was struck by a door that had been opened by a teacher (hereinafter "the accident"); and

WHEREAS, based upon information received from the Board's insurance carrier concerning Ms. McDay's ability to return to work, the Board charged Ms. McDay's sick leave bank for approximately 44 days of absence during the 1995-1996 school year; and

WHEREAS, on the 11 work days prior to her retirement (that is, between April 15, 1997 and April 30, 1997), Ms. McDay's pay was "docked" due to absence because she had no remaining paid leave in her sick leave bank; and

WHEREAS, a dispute arose concerning whether or not the Board properly charged Ms. McDay's sick leave bank during the 1995-1996 school year pursuant to N.J.S.A. 18A:30-2.1 which provides for payment of full salary and wages for up to one calendar year to employees injured as the result of an accident arising out of and in the course of their employment; and

WHEREAS, if the Board had not charged Ms. McDay's sick leave bank subsequent to the accident, Ms. McDay's pay would not have been docked between April 15, 1997 and April 30, 1997; and

WHEREAS, Ms. McDay filed a Petition of Appeal before the Commissioner of Education, Agency Reference Number 112-3/96; and

WHEREAS, the Commissioner of Education transmitted the matter for a hearing before the Office of Administrative Law, OAL Docket No. EDU 02987-96S; and

WHEREAS, Ms. McDay has advised the Board that she subsequently was awarded an accidental disability pension as a result of the accident; and

WHEREAS, on June 13, 2002, the Honorable Joel Gottlieb, J.C., entered an Order Approving Settlement with Dismissal of Ms. McDay's related claim

before the Division of Workers' Compensation, Claim Petition No. 1996-46663, regarding workers' compensation benefits for Ms. McDay as a result of the accident; and

WHEREAS, prior to a hearing being held before the Office of Administrative Law regarding the issue of reimbursement for statutory sick leave pursuant to N.J.S.A. 18A:30-2.1, the parties reached an amicable resolution to the issues in dispute.

NOW, THEREFORE, for the consideration specified below, the parties set forth the following mutual covenants and agreements:

1. Reimbursement for Sick Days. Within 30 days of the full execution of this Stipulation, the Board shall pay Ms. McDay $2,839.32 as full reimbursement for the eleven (11) work days between April 15, 1997 and April 30, 1997 on which her pay was docked due to absence. The parties agree that this payment represents any and all compensation owed by the Board to Ms. McDay to date. This amount will be reflected on an IRS Form W-2 Wage and Tax Statement. Such settlement amount shall be designated "wages" and shall be subject to all applicable state, federal and local taxes and any other withholdings as are required by law.

2. Dismissal of Petition. Upon full execution of this Stipulation, Ms. McDay will immediately withdraw her pending petition before the Commissioner of Education.

3. Release and Waiver. In consideration of the aforesaid payment and other terms and conditions of this Stipulation, and except as prohibited by law, Ms. McDay, personally and for her estate and/or her heirs, waives, releases

and gives up any and all claims, demands, obligations, damages, liabilities, causes of action, and rights, in law or in equity, known and unknown, that she may have against the Board and any and all of its officers, directors, agents, representatives and employees (present and former), and their respective successors and assigns, heirs, executors and personal or legal representatives (hereinafter "releasees"), based upon any act, event, or omission occurring before the execution of this Stipulation, including, but not limited to, any events related to, arising from, or in connection with, Ms. McDay's employment and/or association with releasees.

4. No Claims Permitted/Covenant Not to Sue. Ms. McDay agrees, to the fullest extent permitted by law, not to commence, encourage, facilitate or participate in any action or proceeding for damages, reinstatement, injunctive or any other type of relief, in any state, federal or local court or before any administrative agency relating to her employment, based upon any act, event or omission occurring before the effective date of this Stipulation. Nothing in this Stipulation is intended to prevent Ms. McDay from an action to enforce the Board's obligations as set forth herein. Nothing in this Stipulation is intended to prevent Ms. McDay from contacting the Equal Employment Opportunity Commission ("EEOC"); however, if Ms. McDay signs this Stipulation, she will not be able to obtain any relief or recovery in connection with any charge filed with the EEOC. Except as prohibited by law, in the event that any such charge, complaint or action is filed by Ms. McDay, it shall be dismissed with prejudice upon presentation of this Stipulation, and Ms. McDay shall

reimburse releasees for the costs, including attorneys' fees, of defending any such action.

5. No Admission of Liability. It is expressly understood that neither the execution of this Stipulation, nor any other action taken by releasees in connection with this settlement, constitutes an admission by releasees of any violation of any law, duty or obligation, or that any decisions or actions taken in connection with Ms. McDay's employment were unwarranted, unjustified, retaliatory, discriminatory, wrongful or otherwise unlawful. The parties agree that releasees have entered into this Stipulation to conclude this litigation and avoid costs and expenses attendant thereto. Releasees specifically reiterate their denial of any legal liability or obligation to Ms. McDay or any other person.

6. Entire Agreement. This Stipulation contains the sole and entire agreement among the parties hereto, and fully supersedes any and all prior agreements and understandings pertaining to the subject matter hereof. No other promises or agreements shall be binding unless in writing, signed by the parties hereto, and expressly stated to represent an amendment to this Stipulation.

7. Counterparts and Applicable Law. This Stipulation may be executed in counterparts and shall be construed and interpreted in accordance with the laws of the State of New Jersey. The parties agree that any action to enforce or interpret this Stipulation shall only be brought in a court of competent jurisdiction of the State of New Jersey, which the parties hereby acknowledge and agree to be the Superior Court of the State of New Jersey,

venued in Middlesex County. The parties further agree that this Stipulation may be specifically enforced in court, may be the subject of an action for breach, and may be used as evidence in a subsequent proceeding in which either of the parties allege a breach of this Stipulation, and that in the event that Ms. McDay breaches this Stipulation and releasees are successful in an action against her, Ms. McDay shall be liable for the attorneys' fees and costs incurred by releasees with respect to any such action.

8. Revocation. As required by the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 626, Ms. McDay will have twenty-one (21) days from her receipt of this Stipulation to consider its terms before signing it. Once Ms. McDay signs this Stipulation, she shall have seven (days) to revoke this Stipulation or it shall become binding and in full force and effect seven (7) days after Ms. McDay signs it. Ms. McDay may revoke this Stipulation for a period of seven days following the day she signs it. Any revocation within this period must be submitted, in writing, to Elizabeth Farley Murphy, Esq., Wilentz, Goldman & Spitzer, P.A., 90 Woodbridge Center Drive, P.O. Box 10, Woodbridge, NJ 07095 and must state "I hereby revoke my acceptance of this Stipulation." The revocation must be personally delivered to Elizabeth Farley Murphy, or mailed to Elizabeth Farley Murphy, and postmarked within seven days of execution of the Stipulation. This Stipulation shall not become effective or enforceable until after the revocation period has expired. If the last day of the revocation period is a Saturday, Sunday, or legal holiday in New Jersey, then the revocation period shall not expire until the next following day which is not a Saturday, Sunday, or legal holiday. Ms. McDay acknowledges that she

waives her rights or claims herein in exchange for consideration in addition to anything of value to which she already is entitled. Ms. McDay acknowledges that she has been advised to consult with an attorney prior to executing this Stipulation;

9. This Stipulation must be approved by the Board by resolution prior to being effective or final.

IN WITNESS WHEREOF, THE PARTIES HERETO SET THEIR HANDS TO THIS STIPULATION AS FOLLOWS:

Cynthia McDay
CYNTHIA McDAY

March 21, 2003
Date

STATE OF NEW JERSEY:
: ss:
COUNTY OF MIDDLESEX

I CERTIFY that on March 21st, 2003, CYNTHIA McDAY personally came before me and acknowledged under oath, to my satisfaction, that she: (a) is named in and personally signed this document; and (b) signed, sealed and delivered this document as her own act and deed.
Sworn and subscribed to before me this 21st day of March, 2003.

Kamini Patel
Notary Public, State of New Jersey

KAMINI PATEL
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires May 27, 2004

3/24/03

ATTEST:

Vincent S. Smith
Superintendent of Schools/
Business Administrator/Board
Secretary

4/24/03
Date

WOODBRIDGE TOWNSHIP
BOARD OF EDUCATION

Judy Leidner
Judy Leidner
President

5/1/03
Date

OAL DKT. NO. EDU 02987-96S
AGENCY DKT. NO. 112-3/96

CYNTHIA MC DAY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WOODBRIDGE, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 6/02/03

Date of Mailing: 6/02/03

* Respondent's counsel confirmed by letter, dated May 5, 2003, that the Board approved the Stipulation of Settlement at its meeting on April 24, 2003.

274-03

274-03

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

COMMISSIONER OF EDUCATION

DECISION

June 3, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 1226-03

AGENCY DKT. NO. 407-12/02

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,

Petitioner,

v.

SANDRA KEARNEY,

Respondent.

Arsen Zartarian, Esq., appearing for petitioner

Eugene G. Liss, Esq., appearing for respondent

Record Closed: April 10, 2003 Decided: May 1, 2003

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

Petitioner State-Operated School District of the City of Newark (District) certified tenure charges of conduct unbecoming a school employee against tenured teacher Sandra Kearney (Respondent) under the Tenure Employees Hearing Law, *N.J.S.A.* 18A:6-10 to -18.1. The Bureau of Controversies and Disputes of the Department of Education transmitted to the Office of Administrative Law (OAL) on January 17, 2003, for hearing as a contested case.

Prior to the hearing scheduled April 28, 2003, settlement discussions were held and a settlement was reached. In April 2003, the settlement was reduced to writing and signed by the parties. Based on a review of the record and testimony at the hearing, I **FIND** that the proposed settlement is consistent with the public interest for the following reasons.

1. Ms. Kearney has been an employee of the District for 18 years, wherein she required tenure as a teaching staff member.

2. During the past several years, certain allegations of improper conduct was made against Ms. Kearney involving inappropriate behavior and corporal punishment.

3. In November 2002, the Board determined, after a lengthy investigation, to charge Ms. Kearney with multiple counts of conduct unbecoming a school employee and charged that this conduct warranted Ms. Kearney's dismissal (See District's Petition and Statement of Supporting Evidence).

4. Prior to the hearing, the parties became convinced that it was in the public interest to settled the matter.

5. At the hearing the District representative explained the reasons why the District decided to settled the matter rather than try it. These reasons included that the students involved were elementary and middle school children of tender years who might be traumatized by the hearing. The multi-day hearing might have caused grave inconvenience to the children, the parents and the District. The passage of time had resulted in some children giving contradiction statements. On the older claims the District has been unable to locate at least one victim. The settlement would result in a complete and permanent separation as desired by the Board.

6. Ms. Kearney, under oath, testified credibly and appropriately that she understood the settlement, and she thought that the settlement was in her interest as well as the public interest.

7. Ms. Kearny expressly understood that the Commissioner of Education may refer this matter to the State Board of Examiners for possible certificate revocation proceedings. Before entering into this agreement, Ms. Kearney was advised by counsel and fully understood her rights.

I **FIND** that the parties have voluntarily entered into this agreement which fully disposes of all issues in controversy and is consistent with the law.

Therefore, I **CONCLUDE** that the terms of the settlement are in the public interest as well as the party's interest and otherwise meet the requirements of *N.J.A.C.* 6A:3-5.6. I hereby **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

May 1, 2003
DATE

MARGARET M. HAYDEN, ALJ

Receipt Acknowledged:

5-6-03
DATE

M. Kathleen Dunbar
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 0 9 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jb

J-1 Ex

NEWARK PUBLIC SCHOOLS
Office of the General Counsel
2 Cedar Street
Newark, New Jersey 07102
(973) 733-7139

MAR 10 10 23 AM '03

In the Matter of the Tenure Hearing of	**BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY**
SANDRA KEARNEY, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK	**OFFICE OF ADMINISTRATIVE LAW** **Agency Ref. No. 407-12/02** **Docket No. EDUTH 01226-03N**
	STIPULATION OF SETTLEMENT

WHEREAS, the parties, State-Operated School District of the City of Newark ("District"), and Sandra Kearney ("Ms. Kearney"), a tenured teacher, residing at 27 Highland Terrace, Irvington, New Jersey 07111, hereby stipulate and agree as follows:

1. Ms. Kearney hereby agrees to irrevocably resign her tenured teaching position, effective September 30, 2003, and to relinquish any rights to such position under *N.J.S.A.* 18A:28-5. Attached is a copy of the signed Letter of Resignation (Exhibit A). Upon the final approval of the signed Stipulation, the District shall and hereby does withdraw the Tenure Charges of Conduct Unbecoming certified on or about December 30, 2002.

2. Ms. Kearney will receive her salary and benefits as an employee from January 1, 2003 through September 30, 2003.

3. In accordance with the District's Department of Records/Verification policy, unless otherwise compelled by law and/or Authorization of Release by Ms. Kearney, an authorized District representative will only confirm dates of employment and separation.

4. As of September 30, 2003, all of Ms. Kearney's employment rights, including, but not limited to salary, insurance coverage, tenure and seniority, will permanently end. Ms. Kearney expressly waives and gives up any rights to tenure in the District and agrees not to seek employment with the District in the future.

5. As of September 30, 2003, Ms. Kearney will receive compensation for all sick, personal and/or vacation days accrued as per the terms of the Collective Bargaining Agreement between the State-Operated School District of the City of Newark and the Newark Teachers Union.

6. The District will not pursue tenure charges against Ms. Kearney as long as this Stipulation remains in effect and is not voided by any court of competent jurisdiction or agency with jurisdiction over this matter. However, if the Stipulation is voided, the District retains the right to file and consider for certification tenure charges against Ms. Kearney, including such charges that have previously been filed by the District against Ms. Kearney and Respondent does not admit to Petitioner's charges.

7. Ms. Kearney specifically acknowledges that she has been advised of the duty of the Commissioner of Education pursuant to N.J.A.C. 6:11-3.6 and In re Cardonick concerning referral to the State Board of Examiners for

possible action regarding her teaching certification. The parties agree that settlement of this matter will be in the public's best interest. In addition, settlement of this matter will avoid the necessity of student testimony

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

9. This Stipulation constitutes the full agreement between the parties.

10. The undersigned representatives of the parties hereby acknowledge that they have been duly authorized by the respective parties to sign this Stipulation and bind their principals to its terms.

11. Except as noted above, Ms. Kearney waives all claims of any nature in any forum against the State Operated School District of the City of Newark with regard to this matter, including fees, or other monetary relief. This agreement includes, without limitation, any and all claims directly or indirectly related to or arising out of her employment by the District. This release specifically includes, but is not limited to, discrimination on any basis, including claims Ms. Kearney may have in connection with her employment with Respondent under the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, the Age Discrimination in Employment Act, the New Jersey Law Against Discrimination, the Older Workers Benefit Protection Act, the Conscientious Employees Protection Act, and any other federal or state civil rights laws, wrongful discharge claims, grievances under collective bargaining agreement, sick leave,

disability, or payment, with the exception of any claim under the workers compensation laws.

12. This Stipulation is subject to approval by the State District Superintendent and the Commissioner of Education.

Dated: April 2 2003

Sandra Kearney

Dated: April 2 2003

Eugene Liss, Esq.
Attorney for Ms. Holman

Dated: 4/8/03

Marion Bolden
State District Superintendent

Dated: 4/8/03

Arsen Zartarian, Esq.
Associate Counsel
Newark Public Schools

Exhibit A

April 2, 2003

Ms. Marion Bolden
State District Superintendent
Newark Public Schools
2 Cedar Street
Newark, New Jersey 07102

Dear Ms. Bolden:

I hereby resign my tenured teaching position with the State Operated School District of the City of Newark effective September 30, 2003.

Very truly yours,

Sandra Kearney

Sandra D Kearney

CERTIFICATION

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

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

SANDRA KEARNEY

DATE

OAL DKT. NO. EDU 1226-03
AGENCY DKT. 407-12/02

IN THE MATTER OF THE TENURE	:	
HEARING OF SANDRA KEARNEY,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF NEWARK, ESSEX	:	
COUNTY.	:	
	:	

The record, Stipulation of Settlement and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon review, the Commissioner approves the settlement terms since they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846; *N.J.A.C.* 6A:3-5.6(a). The matter is hereby dismissed, subject to compliance with the terms of the settlement. A copy of this decision will be transmitted to the State Board of Examiners for action as it deems appropriate.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 6|03|03

Date of Mailing: 6|03|03

284-03

AP-BOYD, INC., A NEW JERSEY CORPORATION, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY AND FRANK C. GIBSON, INC., RESPONDENTS.	:	DECISION

SYNOPSIS

Petitioning contractor and unsuccessful bidder alleged the Board did not award contract for plumbing and fire protection to the lowest bidder. The Board contended petitioner did not comply with a statutory disclosure requirement and sought award of counsel fees.

The ALJ found that the Board was correct in rejecting petitioner's bid, accepting the next lowest bid from Respondent Gibson and awarding the contract to Gibson. The ALJ determined that failure to comply with the statutory disclosure requirement was a material defect in the bid requiring its rejection. *N.J.S.A.* 52:25-24.2. Moreover, the ALJ concluded that, pursuant to the provisions of the Instructions to Bidders, petitioner was obligated to reimburse the Board the legal fees and costs it incurred in defending against petitioner's protest. The ALJ ordered the reimbursement.

The Commissioner adopted the findings and determination in the Initial Decision as his own and directed petitioner to reimburse the Board in the amount of $4,453.21 for legal fees and costs. The Petition was dismissed.

June 9, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
GRANTING RESPONDENTS' MOTIONS FOR SUMMARY DECISION IN PART, AND DENYING PETITIONER'S MOTION FOR SUMMARY DECISION
OAL DKT. NO. EDU 4723-02
AGENCY DKT. NO. 170-6/02

AP-BOYD, INC., A NEW JERSEY CORPORATION,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY AND FRANK C. GIBSON, INC.,
Respondents.

Steven P. Russo, Esq., for petitioner
James H. Landgraf, Esq., for respondent Board of Education (Cureton Caplan, attorneys)
Joseph J. Hocking, Esq., for respondent Frank C. Gibson (Hedinger & Lawless, attorneys)

Record Closed: April 15, 2003 Decided: April 22, 2003

BEFORE **JOSEPH F. MARTONE**, ALJ:

STATEMENT OF THE CASE

In this matter, petitioner asserts that respondent Board of Education improperly did not award a contract to the lowest responsible bidder. In challenging this action, petitioner initially filed a petition on June 6, 2002, protesting rejection of petitioner's bid and accepting a higher bid. Following this, petitioner filed a petition for declaratory ruling on June 15, 2002. On July 19, 2002, the Commissioner declined to consider the matter as one for declaratory judgment. The matter was then transmitted to the Office of Administrative Law (OAL) on July 29, 2002, for hearing as a contested case. The matter was assigned to me on August 28, 2002, and a telephone prehearing conferences were scheduled for October 1, 2002, and December 4, 2002. The matter was scheduled for hearing on April 22 and 23, 2003. During the discovery period, discovery orders were entered on January 28, 2003, dealing with certain discovery motions made by the parties.

On March 5, 2003, respondent Middletown Township Board of Education filed a motion for summary judgment[1] seeking dismissal of the petition (RB-1) together with a supporting brief (RB-2) and certifications (RB-3 and RB-4). On March 18, 2003, respondent Frank C. Gibson, Inc., (Gibson) filed a cross motion for dismissal (RG-1) with supporting certifications (RG-2 and RG-3) and brief (RG-4). On March 24, 2003, petitioner filed a cross motion for summary judgment (P-1) a certification of Andre Poulos (P-2) and a memorandum of law (P-3) in opposition to the motions of respondents. On March 31, 2003, petitioner filed a certification of Andre Poulos (P-4) and a memorandum of law (P-5) opposition to the motions of respondents. On March 28, 2003 (received April 15, 2003), respondent Board of Education submitted a letter in lieu of brief in opposition to petitioner's submission (RB-6). On April 2, 2003, respondent Board of Education submitted a certification supporting respondent Gibson's cross motion to dismiss (RB-5). On April 9, 2003, respondent Gibson filed a letter brief in reply to petitioner's opposition to its motion (RG-5).

[1] The correct designation pursuant to *N.J.A.C.*1-12.5 is a motion for summary decision.

N.J.A.C. 1:1-12.2(e) provides that all motions in writing shall be submitted for disposition on the papers unless oral argument is directed by the judge. Since I have determined that oral argument is not necessary in order to address the issues herein, and since the matter was scheduled for hearing on April 22, 2003, the motions were submitted to me for decision without awaiting the requisite 20 days provided for by *N.J.A.C.* 1:1-12.2(a) and the record was close on April 15, 2003, the date of receipt of the last submission.

FACTUAL DISCUSSION

A careful review of the certifications in this matter reveals that most of the essential facts relating to the issues to be addressed herein are not in dispute. For the purpose of deciding the pending motions, the facts set forth as follows are determined to be the facts in this matter.

On May 16, 2002, petitioner submitted a bid for plumbing and fire protection portion of the project in the amount of $1,313,560. It is undisputed that petitioner's bid was the lowest bid presented to respondent for this portion of the project.

On May 17, 2002, respondent Frank C. Gibson, Inc. (Gibson) protested the low bid submitted by petitioner alleging that petitioner exceeded its pre-qualified classification limit of $4,000,000 by excluding certain contracts awarded for renovations at an elementary school in Freehold and by not being truthful as to the dollar amount of work to be completed on other projects.

On May 21, 2002, respondent Board required petitioner to confirm all information provided in support of its bid and on that same date, petitioner replied by fax forwarding documentation and confirming all information.

On May 22, 2002, respondent Board accepted the bid of respondent Gibson for $1,359,411 and awarded the contract to respondent Gibson for the plumbing and fire protection portion of the project, even though it was $45,851 higher than petitioner's bid. On May 31, 2002,

respondent Board faxed a notice to petitioner that petitioner's bid had been rejected on May 22, 2002, as non-responsive to the bid requirements for the following alleged reasons: (a) petitioner failed to provide a pre-qualification application affidavit with its bid, (b) petitioner failed to submit a stock-partner disclosure statement, (c) petitioner failed to provide a contractor's certification of qualifications, (d) petitioner provided a financial statement dated December 31, 2000, and (e) petitioner would have exceeded its New Jersey Department of Treasury Notice of Classification aggregate amount of work of $4,000,000 by $237,000 if the bid had been awarded to petitioner.

LEGAL DISCUSSION AND ANALYSIS

The issues raised by the motions and cross motions herein are as follows:

1. (a) Whether petitioner's bid complied with *N.J.S.A.* 52:25-24.2 requiring a corporation or partnership to submit a statement setting forth the names and addresses of all stockholders in the corporation or partnership who own 10% of more of its stock, or of all individual partners in the partnership who own a 10% or greater interest therein, as the case may be, prior to the receipt of the bid or accompanying the bid? (b) If petitioner failed to comply, is this an appropriate basis for rejecting petitioner's bid and for dismissal of the petition?

2. Whether the petition should be dismissed as moot based on the amount of work performed to date by respondent Gibson, pursuant to *Richardson Engineering Co. v. Rutgers, et al.*, 52 *N.J.* 207, 219 (1968)?

3. Whether petitioner, as an unsuccessful protester to the award of the bid, is obligated to pay counsel fees to respondent Board of Education pursuant to the Instructions to Bidders?

1. Legal effect of N.J.S.A. 52:25-24.2

N.J.S.A. 52:25-24.2 provides:

> No corporation or partnership shall be awarded any contract nor shall any agreement be entered into for the performance of any work or the furnishing of any materials or supplies, the cost of which is to be paid with or out of any public funds, by the State, or any county, municipality or school district, or any subsidiary or agency of the State, or of any county, municipality or school district, or by any authority, board, or commission which exercises governmental functions, unless prior to the receipt of the bid or accompanying the bid, of said corporation or said partnership, there is submitted a statement setting forth the names and addresses of all stockholders in the corporation or partnership who own 10% or more of its stock, of any class or of all individual partners in the partnership who own a 10% or greater interest therein, as the case may be. If one or more such stockholder or partner is itself a corporation or partnership, the stockholders holding 10% or more of that corporation's stock, or the individual partners owning 10% or greater interest in that partnership, as the case may be, shall also be listed. The disclosure shall be continued until names and addresses of every noncorporate stockholder, and individual partner, exceeding the 10% ownership criteria established in this act, has been listed.

In reaching a decision as to the legal effect of the foregoing statutory provision, I will accept as true the statements set forth in the Certification of Andrew Poulos. In that Certification, Mr. Poulos states that he is Vice president of AP-Boyd, Inc., and that his Certification is based upon his own personal knowledge of the facts and circumstances surrounding the issues raised by this litigation. He states that respondent Board of Education has filed a motion for summary judgment that specifically seeks a dismissal of AP-Boyd's petition for failure to submit a "stockholder or partnership disclosure statement" which, according to respondent Board, is an "absolute requirement of the bidding documents". William Doering, Business Administration and Board Secretary of respondent Board stated that this stockholder or partnership disclosure statement is "a document establishing compliance with *N.J.S.A.* 52:25-24.2", which statute requires such a disclosure statement on the bidding for school projects.

In his Certification, Mr. Poulos states that AP-Boyd's failure to complete this "stockholder or partnership disclosure statement" is not fatal to its bid as has been urged by

respondent Board. The above statute is not intended to require respondent Board to accept respondent Gibson's higher bid because of a mere technical violation by the lowest bidder. In paragraphs 4 through 6 of his Certification, Mr. Poulos goes on to state that:

> 4. While AP-Boyd did not submit this disclosure statement, it should be noted that AP-Boyd submitted its New Jersey Notice of Classification Letter and Certificate verifying AP-Boyd, Inc is a licensed HVAC, Plumbing & Sprinkler Contractor. By definition AP-Boyd, Inc. could not be so licensed unless at least one corporate stockholder is a licensed master plumber and owns 10% of the corporate stock. Both John Krohn and I are licensed master plumbers who each own 10% of the issued and outstanding stock. Our respective wives, Kathleen Krohn and Susan M. Poulos, each own 40% of the remaining issued and outstanding stock.
>
> 5. Included in AP-Boyd's Bid Application is the Contractor's Qualification Statement where it is disclosed that Susan M. Poulas is President, I am Vice-President, Kathleen Krohn is Secretary and John Krohn is Treasurer of the corporation. In the Contractor's Qualification Statement, it is further disclosed that AP-Boyd is a licensed plumber legally qualified to do business in New Jersey. Attached to the Contractor's Qualification Statement are our Resumes in which both John Krohn and I disclose we are Licensed Master Plumbers. (Exhibit H-1 to H-9) [Attachments to Poulos Certification.]
>
> 6. AP-Boyd also acknowledges its awareness of *N.J.S.A.* 52:25-24.2 requiring all owners of 10% of the stock of AP-Boyd be disclosed. I believed we had done that by disclosing the names of the 4 individuals who are officers (and the only stockholders). This, combined with the requirement that John Krohn and I must own at least 10% of the stock for AP-Boyd in order to be licensed, led me to believe AP-Boyd had substantially complied.

According to Mr. Poulos, the bids were opened on May 16, 2002. On May 21, 2002, respondent Board sought clarification of certain bid deficiencies. (Exhibit A). Petitioner was given 24 hours to produce documentation, which Mr. Poulos asserts included the stockholder disclosure statement. Petitioner immediately produced documentation as to the uncompleted work projects that it believed was respondent Board's most important concern. Respondent Board did not respond to Mr. Poulos' request for 48 hours (until noon of May 23) in order to respond to its request, instead of the 24 hours it required. Mr. Poulos states that he was not

available in the office to respond for the middle 24 hours of that time period (ie. May 22) because of a prior commitment. He then faxed two letters to respondent Board's representative, Hill International, forwarding information as to contracts and advised them he would forward the balance of the information by noon on May 23, 2002. (Exhibit B-1 to B-3). Instead, respondent Board of Education awarded the contract to respondent Gibson on May 22, 2002. By letter dated May 24, 2002, which AP-Boyd received on May 31, 2002, Mr. Poulos was notified of the rejection of AP-Boyd's bid. (Exhibit C).

Petitioner contends that the taxpayers of Middletown have been asked to pay the additional cost of $45,581 for the sake of the waiveable requirement of the 10% stock disclosure ownership form.

Respondents rely on *Muirfield Const. v. Essex County*, 336 *N.J. Super.* 126 (App. Div. 2000), in support of their contention that the failure of the lowest bidder to comply with a statutory disclosure requirement is a material defect in the bid requiring its rejection. However, it may be argued that *Muirfield* is distinguishable from the present matter because it dealt with the alleged failure on the part of the lowest bidder to comply with two separate statutory disclosure requirements. In addition to the disclosure requirements of *N.J.S.A.* 52:25-24.2, the provisions of *N.J.S.A.* 45:14C-2(h) require that a licensed master plumber own at least 10% of a bidding entity's stock in order to qualify as a "plumbing contractor" competent to participate in the public bidding process. It also involved the provisions of *N.J.S.A.* 40A:11-23.2c of the *Local Public Contracts Law* prohibiting any subsequent cure of defects in a statement of corporate ownership required by bid plans and specifications. In discussing the reasons for its decision, the *Muirfield* Court stated that the duty to disclose under *N.J.S.A.* 52:25-24.2 becomes a significant imperative when considered with the mandate of *N.J.S.A.* 45:14C-2(h), indicating that the purpose of licensed master plumber 10% ownership insures that a person of requisite skill and knowledge who is exposed to appropriate sanctions for violations, will have an interest in and control over the performance of the public contract. *Muirfield, supra,* 336 *N.J. Super.* at 135.

There are a number of other cases that appear to clarify the law on this point. In *George Harms Construction Co., Inc. v. Borough of Lincoln Park,* 161 *N.J. Super.* 367, (Law Div.1978),

it was determined that a bidder's purported inadvertent failure to submit a list of all shareholders or partners owning 10% or more of the company in accordance with the mandate of *N.J.S.A.* 52:25-24.2 was neither waivable nor curable, even though the required list was provided ***shortly after*** the opening of bids. [Emphasis added.] The Court indicated at p. 376 that in furtherance of the public policy of open competition on common terms, the courts of New Jersey have consistently held that where an error is deemed material, it cannot be cured after bids are opened, even where the error results from simple negligence. The Court stated that to permit correction of material deficiencies after bid opening would open the door to fraud and favoritism and defeat the statutory purpose of protection of the public. The Court reasoned that if the bidder was dissatisfied with the bids or determined to avoid the contract the bidder could refuse to supply the missing statement. The municipality would then be without authority to award the contract and the bidder would have been given the option to frustrate the bidding procedure. *Id.* at 377.

In *Stano v. Soldo Constr. Co.,* 187 *N.J. Super.* 524, 531, 539 (App.Div.1983), the Appellate Division distinguished the incurable bid defect in *Harms* from a non-defective but "unavoidably confusing" bid disclosure statement which was accurate but was later "clarified". It agreed with the trial court's assessment that the bidder had provided an accurate shareholder's statement, and that "[t]he later clarification was simply intended to aid the county in its interpretation of the statement and was permissible." *Id.* at 539. The Court limited the decision in *George Harms Constr. Co.* to cases where there has been no submission of a proper statement at all. *Id.* at 539. In doing so, the Court accepted the decision in *Harms* as a valid statement of the law.

In *Schlumberger Industries, Inc. v. Borough of Avalon,* 252 *N.J. Super.* 202, 211-12, (App.Div.1991), certif. denied, 130 *N.J.* 8 (1992), the Court recognized that a bidder's later clarification of the commonly-known fact that it was a wholly-owned subsidiary of a large public corporation with no single 10% shareholders did not impact upon the bidding process in a manner implicating the bid award biases that the mandate of *N.J.S.A.* 52:25-24.2 was intended to preclude. The Court stated the following:

> Furthermore, in the case of a public corporation, where the principal disclosure anticipated by the statute relating to any individuals owning over 10% of the corporate stock would have resulted in an answer of 'none" or "not applicable," there may even be a consideration of relaxing this requirement if there is an immediate cure and there is no deception concerning the identity of the bidder. [Id. at 209.]

However, the Court specifically noted that "if there had been undisclosed shareholders holding 10% or more of the stock or if the identity of even a public company had been purposely withheld, the bid might properly have been rejected." *Id.* at 212.

See also Impac, Inc. v. City of Paterson, 178 *N.J. Super.* 195, 202-03 (App. Div. 1981), *certif. denied sub nom. Impact, Inc. v. City* of *Paterson,* 87 *N.J.* 414, (1981), affirming the rejection of a bid where the requisite statement of ownership "substantially departed from the requirements of *N.J.S.A.* 52:25-24.2, and gave erroneous information of a significant nature.

Based on the foregoing, I **FIND** that *N.J.S.A.* 52:25-24.2 specifically prohibits the awarding of any contract to be paid with public funds, unless prior to the receipt of the bid or accompanying the bid, a corporation or partnership submits a statement setting forth the names and addresses of all stockholders who own 10% or more of its stock or of all individual partners in the partnership who own a 10% or greater interest therein. I **FIND** that this mandate is neither waivable nor curable, even if the required statement is provided shortly after the opening of bids. Finally, I have carefully reviewed all of the documents referred to by Mr. Poulos in paragraphs 5 and 6 of his Certification. While several of them divulge the names of the President, Vice-President, Secretary and Treasurer of petitioner AP-Boyd, and one of them sets forth the Resumes of the Principals (H-5), I **FIND** that not one of the documents referred to by petitioner complies with the requirement for a statement setting forth the names and addresses of all stockholders who own 10% or more of the stock of AP-Boyd. Therefore, I **CONCLUDE** that respondent Board of Education was correct in rejecting petitioner's bid, accepting the next lowest bid of respondent Gibson for $1,359,411 and awarding the contract to respondent Gibson for the plumbing and fire protection portion of the project.

2. Mootness issue

I next turn to the question whether the petition should be dismissed as moot based on the amount of work performed to date by respondent Gibson? I should note that it is not necessary to deal with this issue in view of my determination that petitioner's bid was properly rejected by respondent Board of Education. However, I recognize that the transmitting agency, or the Courts if there is an appeal, may disagree with my determination as to that issue. Therefore, in order to make a complete a record and avoid time-consuming remands, I will attempt to set forth my rulings on any open issues, if possible.

Respondents Gibson and Board of Education argue that pursuant to *Richardson Engineering Co. v. Rutgers, et al.,* 52 *N.J.* 207, 219 (1968), it should be so dismissed. In *Richardson,* the Court stated:

> When a party seeks review of the award of construction contracts for projects of the type involved in that matter, the attack must be made with the "utmost promptitude." *Bullwinkel v. City of East Orange, 4 N. J. Misc.* 593 *(Sup. Ct.* 1926). Whenever public money is to be expended or if the successful bidder has made substantial preparations for the work, incurred considerable expenses and obligated himself still further in undertaking to carry out the contract, ordinarily, review of the award will be denied unless sought promptly. *Gunne v. Borough of Glen Ridge,* 11 *N. J. Misc.* 3 (Sup. Ct. 1932); *Brown v. Atlantic City,* 5 *N. J. Misc.* 397 (Sup. Ct. 1927); *Read v. Atlantic City,* 49 *N. J. L.* 558, 562 (Sup. Ct. 1887). [*Id.* at 219]

In the *Richardson* case, the plaintiff did not file suit until 18 days after the execution of the contract it was challenging. In this matter, petitioner filed its petition with the Commissioner of Education on June 6, 2002, approximately 6 days after petitioner was notified if the rejection of its bid. The contract with respondent Gibson was signed on June 17, 2002. Under these circumstances, it appears that a determination whether petitioner failed to challenge the bid award with the utmost promptitude cannot be decided on the facts before me based on the factual scenario in the *Richardson* case. Thus, a hearing would be necessary in order to understand the

circumstances surrounding petitioner's filings in this matter in order to determine whether petitioner acted with the utmost promptitude. Accordingly, I **CONCLUDE** that this issue cannot be decided by a motion for summary decision. See, *Brill v. Guardian Life Ins. Co. of America,* 142 *N.J.* 520 (1995).

3. Claim for legal fees

I next turn to the question whether petitioner, as an unsuccessful protester to the award of the bid, is obligated to pay counsel fees to respondent Board of Education pursuant to the Instructions to Bidders? It is noted that respondent Board of Education sought the relief of the award of counsel fees in defending petitioner's bid protest in its Reply and Cross-Petition filed in this matter.

In paragraph 12 through 14 of his Certification, William Doering, respondent's Business Administrator and Board Secretary states:

> 12. Section 5.2.2 of the Instructions to Bidders (Exhibit B) further provided that by submission of its bid each bidder "agrees and understands that if it initiates a bid protest to question either the action of the owner in rejecting one or more bids or in accepting any bid, and the appropriate tribunal determines that the owner acted within its legal rights and its actions were appropriate and are sustained, that the bidder raising the protest shall be liable and responsible to the owner for any and all costs incurred by the owner as a result of any delay caused in awarding the contract to which the bid protest applied, as well as any and all costs and expenses, including legal fees, incurred by the owner in defending such protest".
>
> 13. It was the position of the Board that not only was it within its rights to reject the Boyd bid on the basis of the bid submittal deficiencies, but that with regard to the absence of the stockholder and partner disclosure statement as required by *N.J.S.A.* 52:25-24.2, that the Board was mandated to reject the bid in that this bid submittal attachment was deemed as a mandatory, non-waivable bid requirement.

> 14. Although the project has moved forward and has been in progress for close to a year, and therefore no delays in the progress have occurred, the Board has incurred significant cost in legal fees in defending this current protest. To date, the Board has incurred legal costs in the amount of $4,519.21 for which it is entitled to recovery from AP Boyd under the terms of Section 5.2.2.

The general rule is that counsel fees are the responsibility of each litigant and are not recoverable absent express authorization by statute, court rule or contract. *R.* 4:42-9; *State Dept. of Environ. Protect. v. Ventron Corp.,* 94 *N.J.* 473, 504 (1983). It has also been held that the Commissioner of Education does not have plenary authority to award counsel fees in determining "controversies and disputes" presented for determination under Education Law. *Balsley by Balsley v. North Hunterdon Regional Sch. Dist. Bd. of Educ.,* 225 N.J. Super. 221, 225-226 (App. Div. 1988), reversed on other grounds, 117 *N.J.* 434, 441-442 (1990). In *Fisher v. Bd. of Educ. Union Tp., et al.,* 99 *N.J. Super.* 18, 22 (App. Div. 1968), it was held that since the Commissioner and State Board play a significant role in relation to contracts for school construction, it was appropriate that a controversy involving a construction contract be decided in the first instance by the Commissioner and State Board under school law. Therefore, I **CONCLUDE** that a contractual provision for counsel fees in a school construction matter may be decided by the Commissioner of Education.

It is undisputed that the Instructions to Bidders provided that by submission of its bid each bidder agrees and understands that if it initiates a bid protest and it is determined that the owner's actions were appropriate and are sustained, the bidder raising the protest shall be liable and responsible to the owner for any and all costs and expenses, including legal fees, incurred by the owner in defending such protest. This provision is an undertaking by the bidder by contract, and is one of the exceptions to the general rule. See, Comment, paragraph 2.11 to *R.* 4:42-9, wherein it is stated that counsel fees may be allowed where the parties have agreed thereto in advance by stipulation in a promissory note, power of attorney or other agreement or contract or where there is a statutory or contractual indemnity so providing, citing, e.g. *Satellite Gateway Com. v. Musi Dining Car Co.,* 110 *N.J.* 280 (1988); *Ryan v. Biederman Industries,* 223 *N.J. Super.* 492 (App. Div. 1988); *Liqui-Box v. Estate of Elkman,* 238 *N.J. Super.* 588 (App. Div. 1990), certif. den. 122 *N.J.* 142 (1990); *Holbert v. Great Gorge Village,* 281 *N.J. Super.* 222.

228-229 (Ch. Div. 1994); *Belfer v. Merling.* 322 *N.J. Super.* 124, 141 (App. Div. 1999). Such a provision will, however, be strictly construed in light of the general policy disfavoring counsel fee awards, referring to *McGuire v. City of Jersey City.* 125 *N.J.* 310 (1991).

It should be noted that in this case, petitioner did not challenge or otherwise question the amount of counsel fees being sought by respondent Board of Education. Attorney for respondent Board of Education also submitted a certification as to counsel fees and costs (RB-3). I **FIND** that the hourly rate of $165.00 per hour is not unreasonable and should be approved. However, I **FIND** that billings annexed to the certification of counsel total $4,453.21 rather than the amount set forth in his certification. *See, Pardo v. Chevrolet Motor Division,* 92 *N.J.A.R.* 2d (CMA) 105, approving a counsel fee based on an hourly rate of $150.00 in 1992. Therefore, I **FIND** that respondent Board of Education is entitled to recovery of legal fees and costs from AP Boyd under the terms of Section 5.2.2. of the Bid Specifications. Accordingly, I **CONCLUDE** that petitioner is obligated to reimburse to the respondent Board of Education the legal fees and costs it has incurred in defending petitioner's protest in the corrected amount of $4,453.21.

Conclusion

In the foregoing discussion, I have determined that respondent Board of Education of the Township of Middletown was correct in rejecting petitioner's bid and accepting the next lowest bid of respondent Gibson and awarding the contract to respondent Gibson for the plumbing and fire protection portion of the project. With respect to whether the petition should be dismissed as moot based on the amount of work performed to date by respondent Gibson, I found that I could not make a determination on a motion and that a hearing would be necessary in order to assess all of the surrounding circumstances. However, based on my decision regarding the propriety of rejecting petitioner's bid, I **FIND** that it is unnecessary to schedule a hearing to determine this issue. Finally, I have determined that petitioner is obligated to reimburse respondent Board of Education for the legal fees and costs it has incurred defending petitioner's protest in the amount of $4,453.21. I **FIND** that as a result of these determinations, this matter is concluded and should result in the dismissal of petitioner's petition.

DECISION AND ORDER

Based on the foregoing, it is hereby **ORDERED** that the actions of respondent Board of Education in rejecting petitioner's bid for failure to comply with the provisions of *N.J.S.A.* 52:25-24.2, accepting the next lowest bid of respondent Gibson for $1,359,411 and awarding the contract to respondent Gibson for the plumbing and fire protection portion of the project is hereby **AFFIRMED**. It is further **ORDERED** that respondent Gibson's motion to dismiss the petition as moot based on the amount of work performed to date by respondent Gibson is hereby **DENIED.** It is further **ORDERED** that petitioner shall reimburse respondent Board of Education the legal fees and costs it has incurred in defending petitioner's protest in the amount of $4,453.21. It is further **ORDERED** that petitioner's petition is hereby **DISMISSED.**

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

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

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

April 22, 2003
DATE

JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

4-24-03
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APR 25 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

mph

APPENDIX

LIST OF EXHIBITS:[2]

For petitioner:

P-1 Petitioner's cross motion for summary judgment filed March 24, 2003

P-2 Certification of Andre Poulos in response to respondent's motion and in support of petitioner's cross motion filed March 24, 2003

P-3 Petitioner's memorandum of law in opposition to respondent's motion and in support of petitioner's cross motion, filed March 24, 2003

P-4 Certification of Andrew Poulos in response to respondent Gibson's motion to dismiss, filed March 31, 2003

P-5 Memorandum of law in opposition to respondent Gibson's motion to dismiss filed March 31, 2003

For respondent Board of Education:

RB-1 Respondent Board of Education motion for summary judgment, filed March 5, 2003

RB-2 Respondent Board of Education brief in support of motion to dismiss and for fees and costs, filed March 5, 2003

RB-3 Certification of James Landgraf, Esq., in support of motion and for fees and costs, filed March 5, 2003

RB-4 Certification of William Doering in support of motion and for fees and costs, filed March 5, 2003

RB-5 Certification of Joseph Lucarelli in support of respondent Gibson's motion to dismiss, filed April 2, 2003

[2] While these documents were not the subject of evidentiary rulings and were not formally admitted into evidence, I have given them exhibit numbers and have referred to them in this Initial Decision as a matter of convenience and to avoid confusion.

RB-6 Letter in lieu of brief in reply to petitioner's opposition, dated March 28, 3002, filed on April 15, 2003 [delayed by U.S. Postal Service]

For respondent Gibson:

RG-1 Respondent Gibson's cross motion for dismissal for mootness, filed March 18, 2003

RG-2 Certification of Joseph J. Hocking, Esq., in support of motion, filed March 18, 2003

RG-3 Certification of Frank C. Gibson, Jr., in support of motion, filed March 18, 2003

RG-4 Brief in support of respondent Gibson's motion to dismiss, filed March 18, 2003

RG-5 Letter brief on behalf of respondent Gibson in reply to petitioner's opposition to Respondent Gibson's motion, filed April 9, 2003

OAL DKT. NO. EDU 4723-02
AGENCY DKT. NO. 170-6/02

AP-BOYD, INC., A NEW JERSEY CORPORATION, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY AND FRANK C. GIBSON, INC., RESPONDENTS.	:	DECISION

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

Upon his full and independent review, the Commissioner concurs with the determination of the Administrative Law Judge (ALJ) that petitioner's failure to submit a timely stockholder or partnership disclosure statement, pursuant to *N.J.S.A.* 52:25-24.2, rendered its bid materially defective and, therefore, the Board was correct in rejecting petitioner's bid, accepting the next lowest bid and awarding the plumbing and fire protection contract to this company. The Commissioner, similarly, agrees with the ALJ that the within Board is entitled to a recovery of legal fees and costs, pursuant to the provisions of the Instructions to Bidders, in the amount of $4,453.21.

Accordingly, the recommended decision of the OAL is adopted for the reasons stated therein. Petitioner is directed to reimburse the Board, in the amount of $4,453.21, for

legal fees and costs incurred in defending against petitioner's protest here. The instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 6/09/03

Date of Mailing: 6/09/03

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

285-05

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF JANICE ROBBIE, BOARD OF EDUCATION OF THE TOWNSHIP OF MONTCLAIR, ESSEX COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

June 9, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 1793-02

AGENCY DKT. NO. 15-1/02

BOARD OF EDUCATION OF THE
TOWNSHIP OF MONTCLAIR,
ESSEX COUNTY,
Petitioner,

v.

JANICE ROBBIE,
Respondent.

Mariann Crincoli, Esq., appearing for Petitioner
(Schenck, Price, Smith & King, LLP, attorneys)

Mary J. Hammer, Esq., appearing for Respondent
(Bucceri & Pincus, attorneys)

Record Closed: May 8, 2003 Decided: May 12, 2003

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) from the Department of Education on February 15, 2002, for hearing as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. The Board charged

Respondent with leaving her employment position without providing the requisite prior notice and sought suspension of her teaching certificate for one year.

A hearing was scheduled for October 7, 2002 at the OAL, 185 Washington Street, Newark, New Jersey but was adjourned as a result of our office relocating to 33 Washington Street, Newark. The matter was rescheduled for October 25, 2002, which was adjourned at the parties request due to school vacation and tentative settlement discussions. After numerous adjournment, the parties reached a settlement.

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

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

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

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

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

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

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

May 12, 2003
DATE

Maria M. LaFiandra
MARIA MANCINI LA FIANDRA, ALJ

Receipt Acknowledged:

5/16/03
DATE

Kathleen Lawson
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 16 2003
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jb

SCHENCK, PRICE, SMITH & KING, LLP
10 Washington Street
P.O. Box 905
Morristown, New Jersey 07963-0905
(973) 539-1000
Attorneys for Petitioner,
Montclair Board of Education

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF JANICE ROBBIE, MONTCLAIR BOARD OF EDUCATION, ESSEX COUNTY	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL Dkt. No. EDUOR 01793-02N Agency Reference No. 15-1/02 **STIPULATION OF SETTLEMENT AND MUTUAL GENERAL RELEASE**

THIS STIPULATION OF SETTLEMENT AND MUTUAL GENERAL RELEASE (hereinafter "Stipulation") is made and entered into this 28th day of ~~February~~ Apr. 1, 2003 by and between the BOARD OF EDUCATION OF THE TOWNSHIP OF MONTCLAIR, ESSEX COUNTY, with its administrative offices located at 22 Valley Road, Montclair, New Jersey 07042 (hereinafter referred to as the "Board" or "District"), and JANICE ROBBIE, whose address is 305 East Baldwin Street, Hackettstown, New Jersey, 07840 (hereinafter referred to as the "Employee").

WITNESSETH:

WHEREAS, the Employee commenced employment as a teacher with the Board on September 5, 2000 and worked in the District pursuant to an employment contract (hereinafter referred to as the "Contract") through June 21, 2001; and

WHEREAS, by memorandum dated May 19, 2001, the Board informed the Employee that it had voted to renew her contract for the 2001-2002 school year; and

WHEREAS, the Employee tendered a verbal resignation of employment on or about August 17, 2001; and

WHEREAS, a dispute arose relative to the Employee's resignation from her employment in the District, which gave rise to the Board's application to the Commissioner of Education to have the Employee's teaching certificate suspended; and

WHEREAS, the parties hereto are in agreement that this resolution is not a determination on the merits of this case in any manner; and

WHEREAS, in order to avoid the time, expense and uncertainty of litigation, the parties desire to resolve this dispute and have negotiated in good faith regarding the terms and conditions of this Stipulation; and

WHEREAS, the parties hereto wish to memorialize their promises and covenants in this Stipulation.

NOW, THEREFORE, the Board and the Employee, for the consideration specified below, stipulate as follows:

1. SETTLEMENT OF CASE. The parties hereto stipulate to request that the Court and the Commissioner of Education dismiss the above captioned action, with prejudice, as settled.

2. MUTUAL GENERAL RELEASE. As further consideration for the parties' covenants as set forth in this Stipulation, upon the full execution of this Stipulation, the Employee, for herself and her past, present and future heirs, agents and representatives, and the Board, and its past, present and future directors, officers, trustees, employees, attorneys, agents, representatives, subsidiaries, parent corporations, successors, predecessors, executors, administrators, insurers and assigns (collectively the "Board"), forever and irrevocably release and discharge each other from any and all claims they may have against the other resulting from anything that has happened up to the date of this Stipulation, including claims of which the parties are unaware and claims which are not specifically released and given up in the following language. The parties specifically release and give up any and all claims which they may have against each other arising from or relating to Employee's employment with the Board and/or arising from or relating to Employee's separation from employment with the Board, including, but not limited to, claims arising under (1) the Constitution of the United States, (2) the Age Discrimination in Employment Act of 1967, as

amended, 29 U.S.C. § 621 *et seq.*, (3) Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000(e) *et seq.*, (4) the Civil Rights Act of 1866, 42 U.S.C. § 1981 *et seq.*, (5) the Rehabilitation Act of 1973, 29 U.S.C. § 791 *et seq.*, (6) the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, (7) the Family and Medical Leave Act, 29 U.S.C. § 2601 *et seq.*, (8) the Family Leave Act, *N.J.S.A.* 34:11B-1 *et seq.*, (9) the Constitutions of the United States of America and the State of New Jersey, (10) the New Jersey Law Against Discrimination, *N.J.S.A.* 10:5-1 *et seq.*, (11) the Conscientious Employee Protection Act, *N.J.S.A.* 35:19-1 *et seq.*, (12) the Education Laws of the State of New Jersey, *N.J.S.A.* 18A:1-1 *et seq.,* including but not limited to the Tenured Employees Hearing Act, *N.J.S.A.* 18A:6-10 *et seq.,* (13) the New Jersey Employer-Employee Relations Act, *N.J.S.A.* 34:13A-1 *et seq.*, (14) any expressed or implied contract between the Board and the Employee, whether oral or written, (15) any collective negotiations agreement, (16) all regulations promulgated pursuant to any of the aforementioned laws, (17) any other Federal, State, County, local or Board common law, statutes, ordinances, resolutions and regulations not mentioned above, and (18) any employment manual or handbook or personnel or Board policies. Specifically excepted from this release are any claims or rights arising under the Workers' Compensation Act, *N.J.S.A.* 34:15-1 *et seq.*, the Teachers' Pension and Annuity Fund Law, and for health insurance continuation coverage under and pursuant to Consolidated Omnibus Budget Reconciliation Act (commonly referred to as "COBRA"), provided that the Employee is not entitled to have the Board pay any amounts for her or her dependents' health insurance continuation coverage under COBRA.

3. NO ADMISSION OR PAST PRACTICE. Neither the Board nor the Employee admit to any liability or that any procedures followed in this case were unlawful, inappropriate or ineffective.

4. SAVINGS CLAUSE. If, during the term of this Stipulation, it is found that a specific provision(s) of the Stipulation is/are illegal under federal or state law, it is the parties' wishes that such provision(s) is/are conformed and enforced to achieve the parties' intent to the maximum extent permissible under law and that the remainder of the Stipulation not affected by such a ruling shall remain in full force and effect.

5. GOVERNING LAW. This Stipulation is made and entered into in the State of New Jersey and shall in all respects be interpreted, enforced and governed under the laws of the State of New Jersey.

6. CONSULTATION. The Employee represents that she has been represented by Mary Hammer, Esq., of the firm of Bucceri & Pincus, during the negotiations and development of this Stipulation and that Ms. Hammer fully explained all provisions of this Stipulation and their consequences before Employee signed this Stipulation. The Employee represents that she is fully satisfied with the advice she received from Ms. Hammer.

7. SIGNATURE. The Employee affirms that the only consideration for signing this Stipulation is the terms actually stated in this Stipulation and that no other promises or agreements of any kind have been made to the Employee by any person or entity whatsoever to cause the Employee to sign this Stipulation. The Employee represents that she fully understands the meaning and intent of this instrument and that she is voluntarily signing this Stipulation of her own will without coercion or duress. The Employee understands, accepts and agrees to all of the terms of this Stipulation.

8. PLAIN MEANING. The terms and conditions of this Stipulation shall be construed according to their plain meaning, and shall not be construed in favor of or against either the Employee or the Board.

9. HEADINGS. The headings set forth in this Stipulation are merely for the convenience of the reader and it is expressly understood and agreed that the headings shall not control or modify the meaning of this Stipulation in any way.

10. WHO IS BOUND. All parties are bound by this Stipulation and each of its provisions. Anyone who succeeds to their rights and responsibilities, such as their successors and assigns, as well as the Employee's heirs and the executor of her estate, also are bound. This Stipulation is made for the benefit of all the parties hereto and all who succeed to their rights and responsibilities, and expressly includes their officials, employees, agents, attorneys, successors and assigns.

11. NOTICES. Any notices required to be sent pursuant to this Stipulation shall be considered to be effective when sent by certified mail, return receipt requested, to:

To the Employee:	To the Board:
Mary Hammer, Esq. Bucceri & Pincus 1200 Route 46 Clifton, New Jersey, 07013-2440	James B. Patterson, Personnel Administrator Montclair Board of Education 22 Valley Road Montclair, New Jersey 07042

Any changes in the above addresses must be provided by certified mail, return receipt requested to the other party.

12. NON-AGREEMENT. If this Stipulation is not fully executed by all parties then this Stipulation shall become null and void and shall be of no effect.

13. COMPLETE AGREEMENT. This Stipulation embodies the entire agreement between the parties hereto and supersedes any prior or contemporaneous agreement, representation or understanding, whether written or oral. This Stipulation may not be modified except by written instrument executed by all the parties hereto.

PLEASE READ THIS STIPULATION CAREFULLY. IT IS A LEGAL DOCUMENT. IT INCLUDES JANICE ROBBIE'S AGREEMENT TO GIVE UP CERTAIN KNOWN AND UNKNOWN CLAIMS AGAINST THE BOARD OF EDUCATION OF THE TOWNSHIP OF MONTCLAIR, ESSEX COUNTY, ITS OFFICIALS, OFFICERS, EMPLOYEES, AGENTS, REPRESENTATIVES AND ATTORNEYS.

IN WITNESS WHEREOF, the parties hereto set their hands and seals to this Stipulation effective on the day and year first above written.

Janice Robbie
JANICE ROBBIE

STATE OF NEW JERSEY, COUNTY OF ESSEX SS.:

I CERTIFY that on ~~February~~ March 4, 2003,

Janice Robbie personally came before me and acknowledge under oath, to my satisfaction, that this person:

(a) is named in and personally signed this document; and
(b) signed, sealed and delivered this document as her act and deed.

Sworn and subscribed to before me this 4th day of ~~February~~ March, 2003.

Mary J. Hammer
An Attorney at Law of the
State of New Jersey

BOARD OF EDUCATION OF THE
TOWNSHIP OF MONTCLAIR,
ESSEX COUNTY

By: J. Clarence L. Kimmins

ATTEST:

Document #: 575753/MC

OAL DKT. NO. EDU 1793-02
AGENCY DKT. NO. 15-1/02

IN THE MATTER OF THE SUSPENSION OF	:	
THE TEACHING CERTIFICATE OF JANICE	:	
ROBBIE, BOARD OF EDUCATION OF THE	:	COMMISSIONER OF EDUCATION
TOWNSHIP OF MONTCLAIR, ESSEX	:	DECISION
COUNTY.	:	
	:	

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

COMMISSIONER OF EDUCATION

Date of Decision: 6/9/03

Date of Mailing: 6/9/03

* Although the Stipulation of Settlement does not so state, the record in this matter indicates that the Board of Education of the Township of Montclair accepted the terms of the agreement at its meeting on April 28, 2003.

283-04

283-03

T.B.R., on behalf of minor children, T.R. AND N.R.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF KINGWOOD, HUNTERDON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning father challenged the Board's denial of his request to permit alternate week bus transportation for his children due to joint physical and legal custody of the children with their mother, who resides in the same District.

The ALJ determined that the Board acted within its scope of discretion and acted reasonably in rejecting the request for dual bussing to both residences. The Board has a reasonable policy assigning one seat on one bus route to each student. Moreover, the ALJ found no circumstances to dictate that the Board must deviate from this policy.

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

June 5, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8382-02

AGENCY DKT. NO. 321-10/02

T.B.R. O/B/O MINOR CHILDREN

T.R. AND N.R.,

Petitioner,

v.

BOARD OF EDUCATION OF THE

TOWNSHIP OF KINGWOOD,

HUNTERDON COUNTY,

Respondent.

Brian M. Cige, Esq., for petitioner

James T. Prusinowski, Esq., for respondent (Fogarty & Hara, attorneys)

Record Closed: April 9, 2003 Decided: April 22, 2003

BEFORE **DOUGLAS H. HURD,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, T.B.R., is the biological father of T.R and N.R., who lives in Pittstown. E.R. is the biological mother of T.R. and N.R. who lives in Stockton. T.R. and N.R. are minor children who are enrolled in and attend the Kingwood Elementary School. The Honorable

Marilyn Ryne Herr, J.S.C., entered a court order on June 28, 2002, which grants T.B.R. and E.R joint physical and legal custody of T.R. and N.R. on alternating weeks.

Due to this joint custody arrangement, E.R. sought to have the Respondent, the Kingwood Township Board of Education (Board), arrange to have the bus pick up and drop off the children at each parent's respective residence based upon when the children were scheduled to stay with each parent. The Board denied this request at meetings held on August 27 and September 10, 2002. The Board determined that E.R.'s residence would be the children's domicile and the only location where bussing would be provided.

On September 18, 2002, T.B.R. filed a Complaint with the Hunterdon County Superior Court, seeking specific performance from the Board for the provision of dual bussing routes for the children. On September 23, 2002, the Board filed an Answer along with a brief seeking the removal of this matter to the New Jersey Department of Education. On October 2, 2002, the Honorable Robert P. Mahon, P.J. Ch., filed an order directing that this action be transferred to the New Jersey Department of Education.

The Department of Education transferred this matter to the Office of Administrative Law, where it was filed on December 9, 2002. On a conference call on January 30, 2003, the parties agreed that it did not appear that an evidentiary hearing was necessary. Accordingly, by confirming letter on February 4, 2003, I ordered the parties to file a Joint Stipulation of Facts, to be due on March 5, 2003, and to file simultaneous dispositive motions, to be due thirty days from the filing of the Joint Stipulation of Facts.

FINDINGS OF FACT

The Joint Stipulation of Facts submitted by the parties is accepted as the findings of fact in this matter. In summary, this Joint Stipulation of Facts includes the following material facts:

1. Prior to June 24, 2002, T.B.R., E.R., T.R., and N.R. lived together as a family at 3 Hampton Road, Pittstown, New Jersey. During the time they lived at this

residence as a family, the Board provided the children with bussing to Kingwood Township Elementary School.

2. On or about June 24, 2002, E.R. left the marital residence and began living in Stockton, New Jersey.

3. T.B.R. filed for divorce on June 26, 2002. On June 28, 2002, a court order was entered granting T.B.R. and E.R. joint physical and legal custody of the children on alternating weeks.

4. T.B.R. and E.R. both live in the Kingwood School District.

5. The Board provides bussing to all students in grades K-8.

6. The Board assigns students one seat on one bus route which will be on the route of the child's residence of record. The policy further states, "In the event that permanent child-care arrangements have been made, parents may request in writing that the assigned seat be on the route of the childcare provider. In this case, the child will forfeit the original seat on the resident route for both pick-up and drop-off for the entire school year."

7. On or about July 16, 2002, T.B.R. received a letter from the Board stating that based upon T.B.R's conversation with the Board, it had been determined that the residence of record for the children was the Pittstown residence, and that transportation would be provided to and from that address.

8. Through both letter and e-mail dated August 22, 2002, E.R. notified the Board that pursuant to court order, both herself and T.B.R. were to share custody of the minor children on alternating weekly schedules. This correspondence requested that the Board arrange to have the bus pick up and drop off the children at each parent's respective residence based upon when the children were scheduled to stay with each parent.

9. At an August 27, 2002, Board meeting, E.R.'s request for alternate week bussing was denied by the Board.

10. On August 29, 2002, Daria Wasserbach, School Business Administrator/Board Secretary, consulted with Patricia Cranley of the County Superintendent's Office and was informed that the New Jersey residency laws should be used in determining where a student should be picked up for bussing purposes. Cranley

advised Wasserbach that *N.J.A.C.* 6A:28-2.4 was to be used to determine residency, and therefore school bus pick-up locations.

11. In a letter dated September 4, 2002, E.R. advised the Board that the children would be staying at her residence in Stockton on October 15, 2002. E.R. further stated that she wished to appeal the Board's decision not to provide alternate week bussing.

12. Wasserbach consulted with Greg Fera, Senior Transportation Specialist of the Department of Education, who confirmed that the Department utilizes *N.J.A.C.* 6A:28-2.4(a)(ii)(1)(A) to determine a child's domicile, and therefore appropriate school district pick-up locations.

13. At a September 10, 2002, Board meeting, the Board reconsidered E.R.'s appeal and reaffirmed its denial of the request for alternate week bussing.

14. Wasserbach advised T.B.R. by letter dated September 11, 2002, that the children would be considered domiciled at E.R.'s residence in Stockton in accordance with *N.J.A.C.* 6A:28-2.4(a)(ii)(1)(A). The letter also advised T.B.R. that an exception would not be made and that the Board would only bus the children from E.R.'s residence in Stockton.

15. At the request of T.B.R, Elizabeth Smith, Ph.D., drafted a letter indicating that the children were in need of a consistent and stable routine in order to support their sense of security. This letter indicated that any discrepancy in bussing arrangements might disrupt the minor children's adjustment to their new living arrangements. Smith voiced particular concern in regards to N.R.'s reaction to this new arrangement given the fact that he needs a high degree of structure and predictability in his daily routine.

16. The Board does not operate its own bussing service. The Board is part of the Joint Transportation Agreement with two other school districts. As part of this Agreement, one of the other school districts subcontracts with private bus companies. The Board participates in a Joint Transportation Agreement because it is cost-effective.

17. The Board receives at least one or two requests per year for dual residence transportation. All such requests are denied based upon the Board's policy of assigning all students one seat on one bus route.

18. The Board imposes its bussing policies strictly and requires that students only ride their designated bus. Permission to alter a student's bus assignment, even for one-time events, is refused, regardless of whether the student has written parental permission to do so.

ANALYSIS

The applicable standard of review is whether the local school board's decision was arbitrary, capricious or unreasonable. *See Kopera v. Board of Educ. of West Orange*, 60 *N.J. Super.* 288 (App. Div. 1960) (it is a well-established rule that the action of a local school board "which lies within the area of its discretionary powers may not be upset unless patently arbitrary, without rational basis or induced by improper motives.")

Pursuant to *N.J.S.A.* 18A:39-1, each school district shall provide transportation to and from school for any elementary school pupil who resides more than two miles from their public school of attendance. It is undisputed that pursuant to this statute and the Board's policies that the children are entitled to receive transportation to and from their respective school in the Kingwood Township School District.

Each school district is also authorized pursuant to *N.J.S.A.* 18A:39-1 to make rules and contracts for the public transportation of its students. Pursuant to this statutory authority, the Board has adopted policies governing the bussing of its students. Specifically, the Board adopted a policy assigning one seat on one bus route that will be the route of the child's residence.

The Board did not have a specific rule governing the scenario presented in this matter in which there are two residences within the district and the children spend equal time at the residences. In an effort to determine which residence will be the residence entitled to bussing, the Board consulted the County and the Department of Education for guidance. The Board was referred to *N.J.A.C.* 6A:28-2.4(a)(ii)(1)(A), which sets forth the mechanism to designate a student's domicile when living in more than one district. The regulation essentially states that if a student's physical custody is shared on an equal-time basis, then his or her domicile is that of the parent with who they resided on October 15 of the current school year. Since the children

were scheduled to be with E.R. on October 15, the Board decided that E.R.'s place of residence is the one entitled to bussing.

The Board contends that it acted within its scope of discretion and acted reasonably in rejecting the request for dual bussing to both residences. The Petitioner, on the other hand, contends there is nothing as a matter of law that precludes the Board from accommodating the request of the Petitioner. The Petitioner cites that the Board in making its determination should consider the best interest of the children and that dual bussing will make the children more secure in light of the recent divorce. The Petitioner also argues that *N.J.A.C.* 6A:28-2.4(a)(ii)(1)(A) is not applicable because it applies where parent's are domiciled in different districts. This situation, however, involves parent's being domiciled in the same district.

I agree with the Petitioner that *N.J.A.C.* 6A:28-2.4(a)(ii)(1)(A) is not directly applicable to this situation because it does not involve parents who are domiciled in the same district. However, the Board acted reasonably in looking to this regulation for guidance based upon the advice of the County and the Department of Education. The Board's policy assigning one seat on one bus route is also reasonable and is based on an effort to contain costs and reduce confusion regarding the proper bussing routes for students. The Board has enforced this policy in the past by denying other requests for dual bussing of children similar to the present circumstances.

The Petitioner is also correct that there is nothing in the law that precludes the Board from accommodating the Petitioner's request. However, this is not the issue. The issue is whether the Board exercised its discretion in an arbitrary manner. I find and conclude that there is no evidence to indicate that the Board's decision was arbitrary or unreasonable. The Board has a reasonable policy assigning one seat on one bus route. This policy is within its discretionary authority. There are no circumstances here that dictate the Board must deviate from this policy. The fact that the Board did not deviate from its policy, despite the Petitioner's argument that the policy was not in the best interests of the children, does not render the decision arbitrary. In addition, the Petitioner's contention that granting its request would not result in additional costs to the Board does not justify an exception to its policy either. The fact is that the Board's decision was within its discretionary authority, not inconsistent with the law and based on a policy that reasonably seeks to contain costs and reduce confusion of bussing routes.

ORDER

Based on the foregoing, it is hereby **ORDERED** that the decision of the Board denying the Petitioner's request for dual bus routes for his minor children is **AFFIRMED**.

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

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

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

April 22, 2003
DATE

DOUGLAS H. HURD, ALJ

Receipt Acknowledged:

April 25, 2003
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 28 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

/lam

DOCUMENTS IN THE RECORD

J-1 Joint Stipulation of Facts and attachments

For Petitioner:

P-1 Petitioner's Brief and attachments

For Respondent:

R-1 Respondent's Brief and attachment

OAL DKT. NO. EDU 8382-02
AGENCY DKT. NO. 321-10/02

T.B.R., on behalf of minor children, T.R. AND N.R.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF KINGWOOD, HUNTERDON COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon careful and independent review of the record in this matter, the Commissioner concurs with the Administrative Law Judge's (ALJ) finding that the Board's decision to provide only one bus stop for petitioner's children, who share time between their divorced parents residing in separate residences within the same District, was not arbitrary or unreasonable and was within the Board's discretionary authority.

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

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 6|05|03

Date of Mailing: 6|05|03

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

286-03

C.B., on behalf of minor child, Q.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning parent challenged the Board's residency determination that his child, Q.B., was not domiciled within the District. The Board sought tuition for the time of ineligible attendance in the District.

The ALJ found that, based on the testimony of the Township's residency investigator, Q.B. was not domiciled in the District but was domiciled in Trenton. The ALJ determined that petitioner failed to sustain his burden of proof that Q.B. was entitled to a free public education in the District. The petition was dismissed; petitioner was ordered to pay tuition in the amount of $5,914.92 for the period of Q.B.'s ineligible attendance in the District's schools.

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

June 10, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 0243-03

AGENCY DKT. NO. 376-11/02

C.B., on behalf of minor

Child, Q.B.,

Petitioner,

v.

HAMILTON TOWNSHIP

BOARD OF EDUCATION,

Respondent.

No appearance by or on behalf of the petitioner

Dennis M. DeSantis, Esq., for respondent (Destribats, Campbell, DeSantis & Magee, attorneys)

Record Closed: May 12, 2003 Decided: May 16, 2003

BEFORE **JOHN SCHUSTER III**, ALJ:

STATEMENT OF THE CASE

Pursuant to *N.J.S.A.* 18A:38-1, respondent, Board of Education (BOE), held a hearing and determined that Q.B., the child of C.B., was not domiciled within the BOE's school district, although she continued to attend a school within the BOE district. Consequently, the BOE

decided that the child should be removed from the school and that C.B. should pay tuition for the child.

According to the papers filed, C.B. alleges that he and his child, Q.B., are domiciled within the district and claims that the BOE was and is required to provide his child with a free public education. The BOE submits that C.B. has not met his burden of proof and counterclaims for an order requiring C.B. to pay tuition.

PROCEDURAL HISTORY

On November 15, 2002, the BOE informed C.B. that he was required to withdraw Q.B. as a student from the Hamilton Township School District and enroll her in the City of Trenton School District, where the BOE determined that Q.B. was domiciled. See R-4. On November 20, 2002, petitioner, C.B., filed a residency appeal with the Commissioner of Education. On December 19, 2002, the BOE filed an answer to the aforesaid petition, including a counterclaim for tuition. *N.J.S.A.* 18A:6-9, 38-1. The Department of Education transmitted the matter to the Office of Administrative Law (OAL) on January 28, 2003, where it was received and filed as a contested case pursuant to *N.J.S.A.* 52:14B-2(b). A hearing was scheduled for April 2, 2003, but was adjourned at respondent's request because petitioner had not responded to interrogatories previously served upon him. On April 3, 2003, a Letter Order was issued by the undersigned requiring the petitioner to respond to the interrogatories propounded upon him and to pay a sanction in the amount equal to the cost incurred by respondent for appearing at the hearing, which had to be adjourned. The hearing was rescheduled for May 12, 2003, at which time the respondent appeared; however, petitioner, C.B., failed to appear. At that time testimony was taken pertaining to Q.B.'s domicile and the cost of her education provided by the Hamilton Township Board of Education.

FINDING OF FACTS

The only witness to testify in this matter is Albert Offredo. He is a residency investigator for the BOE. He has been employed in that capacity for a period of eight years and prior to that employment he was a Hamilton Township police detective for ten years prior to his retirement

from that force. Mr. Offredo testified that C.B. submitted an affidavit to the BOE on or about September 19, 2002 (R-1) indicating that he and his daughter, Q.B., resided with his mother, K.B., at 207 Park Lane, Hamilton, New Jersey. This address is within the district of the Hamilton Township schools. On or about that same date, K.B., the grandmother of Q.B., submitted an affidavit (R-2) stating that Q.B. resided with her at 207 Park Lane in the Township of Hamilton and that this was Q.B.'s permanent domicile. Shortly thereafter, C.B. submitted to the BOE a pupil enrollment form (R-3), where again he indicated that both he and Q.B. resided at 207 Park Lane, Hamilton Township. This document, as well as the parent's affidavit (R-1), also indicate that Q.B.'s mother resides at 652 Washington Street in the City of Trenton.

In his capacity as residency investigator, Mr. Offredo conducted a routine investigation as to the domicile of Q.B. The investigation conducted by Mr. Offredo consisted of reviewing Q.B.'s transportation schedule and her records pertaining to her residency. Mr. Offredo found that the BOE had arranged for Q.B. to be transported to the Crockett Middle School by way of bus at approximately 7:40 a.m., which would pick her up on a corner a short distance from her alleged residence, that being 207 Park Lane. The investigation also consisted of surveillance, which is specifically detailed as follows: (1) On October 18, 2002, Mr. Offredo went to the residence at 207 Park Lane at 6:45 a.m. and observed the residence until 8 p.m. It was observed that Q.B. did not leave that residence that morning; however, on further checking, Q.B. was in attendance at the Crockett Middle School on that date; (2) On October 21, 2002, at 6:45 a.m. Mr. Offredo went to 652 Washington Street, Trenton, New Jersey, which was listed as the residence of Q.B.'s mother. That morning a male identified as C.B. drove Q.B. to 207 Park Lane, where Q.B. exited the vehicle and walked to the school bus stop and subsequently boarded her designated school bus; (3) On October 21, 2002, Mr. Offredo observed Q.B. boarding her designated school bus at the Crockett Middle School at 3 p.m. and Q.B. then proceeded to 207 Park Lane, Hamilton Township; (4) On October 29, 2002, Mr. Offredo went to 652 Washington Street, Trenton, New Jersey at 6:45 a.m. to observe that residence. At 7:35 a.m., C.B. and Q.B. departed that address and went to 207 Park Lane, where Q.B. departed the vehicle, walked to the school bus stop and was transported by bus to the Crockett Middle School; (5) On October 31, 2002, Mr. Offredo again went to 652 Washington Street, Trenton, New Jersey at 6:45 a.m. He observed Q.B. and C.B. departing that address at 7:45 a.m. and proceeding to 207 Park Lane. Since the school bus had already departed, C.B. drove Q.B. to the Crockett Middle School, where

exited that vehicle; (6) On October 6, 2002, Mr. Offredo again went to observe 652 Washington Street, Trenton, New Jersey at 6:45 a.m. At 7:40 a.m., Q.B. was driven by C.B. to 207 Park Lane and again because the school bus had already departed from its designated stop, C.B. continued the journey by taking Q.B. directly to the Crockett Middle School, where Q.B. departed the vehicle and entered the school building; (7) On November 11, 2002, at 6:45 a.m., Mr. Offredo again observed at 652 Washington Street, Trenton, New Jersey. At 7:35 a.m., Q.B. and C.B. left that residence and went to 207 Park Lane. Q.B. went into the house briefly, walked to the bus stop, where Q.B. entered the school bus and proceeded to the Crockett Middle School. I **FIND** that based on the investigation of Mr. Offredo that Q.B. is not domiciled within the Township of Hamilton and, in fact, is domiciled at 652 Washington Street, Trenton, New Jersey.

LEGAL ANALYSIS

N.J.S.A. 18A:38-1(b)(2) states that when the superintendent of a school district determines that a person is attending a district school but is not domiciled within the district, the parent may present proofs at a hearing to show by a preponderance of the evidence that the child is eligible for a free education based on domicile within the district. If the parent or guardian does not meet that burden, then they may be assessed for the child's tuition prorated on per diem basis. Based on the unrefuted testimony at the hearing it is clear that in spite of the affidavits submitted, C.B. and Q.B. do not reside or are domiciled in the Township of Hamilton, but, in fact, are domiciled and reside at 652 Washington Street, Trenton, New Jersey, a location not within the district of the BOE. The respondent has made an application pursuant to that statute for tuition reimbursement, which I **FIND** it is entitled to pursuant to *N.J.S.A.* 18A:38-1(b)(2). I also **FIND** that the allowable tuition for reimbursement purposes has been fixed at $44.81 per day for the 2002-2003 school year. Therefore, from October 2, 2002, the date of Q.B.'s enrollment, until the May 12, 2003, the date of hearing, there have been a total of 132 school days, which based on $44.81 per day equates to a tuition reimbursement of $5,914.92. It has also been represented that the sanction imposed upon C.B. as a result of his failure to provide answers to interrogatories in the amount of $202.50 has not been paid pursuant to my order of April 3, 2003. This sanction is lawfully do and payable by the petitioner.

ORDERS

Based on the above, and for good cause shown, I **ORDER** that the petition in this matter be and is hereby **DISMISSED WITH PREJUDICE**. I further **ORDER** that the BOE's counterclaim for tuition is **GRANTED** and I **ORDER** C.B. to pay $5,914.92. I further **ORDER** that because Q.B. is not domiciled within the district, she may be removed from the educational program offered by the BOE. I further **ORDER** C.B. to pay the sanction previously ordered in the amount of $202.50.

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

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

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

May 16, 2003
DATE

JOHN SCHUSTER III, ALJ

Receipt Acknowledged:

May 20 2003
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 21 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

jh

WITNESSES

For the petitioner:

None

For the respondent:

Albert Offredo

EXHIBITS

For the petitioner:

None

For the respondent:

R-1 Parents' affidavit

R-2 Host Family affidavit

R-3 Pupil Enrollment Form

R-4 Letter from Hamilton Township School District to C.B., dated November 14, 2002

R-5 Letter to C.B. from Hamilton Township Board of Education, dated March 28, 2003

OAL DKT. NO. EDU 0243-03
AGENCY DKT. NO. 376-11/02

C.B., on behalf of minor child, Q.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon his full and independent review, the Commissioner agrees with the determination of the Administrative Law Judge (ALJ) that petitioner has failed to sustain his burden, pursuant to *N.J.S.A.* 18A:38-1(b)(2), of establishing that his child, Q.B., was entitled to a free public education in the schools of Hamilton Township. The Commissioner similarly concurs with the ALJ that the Board must prevail on its counterclaim for tuition.

Accordingly, the recommended decision of the OAL is adopted. Petitioner is hereby directed to pay tuition in the amount of $5,914.92 for the period of Q.B.'s ineligible attendance in the District's schools and the instant Petition of Appeal is dismissed with prejudice.[1]

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 6/10/03

Date of Mailing: 6/10/03

[1] The Commissioner does not reach to the $202.50 sanction imposed on petitioner by the ALJ's Letter Order of April 3, 2003. Such sanction was imposed pursuant to *N.J.A.C.* 1:1-10.5 and, in accordance with *N.J.A.C.* 1:1-3.2(c)4, is outside the jurisdictional purview of the Commissioner of Education.

[2] This decision may be appealed to the State Board pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

287-03

287-03

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

June 12, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 03753-01

AGENCY DKT. NO. 77-3/01

BRENDA MESKO,

Petitioner,

v.

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

Respondent.

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

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

Record Closed: May 20, 2003 Decided: May 23, 2003

BEFORE **THOMAS E. CLANCY**, ALAJ:

This matter was transmitted to the Office of Administrative Law (OAL) on May 14, 2001, for resolution as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F1 to -13.

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

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

Accordingly, I **CONCLUDE** that the attached Settlement Agreement meets the requirements of *N.J.A.C.* 1:1-19.1(d) and I hereby **APPROVE** same. In conjunction therewith, I **ORDER** that the parties comply with its contents and that these proceedings be (and are hereby) **TERMINATED**.

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

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

5/23/03
DATE

Thomas E. Clancy
THOMAS E. CLANCY, ALJ

Receipt Acknowledged:

May 23, 2003
DATE

M. Kathleen Dean-Duncan
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 29 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

da

SETTLEMENT AGREEMENT
Between
THE ELIZABETH BOARD OF EDUCATION
and
BRENDA MESKO

1. This Agreement is being entered into between the Elizabeth Board of Education ("Board") and Brenda Mesko ("Mesko") to resolve the litigation pending between them before the Commissioner of Education, Agency Docket No. 77-3/01 and O.A.L. Docket No. EDUOR 03753-01N and all grievances filed by Ms. Mesko against the Board of Education, as well as any litigation that could have been brought.

2. The Board agrees to return to Ms. Mesko's sick bank a total of thirty-four (34) sick days.

3. Ms. Mesko agrees to withdraw her case before the Commissioner of Education, Agency Docket No. 77-3/01.

4. Neither party makes any admission in the settlement of this case.

5. Ms. Mesko acknowledges that this Agreement is in settlement of disputed issues of fact and law, that she has had the right and opportunity to discuss all aspects of this Agreement with her legal counsel prior to entering into it and that she has availed herself of this right, that she has carefully read and fully understands all of the provisions of this Agreement, and that she is entering into this Agreement knowingly and voluntarily in exchange for good and valuable consideration.

6. In consideration for this Agreement, Mesko irrevocably and unconditionally releases the Board, and any employee and/or official of the Board, from any and all charges, complaints, claims, liabilities, obligations, promises, agreements, causes of action, rights, costs, losses, debts and expenses of any nature whatsoever, known or unknown, which Mesko, her heirs, executors, administrators, successors and assigns ever had, now

have or hereafter can, shall or may have (either directly, indirectly, derivatively or in any other representative capacity) by reason of any matter, fact or cause whatsoever from the beginning of time to the date of this Agreement, including without limitation, all claims arising under Title VII of the Civil Rights Act of 1964, the Equal Pay Act, the New Jersey Law Against Discrimination Act, the New Jersey Conscientious Employee Protection Act, the Civil Rights Act of 1866, 42 U.S.C. §1983, The Americans with Disabilities Act, Title 18A of the New Jersey Statutes, title 6 and 6A of the New Jersey Administrative Code, all claims arising under the public policy of the State of New Jersey, all tortious claims (including intentional infliction of emotional distress and inducing breach of contract) and all other federal, state and local labor and anti-discrimination laws, the common law and any other purported restriction on the Board's employment related decisions.

7. In consideration of this Agreement, the Board releases Ms. Mesko from any claims the Board may have against her.

8. Each party hereto represents that, in executing this Agreement, such party has not relied and does not rely upon any representation or statement of any other party not set forth herein with regard to the subject matter, basis or effect of this Agreement or otherwise.

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

10. Ms. Mesko has voluntarily and without coercion entered into this Agreement.

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

For the Elizabeth Board of Education :

THE MURRAY LAW FIRM, LLC

By: Mary E. Hennessy-Shotter

Dated: 5-20-03

For Brenda Mesko

BERGMAN & BARRETT

By: Michael Barrett

Dated: 5-6-03

Brenda Mesko

Dated: 5/6/03

OAL DKT. NO. EDU 03753-01
AGENCY DKT. NO. 77-3/01

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

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 6|12|03

Date of Mailing: 6|12|03

288-03

CAMDEN EDUCATION ASSOCIATION AND CLARALIENE GORDON,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY, AND SYLVAN LEARNING CENTER,	:	DECISION
RESPONDENTS.	:	

June 12, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 6987-01
AGENCY DKT. NO. 389-9/01

CAMDEN EDUCATION ASSOCIATION AND CLARALIENE GORDON,
Petitioners,
v.
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY, AND SYLVAN LEARNING CENTER,
Respondents.

Richard A. Friedman, Esq., for petitioners (Zazzali, Fagella & Nowak, attorneys)

Karen A. Murray, Esq., for respondent Board of Education (The Murray Law Firm, LLC, attorneys)

Thomas E. Redburn, Jr., Esq., for respondent Sylvan Learning Center (Lowenstein Sandler, PC)

Record Closed: May 20, 2003 Decided: May 21, 2003

BEFORE **JOSEPH F. MARTONE**, ALJ:

Petitioners, education association and resident taxpayer contend that an agreement beween the respondents which permits respondent Sylvan Learning Center to provide educational services to the school district's students is violative or unauthorized by law. This matter was transmitted to the Office of Administrative Law on November 16, 2001, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to

-13. Telephone conferences were held on February 5, 2002, May 20, 2002, and June 27, 2002, and in October, 2002 the parties represented that they were engaged in intense efforts to reach a settlement. When no settlement was forthcoming, the matter was scheduled to be heard on May 7, 2003.

On May 7, 2003, the parties advised that they agreed to a settlement, and they have prepared submitted a Stipulation of Settlement and Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

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

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

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

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

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

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

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

May 21, 2003
DATE

JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

May 23 2003
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 27 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

mph

ZAZZALI, FAGELLA, NOWAK,
KLEINBAUM & FRIEDMAN
150 West State Street
Trenton, New Jersey 08608
(609) 392-8172
Attorneys for Petitioners

CAMDEN EDUCATION ASSOCIATION and CLARALIENE GORDON,	:BEFORE THE OFFICE OF ADMINISTRATIVE LAW
Petitioners,	:Docket No.: EDUOT 06987-01S
v	
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY, and SYLVAN LEARNING SYSTEMS, INC.	**STIPULATION OF SETTLEMENT AND SETTLEMENT AGREEMENT**
Respondents.	

The parties to this matter hereby agree that this matter shall be deemed settled and resolved, based upon the terms and conditions set forth below.

1. The parties acknowledge that this agreement must be approved by the Commissioner of Education, and that if the Commissioner of Education does not approve each and every term of this agreement, the matter shall be returned to the Office of Administrative Law for further proceedings.

2. Upon the approval of the terms of this agreement by the Commissioner of Education, this matter shall be deemed settled, the

petition of appeal will be withdrawn, and this settlement shall have the force and effect of a decision of the Commissioner of Education.

3. The parties agree that all teaching staff members who are assigned to or provide services in the program provided by respondent Sylvan to respondent Camden Board of Education shall be supervised only by certified supervisors employed by the respondent Camden Board of Education, and that no such teaching staff members shall be supervised by any agents, representatives, or employees of respondent Sylvan.

4. The parties agree that all assignments to the reading program provided by respondent Sylvan to respondent Camden Board of Education shall only be made by respondent Camden Board of Education, that all teaching staff members assigned to such programs shall be selected, assigned and chosen for retention only by respondent Camden Board of Education, and that no such assignments, selection, or retention shall be subject to approval by respondent Sylvan. The parties further agree that nothing herein shall be construed to abrogate or limit any teaching staff member's or other employee's tenure or seniority rights.

5. In all circumstances where it is determined that as a result of any teaching staff member's performance in the reading program provided by respondent Sylvan to the respondent Camden Board of Education that consideration may be given to any formal

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A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

action relating to or against the teaching staff member, including but not limited to transfer, reassignment, termination, non-renewal of employment, or discipline, any conferences with the school management team shall include the entire school management team, and shall not include only some of the members of the school management team.

6. The parties agree that all formal observations and evaluations of teaching staff members in the reading program provided by respondent Sylvan to respondent Camden Board of Education shall be performed only by certified supervisors employed by respondent Camden Board of Education, and that any observations or evaluations by agents, employees, representatives, or personnel employed by Sylvan shall not constitute part of the employee's formal evaluations, shall only be used in relation to the Sylvan program, and shall not be used or considered in relation to the teaching staff members' employment status, benefits, or rights in the respondent district.

7. The parties agree that all teaching staff members assigned to, retained, or placed in the reading program provided by respondent Sylvan to respondent Camden Board of Education are and shall be deemed to be employees of respondent Camden Board of Education, that all of their employment has been and shall be without loss or restriction of tenure or seniority rights, and that all teaching staff members assigned to such program have acquired

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A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

and shall acquire tenure and seniority credit for their assignment in such program.

8. In consideration of the foregoing terms, the parties agree that the above matter shall be deemed settled and resolved.

9. The petitioners, Camden Education Association and Claraliene Gordon, hereby waive, release, and give up any and all claims either petitioner may have against respondents (including any of respondents' past and present officers, directors, employees, shareholders, attorneys, agents, heirs, subsidiaries, affiliates, successors and assigns)that: (1) were asserted in the petition of appeal filed in the above-captioned administrative proceeding in relation to the Professional Services Agreement between Sylvan Learning Systems, Inc. and the Camden Board of Education referred to in that petition (the "Agreement"), or (2) are known to petitioners as of the date of this stipulation and could have been asserted in this proceeding. The preceding sentence notwithstanding, in the event that any administrative agency or court subsequently declares any term, practice or procedure included in the Agreement illegal, or any statute is enacted to that effect, petitioner Camden Education Association may assert a claim in relation to the illegal provision in the contract at that time. Nothing herein shall cause the release of any claims held by any person not a party to this stipulation.

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A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

Camden Education Association

By: Claraliene Gordon
Claraliene Gordon, President

Dated: May 2, 2003

Claraliene Gordon, Petitioner

By: Claraliene Gordon
Claraliene Gordon

Dated: May 2, 2003

Sylvan Learning Systems, Inc.

By: _____
Stephen Freeman, President

Dated: _____

The Murray Law Firm, LLC
MURRAY, MURRAY & CORRIGAN
Attorneys for Respondent
Board of Education of the
City of Camden

By: _____
Karen A. Murray, Esq.

Dated: _____

ZAZZALI, FAGELLA, NOWAK KLEINBAUM & FRIEDMAN
PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

OAL DKT. NO. EDU 6987-01
AGENCY DKT. NO. 389-9/01

CAMDEN EDUCATION ASSOCIATION AND CLARALIENE GORDON,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY, AND SYLVAN LEARNING CENTER,	:	DECISION
RESPONDENTS.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 6|12|03

Date of Mailing: 6|12|03

294-03

294-03

ROBERT E.B. MANNING,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF BRIDGETON, CUMBERLAND COUNTY,	:	DECISION
RESPONDENT.	:	

June 16, 2003

OAL DKT. NO. EDU 8340-02
AGENCY DKT. NO. 277-9/02

ROBERT E.B. MANNING,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF BRIDGETON, CUMBERLAND COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and advisement of failure to appear transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-14.4, along with copies of notifications sent to the parties by OAL on May 17, 2003, providing them ten days to submit an explanation for such nonappearance, have been reviewed. There being no explanation filed by the parties, this matter is no longer deemed to be a contested matter before the Commissioner and is hereby dismissed with prejudice.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 6|16|03

Date of Mailing: 6|17|03

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

296-05

296-03

A.A., on behalf of minor child, R.A.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HADDON HEIGHTS, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

June 18, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

OAL DKT. NO. EDU 2436-03

AGENCY DKT .NO. 124-4/03

A.A. o/b/o R.A.,

Petitioners,

v.

BORO OF HADDON HEIGHTS BOARD OF EDUCATION, CAMDEN COUNTY,

Respondent.

Lee Ginsburg, Esq., (South Jersey Legal Services, Inc.) for petitioners

Robert P. Becker, Jr., Esq., (Becker and Duffield, attorneys) for respondent

BEFORE **ANA C. VISCOMI**, ALJ:

STATEMENT OF THE CASE

This matter was transmitted to the Office of Administrative Law (OAL) on April 28, 2003 for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -13. The matter was scheduled for a hearing on April 30, 2003. At that time, the parties agreed to a settlement and prepared a written agreement indicating the terms thereof, which is attached and fully incorporated herein. (J-1)

I have reviewed the record and the terms of the settlement and I find:

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

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

This order on application for emergency relief may be adopted, modified or rejected by Commissioner of the Department of Education, who/which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If (title of agency head) does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

May 12, 2003
DATE

Ana C. Viscomi
Ana C. Viscomi, ALJ

/jck

EXHIBITS

Jointly Submitted

J-1 Settlement Agreement

R.A. by A.A.,
V. Petitioner

Haddon Heights BOE
Respondent

Before Commission of The N.J. Dept. of EDUCATION

Agency Docket #
124-4/03

SETTLEMENT Agreement and Withdrawal [redacted] 06

The parties having met before the court on 4/30/03 and a settlement of the dispute of the parties is hereby set forth as follows:

(1) Petitioner to Return to Class at Haddon Heights H.S. on Monday, May 5, 2003...

(2) Petitioner to be given full Credit for 2002-2003 School year in attendance

(3) Academic evaluation will be conducted to determine what academic process to follow to ensure full academic credit is provided to R.A. and thereafter such educational process to be provided by respondent

(4) Petition is Dismissed.

[redacted] 06

x Lee Gordon, Esq.
Attorney for Petitioner

x Anthony Ali

x Robert P. Boyle, Jr.

x Edward [illegible]

OAL DKT. NO. EDU 2436-03
AGENCY DKT. NO. 124-4/03

A.A., on behalf of minor child, R.A.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HADDON HEIGHTS, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this emergent matter, along with Administrative Law Judge Ana C. Viscomi's Order and attached Settlement Agreement, have been reviewed. Upon such review, the Commissioner approves the agreement. In that it appears that all issues in controversy have been satisfactorily resolved by the parties in their agreement, this matter is hereby dismissed, subject to the compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 6|18|03

Date of Mailing: 6|19|03

297-03

297-03

BOARD OF EDUCATION OF THE WALLKILL VALLEY REGIONAL HIGH SCHOOL DISTRICT, SUSSEX COUNTY,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF RAMSEY, BERGEN COUNTY AND THE NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning Regional High School District challenged the Department's determination that petitioner was the "district of residence" for P.P., a student placed by DYFS in a skills development home. Petitioner asserted that respondent Board was responsible for the tuition and transportation costs of P.P.'s educational placement.

The ALJ found that P.P. resided with and was in the physical custody of his father, D.P., in the respondent District of Ramsey prior to his placement in the skills development facility. The ALJ found that respondent failed to provide any proof that D.P.'s parental rights were terminated. Thus, the ALJ determined that pursuant to statute, respondent Ramsey, the district of residence of P.P.'s father with whom P.P. live, albeit for a matter of weeks, prior to admission to a State facility, was the district responsible for P.P.'s educational costs. *N.J.S.A.* 18A:7B-12b and *N.J.A.C.* 6A:23-5.2(1) and (2).

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

June 18, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO.: EDU 10198-00

AGENCY DKT. NO. 384-10/00

WALLKILL VALLEY REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION,

Petitioner,

v.

RAMSEY BOARD OF EDUCATION,

Respondent.

Ellen S. Bass, Esq., for petitioner
(Rand, Algeier, Tosti & Woodruff, attorneys)

Susanna L. Mould, Esq., for respondent
(Fogarty and Hara, attorneys)

Michael Lombardi, Deputy Attorney General
(Peter C. Harvey, Acting Attorney General of New Jersey, attorney)

Record Closed: March 18, 2003 Decided: May 8, 2003

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

PROCEDURAL HISTORY

On February 8, 2000, Wallkill received a letter from the Warren County Educational Services Commission advising Wallkill that it would be responsible for the tuition and transportation costs of P.P.'s educational placement. On May 2, 2000,

counsel for Wallkill wrote to Melvin L. Wyns, Director, Division of School Finance, Department of Education ("Department" or "DOE"), seeking a formal determination of "district of residence" pursuant to N.J.S.A. 18A: 7B-12. On June 26, 2000, Melvin Wyns notified the Ramsey Board of Education that it was the responsible school district for P.P. pursuant to the requirements of N.J.S.A. 18A: 7B-12, N.J.A.C. 6:20-5.3 and -5.4.

Ramsey appealed the determination on July 21, 2000, to Thomas McMahon, Assistant Commissioner of the DOE. Ramsey argued that D.P. did not have joint custody that D.P.'s parental rights had been terminated, and that P.P.'s stay in his father's home was only temporary. Ramsey contended that P.P.'s custodial parent was his mother and that the mother's district was therefore responsible for the placement.

By letter dated August 1, 2000, the Department reversed its determination, and concluded that Wallkill was the responsible district of residence based on the following additional findings: (a) that the initial placement was in the skills development home rather than the placement in the father's home, (b) P.P.'s father did not have joint custody of P.P., (c) P.P.'s stay with his father was temporary, (d) P.P.'s father's parental rights may have been terminated, and (e) P.P.'s custodial parent prior to placement in the skills development home was his mother who resided in Hamburg as of the date of the initial state placement.[1] Letter from Thomas McMahon to Susanna Mould, Attorney for Respondent, dated August 1, 2000.

On August 7, 2000, Wallkill sent a letter to Mr. McMahon requesting the basis for his determination that D.P.'s parental rights were terminated. The Assistant Commissioner responded, "I based my findings solely upon information presented to me in the letters I received from you and Ms. Mould [counsel for Respondent]. No other information was considered." Letter from Thomas McMahon, Assistant Commissioner, Department of Education, to Ellen S. Bass, Attorney for Petitioner, dated August 14, 2000 (emphasis added).

[1] In its earlier determination by Melvin Wyns, Director of the Division of Finance, the Department had not made any factual findings as to placement, but rather found only that Ramsey was the responsible school district.

Petitioner subsequently filed a petition of appeal with the Commissioner of Education, challenging the DOE's determination of residence. See Petition for Appeal, dated September 20, 2000. The matter was transmitted to the Office of Administrative Law as a contested case for a hearing on the merits. The parties subsequently moved for summary decision.

In its motion for summary decision, Petitioner argues that Ramsey is the district responsible for the tuition of the child in the state facility pursuant to N.J.S.A. 18A: 7B-12. Specifically, Petitioner argues that it should not have to pay for P.P.'s education since P.P. resided with his father at the time of placement and the applicable district of residence prior to placement is Ramsey.

Respondent cross-moved for summary decision, arguing that because the father's parental rights had been terminated and DYFS' placement of P.P. in the father's home was a state-ordered placement, Ramsey is not responsible for P.P.'s education pursuant to the statute and applicable regulations. Respondent further argues that because D.P. did not have legal custody of P.P., P.P.'s placement by DYFS in the father's home amounted to a foster care placement, N.J.S.A. 18A: 7B-12(a), and under that statute the placement with the father is ignored making the mother's district his school district of residence.

Petitioner replied to Respondent's cross-motion for summary decision arguing that respondent's allegations lacked evidentiary value and were based wholly on unsubstantiated hearsay. Specifically, Petitioner argues that Respondent has supplied no proof that the father's parental rights have been terminated. Petitioner further argues that DYFS would not have sent P.P to live with his father if the father's parental rights had been terminated. Moreover, Petitioner asserts that Respondent has presented no proof that P.P. was removed from his mother's home, nor that P.P.'s mother abused or neglected him.

By letter dated October 27, 2000, Petitioner requested that the DOE be named a Respondent in the matter.[2] In addition, Petitioner brought a motion compelling the

[2] While the DOE is a named respondent in this matter, Respondent as it used here refers only to the Ramsey Board of Education and not the DOE.

production of DYFS records to ascertain whether certain facts relied upon by Ramsey were accurate. An *in camera* review of the DYFS file was conducted.

UNDISPUTED FACTS IN THE BRIEFS:

1. P.P. is educationally handicapped. He was born on July 27, 1983. He suffers from Down's syndrome, ADHD, Tourette's syndrome, and has been diagnosed as oppositional defiant.

2. During the 1997-1998 school year, until March 29, 1998, P.P. resided with his mother, K.H.T. and her husband, T.T., in Hamburg, New Jersey, the constituent sending district in the Wallkill Valley Regional High School District ("Petitioner").

3. When P.P. resided with his mother, he was educated at the Association for the Help of Retarded Citizens in Middletown, New York, a special education placement of the Wallkill Child Study Team.

4. On March 31, 1998, the Division of Youth and Family Services ("DYFS") removed P.P. and his sister from K.H.T.'s home and placed them with their father, D.P.

5. P.P.'s father, D.P., has, at all times relevant, resided at 17 Garden Street in Ramsey, New Jersey. As of October 1999, D.P. remained a resident of that address. See Letter to Mr. Bruce De Young, Superintendent Ramsey Board of Education, from Melvin L. Wyns, Director, Office of School Finance, Department of Education, dated June 26, 2000.

6. On April 1, 1998, the Wallkill Child Study Team received correspondence from the Ramsey Public Schools requesting P.P.'s records, insofar as P.P. now resided in Ramsey with his father. Certification of Francesca Cappelletti, dated January 9, 2003, page 2.

7. Wallkill subsequently forwarded the records to Ramsey and has had no further involvement in P.P.'s educational programming. Ibid.

8. The Ramsey Board of Education ("Respondent") immediately placed P.P. in Ramsey High School's Special Education program, which P.P. attended until June of 1998, while living at home with his father and stepmother. Letter from Petitioner to Melvin Wyns, Director, Division of School Finance, Dep't. of Education, dated May 2, 2000, page 2.

9. On June 5, 1998, DYFS placed P.P. in a state-sponsored skills development home located at 893 Stuykens Road, Phillipsburg, New Jersey. Certification of Francesca Cappelletti, supra, at 2.

10. P.P. remains in this placement to date. During the day, P.P. receives his educational program at the Sandhill School in Flemington, Hunterdon County, New Jersey. Letter from Petitioner to Melvin Wyns, supra, at 2.

DISPUTED FACTS IN THE BRIEFS[3]

1. Respondent Ramsey asserts that P.P. was removed from the mother's home based on findings of abuse and neglect and that DYFS "placed" P.P. in his father's home. Petitioner disagrees, arguing instead that P.P. merely went to live with his father because his mother was incapable of caring for him.

2. Respondent asserts that when P.P. was removed from K.H.T.'s home, P.P. became a ward of the state. Petitioner disagrees.

3. Respondent asserts that at all times the DYFS placement of P.P. with his father was temporary.

4. Respondent maintains that D.P.'s parental rights "may have been" terminated. See Certification Of Fredericka Shpetner In Support Of Cross-Motion For Summary Decision, Exhibit C, Letter to Susanna Mould, Esq., from Thomas McMahon, Assistant Commissioner for Department of Education dated August 1,

[3] Many of the disputed facts in this memo are resolved by information contained in the DYFS file.

2000. Petitioner disagrees, asserting there is no factual support for this contention.

5. Petitioner argues that the initial state placement occurred when P.P. was placed in the state facility. Respondent argues that the initial placement occurred when DYFS placed P.P. in his father's home. The Department of Education finds that the initial state placement was in the skills development home. Certification Of Fredericka Shpetner In Support Of Cross-Motion For Summary Decision, Exhibit C, Letter to Susanna Mould, Esq., from Thomas McMahon, Assistant Commissioner for Department of Education, dated August 1, 2000.

FACTS IN THE DYFS FILE

1. Until March 1998, K.H.T., the mother of P.P., had legal and physical custody of P.P. pursuant to a divorce obtained in 1990. D.P., P.P.'s father, was granted visitation rights, which provided that P.P. would stay with him at least one weekend every three weeks.

2. P.P. remained with his mother until approximately March 27, 1998, when DYFS removed him and his sister from K.H.T.'s home based on findings of abuse and neglect by K.H.T. and her husband, T.T., of P.P. and his sister T.P.

3. On March 30, 1998, DYFS placed the children in their father's physical custody in Ramsey, New Jersey.

4. Prior to the placement with the father, DYFS contacted him and asked if he would prefer that the children be placed in foster care or in his home.[4]

5. The father insisted that the children be placed in his care and that the children not be placed in foster care and DYFS complied.

[4] Although the above facts may not be directly relevant to the determination of summary decision, they do serve as evidence refuting the allegation that D.P.'s parental rights were terminated, since he was allowed to make decisions regarding the child's welfare and was not a stranger to the children as Respondent's brief implies.

6. DYFS conducted meetings with P.P.'s father and stepmother, P.B. At these meetings, both D.P. and P.B. informed DYFS that they would actively seek custody of the children.

7. After the placement of P.P. and T.P. in their father's home and at least until June of 1998, DYFS allowed K.H.T. to visit the children on a weekly but supervised basis. These visits were not very successful as K.H.T. frequently cancelled the visits and the children did not appear eager to visit with their mother.

8. K.H.T. has had no recent contact with the children and her exact whereabouts are presently unknown.[5]

ANALYSIS

Summary Decision

The New Jersey Supreme Court in Brill v. Guardian Life Insurance Co., 142 N.J. 520 (1995) held:

> "The judge is required to consider whether competent evidential materials presented, when viewed in light most favorable to nonmoving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the nonmoving party, ...and "[w]hether the evidence presents a sufficient disagreement to require [a hearing] or whether it is so one-sided that one party must prevail as a matter of law." (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252-252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)).

[Id. at 535-536.][6]

[5] As of 2000, K.H.T. was believed to have moved to Ohio. Although she contacted her daughter T.P. on several occasions when T.P. resided with D.P., she has never attempted to contact her son P.P., since his removal from her home in 1998.

[6] See also Frank v. Ivy Club, 120 N.J. 73 (1990) (a hearing must be granted by an agency only if material disputed adjudicative facts exist).

The rule for summary decision pursuant to the Uniform Administrative Procedure Rules, specifically N.J.A.C. 1:1-12.5 are essentially the same as the summary judgment rules pursuant to the New Jersey Rules of Court. It provides as follows:

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

A contested case can be "summarily disposed of before an ALJ without a plenary hearing in instances where the undisputed material facts, as developed on motion or otherwise, indicate that a particular disposition is required as a matter of law." In the Matter of Robros Recycling Corp., 226 N.J. Super. 343, 350 (App. Div. 1988) (citing N.J.S.A. 52:14B-2(b); N.J.A.C. 1:1-12.5 (a)). A summary decision must be based on an examination of the totality of the circumstances, mitigating and aggravating factors, adequate factual findings and conclusions of law. Ibid.

Summary decision is appropriate in this case because the material issues relevant to a resolution of the matter are not in dispute.

Applicable Statutes And Regulations

The district of residence determination is governed by section N.J.S.A. 18A: 7B-12 of the State Facilities Education Act of 1979, which provides, in relevant part:

> For school funding purposes, the Commissioner of Education shall determine district of residence as follows:
>
> ...
>
> b. The ***district of residence for children*** who are in residential State facilities, or who ***have been placed by State agencies in*** group homes, ***skill development***

> ***homes***, private schools or out-of-State facilities, ***shall be the present district of residence of the parent*** or guardian ***with whom the child lived prior to his most recent admission to a State facility*** or most recent placement by a State agency.
>
> ...

[N.J.S.A. 18A:7B-12b. (emphasis added).]

The regulations implementing Title 18A define "present district of residence" as follows:

> ...
>
> 2. The ***present district of residence of a child placed by a State agency*** in a group home, ***skill development home***, private school or out of state facility also referred to in the first paragraph of N.J.S.A. 18A: 7B-12b ***means the New Jersey district of residence of the child's parent***(s) or guardian (s) ***immediately prior to his or her initial admission to a State facility*** or placement by a State agency.

[N.J.A.C. 6A: 23-5.2 (1) and (2) (emphasis added).]

If the language of a statute is plain, unambiguous, and uncontrolled by other parts of the regulation, the words of the statute are to be given their ordinary and well-understood meaning. Fahey v. Jersey City, 52 N.J. 103, 106-07 (1968); Safeway Trails, Inc. v. Furman, 41 N.J. 467, 478 (1964); Lane v. Holderman, 23 N.J. 304, 313 (1957). A regulation is subject to the same rules of construction as a statute and should be construed according to the plain meaning of the language. Medford Convalescent and Nurs. Ctr. v. Div. of Med. Assist. and Health Servs., 218 N.J. Super. 1, 5 (App. Div.1985). "In the construction of the laws and statutes of this state, both civil and criminal, words and phrases shall be read and construed within their context, and shall, unless inconsistent with the manifest intent of the legislature, or unless another or different meaning is expressly indicated, be given their generally accepted meaning, according to the approved usage of the language." Forstrom v. Byrne, 341 N.J. Super. 45, 55 (App. Div. 2001) (emphasis added).

A plain reading of the statute suggests that it specifically relates only to situations where a state agency, such as DYFS, has placed a disabled child into a facility requiring educational funding. See South River v. N.J. State Dep't. of Educ., Div. Of Finance EDU 6441-01, Initial decision (April 12, 2002) <http://lawlibrary.rutgers.edu/search.html> (the statutory and regulatory plan of N.J.S.A. 18A: 7B-12 plainly assigns financial responsibility for a child placed in a residential or other state facility by a state agency). Indeed, the name of the act, the State Facilities Education Act, further evidences that the Legislature specifically enacted legislation limited to funding responsibility for state agency placements in state facilities. See Trustees of Local 478 Trucking and Allied Industries Pension Fund v. Pirozzi, 198 N.J. Super. 297, 312 (L. Div. 1983) (Title given a statute is indicative of its scope as well as legislative intent).

The statute relates specifically to placements requiring educational funding. No other types of placements are listed in the statute. Respondent asserts that the term "placement," as used in the statute, refers to P.P.'s placement into his father's home and, therefore, requires that Wallkill be deemed the responsible school district of residence. No such funding was required when P.P. moved into his father's home. When P.P. lived with his father, his education was provided by Ramsey. In fact, the DOE, in reversing its initial determination, where it found Wallkill responsible for the tuition relating to P.P.'s placement in the skills development home, still concluded that the initial state placement of P.P. was in the state facility rather than with his father.

Next, the statutory language plainly references the district in which a child "lived" prior to admission by a state agency to a state facility. The statute refers to the residence of the parent with whom the child lived. It does not refer to the permanency or the period of time that the child has lived in a parent's home. Where domicile has been raised in these cases, the issue has been a question of the parents' domicile.[7]

[7] Cases interpreting N.J.S.A. 18A: 7B-12, do not reference domicile other than to describe it as it relates to the 'transient' parent with whom the child lived prior to placement. See Bd. of Educ. Borough of Somerville v. Bd. of Educ. City of New Brunswick and N.J. State Dep't. of Ed., EDU 677-96, Initial Decision (November 7, 1996), Final Agency decision (February 5, 1997) <http://lawlibrary.rutgers.edu/search.html > (Commissioner rejected ALJ's findings, but upheld the notion that residence is based on the intended domicile of the parent, not the child). Moreover, "the domicile of an unemancipated child is the domicile of the parent, custodian, or guardian N.J.S.A. 18A: 38-1(a)." P.B.K. v. Board of Education, Tenafly, 343 N.J. Super. 419, 427 (App. Div. 2001). Such is not the case here where the domicile of the father is known and the mother's was known when she lived in N.J.

There is no dispute that D.P. was domiciled in Ramsey. On June 5, 1998, when P.P. was placed in the skills development home in Phillipsburg, he lived with his father. D.P. resided in the district of Ramsey at that time and continues to do so. Thus, because D.P.'s residence is not in dispute, only Ramsey can be the responsible district of residence pursuant to the plain meaning of the statute.

Respondent asserts that P.P.'s placement by DYFS into D.P.'s home was designated a temporary placement. As noted, there is no indication in the statutory language that the child must be living with the parent permanently in order to designate the school district of residence.[8] Even if permanence were relevant, there is no evidence in the DYFS file to suggest that P.P.'s placement in his father's home was intended by DYFS or his father to be temporary.[9] At the time DYFS removed P.P. from the Wallkill school district, it was no longer possible for P.P. to live with his mother, nor was there any indication that P.P. would be returned to his mother's custody. DYFS notes from conversations and meetings with P.P.'s father indicate that D.P. intended for the placement to be permanent.[10] At the time of the placement by DYFS in March of 1998, P.P.'s father attempted to secure permanent custody. The father later realized that he could not provide the special care his son required. As a result, the father called DYFS requesting that P.P. be removed from his home and placed in a facility that could better care for his special needs.

Respondent further asserts that the district of residence is determined by the parent who has legal custody of the child and that P.P.'s mother, K.H.T. had physical and legal custody of P.P. The statute does not refer to custody. Instead, the statute

---

[8] Respondent argues that Summit v. Bd. of Educ. Twp. Of Millburn is applicable to the facts of this case. There, the tribunal found that a child's temporary stay with a non-custodial parent while the custodial parent is incapable of caring for the child did not constitute the child's domicile. 95 N.J.A.R. 2d (EDU) 506. Summit is inapplicable to the facts of this case, since it does not interpret N.J.S.A. 18A: 7B-12, which refers specifically to state placement situations.

[9] If Respondent could show that DYFS intended the placement to be temporary and the placement of the child was merely a step on the way to DYFS' intended placement in the skills development home, then summary decision in favor of petitioner would not be proper, as genuine issues of fact would remain. Namely, It would need to be decided whether DYFS was in fact in legal custody of the child as respondent suggests. However, respondent has failed to provide any evidence of this fact in its cross-motion for summary decision.

[10] For example, D.P. and his wife expressed their intent that the children remain permanently in their home and not be "shifted around". When questioned, the children maintained that they did not intend to return to their mother even if her condition improved and she complied with the court order. In fact, the mother remains in defiance of the court order directing her to seek treatment. Currently, her exact whereabouts are unknown.

plainly states that in so far as the child lives with a parent prior to a state placement, that district of residence is responsible for tuition relating to the placement. Physical custody by the parent of a child at the time of the state placement is sufficient. See Bd. of Educ., Lower Camden Co. v. Dept. of Educ., Bureau of School Finance, EDU 8578-98 Initial Decision (June 4, 1999) <http://lawlibrary.rutgers.edu/search.html> (current residence of parent with whom the child lived prior to most recent placement in state facility after transfer of physical custody is responsible district of residence for purposes of N.J.S.A. 18A: 7B-12). It is undisputed that at the time of P.P.'s initial state placement into the skills development home, D.P. had physical custody of P.P.

Respondent also asserts that D.P.'s parental rights were terminated, but has provided no proof in this regard. Respondent has concluded that the father's rights were terminated because the mother retained sole custody of the children after the divorce. If D.P.'s parental rights had been terminated and DYFS had legal custody of P.P. as Respondent suggests, then Wallkill would be the financially responsible district of residence. See Bd. of Educ. Bor. of Prospect Park v. State of N.J. Dept. of Educ., Div. of Finance, 97 N.J.A.R.2d (EDU) 134 (If child in custody of DYFS, DYFS would be the financially responsible agency); see also Bradley Beach v. N.J. Dep't. of Educ., Div. of Finance, EDU 4975-99, Initial decision (May 15, 2000) <http://lawlibrary.rutgers.edu/search.html> (whether DYFS or adoptive parents had guardianship of child was determinative for purposes of determining district of residence under N.J.S.A. 18A:7B-12).

Indeed, the fact that DYFS placed the child with D.P. evidences D.P.'s parental control. It is highly unlikely that DYFS would place a child in his father's home if his rights had been terminated. Termination of parental rights generally requires a showing, by clear and convincing evidence, of four factors, including a finding that the child's health and development will be endangered by the parental relationship pursuant to N.J.S.A. 30:4C-15.1(a). New Jersey Division of Youth & Family Services v. A.W., 103 N.J. 591 (1986).

Lastly, Respondent asserts that D.P. was acting as a foster parent. N.J.A.C. 10:122B-1.4 sets forth extensive requirements for the establishment of a foster care arrangement. Respondent has also failed to provide any proof in this regard.

Therefore, D.P. could not be considered a foster parent for purposes of determining district responsibility.

CONCLUSION

Summary decision for Petitioner is appropriate because the essential facts are not in dispute. P.P. did not reside with his mother in the Wallkill district prior to his placement in the skills development facility. The facts indicate, instead, that P.P. resided with and was in the physical custody of his father in the district of Ramsey.

The respondent has failed to provide any proof that D.P.'s parental rights were terminated. All available evidence indicates that P.P. was under the legal control of his father. The statute places responsibility on the school district where the child resides prior to placement by a State agency. Accordingly, for school funding purposes, respondent is the responsible school district.

ORDER

It is **ORDERED** that Ramsey is the district of residence and responsible for funding P.P.'s education.

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

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

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

May 8 03
DATE

JEFFREY A. GERSON, ALJ

Receipt Acknowledged:

May 13 2003
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 13 2003
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

sej

APPENDIX

Exhibits:

P-1 Certification of Francesca Cappelletti

P-2 Letter Memorandum dated January 13, 2003

R-1 Certification of Fredericka Shpetner dated January 24, 2003

R-2 Letter Memorandum dated January 22, 2003

OAL DKT. NO. EDU 10198-00
AGENCY DKT. NO. 384-10/00

BOARD OF EDUCATION OF THE WALLKILL VALLEY REGIONAL HIGH SCHOOL DISTRICT, SUSSEX COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RAMSEY, BERGEN COUNTY AND THE NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Exceptions were submitted by Respondent Board of Education of the Borough of Ramsey (hereinafter, "Ramsey"); a reply thereto was filed by petitioner in accordance with *N.J.A.C.* 1:1-18.4.

Ramsey's exceptions acknowledge that the issue herein is whether it, or petitioner, the Board of Education of the Wallkill Valley Regional High School District, is the "district of residence" for P.P. who has been placed by DYFS in a skills development home from June 5, 1998 to the present, pursuant to *N.J.S.A.* 18A:7B-12(b) and *N.J.A.C.* 6A:23-5.2(a)(1) and (2). (Ramsey's Exceptions at 3) Ramsey maintains that P.P.'s placement with his father, D.P., for approximately six weeks was merely a temporary arrangement, upon his father's option, to

avoid having to place P.P. in foster care. (*Id.* at 4) Ramsey also contends that D.P. never obtained custody of P.P., notwithstanding his stated intent and, therefore, concludes:

> [W]hile the [Administrative Law Judge] A.L.J. determined that P.P.'s father assumed physical custody of P.P. on March 30, 1998 when P.P. was placed in his home ***, such custody ended immediately on June 5, 1998 upon P.P.'s departure from his father's home. Indeed, the fact that DYFS unilaterally removed P.P. from his father's home upon his father's request to do so irrefutably proves that DYFS had legal custody of P.P. throughout his temporary residence in Ramsey. Otherwise, DYFS could not have removed P.P. from his father's home absent a showing of neglect or abuse.*** (citation omitted) (*Id.* at 5)

Ramsey maintains that the phrase "district of residence" assumes an intent for a permanent residence and cites *Bd. of Ed. of Summit v. Bd. of Ed. of Twp. of Millburn*, 95 *N.J.A.R.*2d (EDU) 506 to advance its argument, notwithstanding that this case involves the application of *N.J.S.A.* 18A:38-1 *et seq.,* rather than *N.J.S.A.* 18A:7B-12. (*Id.* at 7-8)

Ramsey next asserts "that principles of equity require that, when a student resides temporarily in a district with a parent who is not vested with any legal custody, a 'district of residence' cannot be established." (*Id.* at 9) Here, the parties do not dispute that P.P.'s mother had sole legal and physical custody through March 29, 1998, and that P.P. lived with her for approximately eight years in the boundaries of Wallkill. Thus, Ramsey reasons:

> Simply because P.P.'s father agreed to temporarily have P.P. live with him in Ramsey rather than reside with a foster family should not compel Ramsey to bear the educational costs for P.P. through his twenty-first birthday. In other words, a temporary six (6) week placement should not be allowed to override the eight (8) year history of residence established by P.P.'s mother in Wallkill. *** While the A.L.J. concluded that the address of P.P.'s mother is either unknown *** or out-of-state ***, responsibility should not revert to P.P.'s father as the default "district of residence" simply because P.P. lived with him briefly prior to attending the skill development home.*** (*Id.* at 10)

Ramsey, therefore, urges the Commissioner to reverse the ALJ's decision and find that petitioner is P.P.'s "district of residence."

In reply, petitioner notes that the Initial Decision correctly disposes of Ramsey's contention that D.P.'s parental rights had been terminated and, therefore, the underpinning of the Department's determination was, in fact, faulty. (Petitioner's Reply at 4-5) Additionally, petitioner argues that the ALJ correctly interpreted the applicable statutes and regulations governing a "district of residence" determination for school funding purposes because "[t]he pertinent statutes do not speak in terms of domicile, or custody, or permanency." (*Id.* at 6) For this reason, petitioner asserts that Ramsey improperly relies on the decision in *Summit, supra,* which, as the ALJ noted, does not analyze the provisions of *N.J.S.A.* 18A:7B-12. Finally, petitioner urges the Commissioner to reject Ramsey's equitable arguments as "baseless," inasmuch as it is not supported by the facts on record. (*Id.* at 7)

Upon careful and independent review of the record in this matter, the Deputy Commissioner, to whom this matter has been delegated for review pursuant to *N.J.S.A.* 18A:4-33, concurs with the ALJ that petitioner has proven that the Respondent Department's determination of residence for funding purposes cannot be sustained, where petitioner has duly demonstrated that Ramsey is the present district of residence of P.P.'s father,[1] with whom P.P. lived, albeit for a matter of weeks, prior to P.P.'s most recent admission to a State facility upon his placement by DYFS therein in June of 1998. *See, N.J.S.A.* 18A:7B-12b and *N.J.A.C.* 6A:23-

[1] Indeed, the parties do not dispute that P.P.'s father has, at all times, resided in Ramsey. (Initial Decision at 4)

5.2(1) and (2).[2]

Accordingly, the Initial Decision of the ALJ is adopted for the reasons set forth therein.

IT IS SO ORDERED.[3]

DEPUTYCOMMISSIONER OF EDUCATION

Date of Decision: 6|18|03

Date of Mailing: 6|19|03

[2] In so concluding, the Commissioner is not persuaded by Ramsey's reliance on the decision in *Summit, supra,* for support of its contention that legal custody is essential to a "district of residence" determination under *N.J.S.A.* 18A:7B-12(b). To the extent an analysis pursuant to *N.J.S.A.* 18A:38-1 is even relevant herein, the Commissioner notes that, subsequent to the issuance of *Summit*, the State Board of Education adopted regulations that render inconsequential whether a parent has legal custody of a child in those instances where parents are domiciled in different districts and a local board must determine whether the student is entitled to attend school in the district pursuant to *N.J.S.A.* 18A:38-1(a) through (e). *N.J.A.C.* 6A:28-2.4(a)1ii.

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

298-03

298-03E

K.R.C. AND N.L.C., ON BEHALF OF MINOR CHILD, L.M.U.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON MOTION
BOARD OF EDUCATION OF THE SALEM COUNTY VOCATIONAL-TECHNICAL SCHOOL DISTRICT, WILLIAM ADAMS AND JOHN CLIFFORD,	:	
RESPONDENTS.	:	

June 18, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING
EMERGENT RELIEF
OAL DKT. NO. EDU 4202-03
AGENCY DKT. NO. 213-6/03

K.R.C. & L.L.C. o/b/o L.M.U.,

Petitioners,

v.

BOARD OF EDUCATION OF THE SALEM COUNTY VOCATIONAL TECHNICAL SCHOOLS, WILLIAM ADAMS, AND JOHN CLIFFORD,

Respondents.

K.R.R. & L.M.C., parents of **L.M.U.**, for petitioners pro se

Robert A. Muccilli, Esq., for respondents (Capehart & Scatchard, attorneys)

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

STATEMENT OF THE CASE

Respondent Board of Education of the Salem County Vocational Technical Schools (BOE) operates two high schools: the Salem County Career and Technical High School and the Salem County Arts, Science and Technology High School, in which there are 5 academies, including the Academy of Biological and Environmental Sciences (ABES). Petitioners K.R.C.

and L.M.C. and petitioner L.M.U., their daughter, a graduating senior in ABES program, claim that the BOE should name L.M.U. a "distinguished student speaker" for the upcoming ABES graduation. Respondents submit that she does not meet all of the criteria for that distinction, particularly because she has not been a student in the ABES program for all 4 of her high school years.

For the reasons detailed below, I deny the petitioners' request for emergent relief, i.e., an order requiring the BOE to name L.M.U. as a "distinguished student speaker."

PROCEDURAL HISTORY

On June 12, 2003, the petition was filed with the Department of Education. N.J.S.A. 18A:6-9. The Department transmitted the contested case as a request for emergent relief to the Office of Administrative Law (OAL), where it was filed on June 13, 2003 and scheduled for a hearing on June 16, 2003. N.J.S.A. 52:14B-2(b). (The petition names as respondents only William Adams, Ed.D., Superintendent of the BOE's school system and John Clifford, Ed.D., principal of the BOE's Career and Technical High School. The Department transmitted the case to the OAL with a case caption showing the BOE as a respondent.) On June 16, 2003 in the OAL, Trenton, respondents' answer and exhibits were filed and the request for emergent relief was argued on a taped record.

FINDINGS OF FACT

The BOE operates two high schools: the Salem County Career and Technical High School and the Salem County Arts, Science and Technology High School.

The Salem County Career and Technical High School primarily prepares students to directly enter specific fields of vocational or employment. The Salem County Arts, Science and Technology High School (on campuses other than its own) operates 5 educationally rigorous academies, including the ABES.

On December 17, 1996, the BOE approved establishment of a Law Enforcement and Public Safety Program at the "Career Center" and provided that it "may become a full-time and an academy program." R-C. On July 15, 1997, the Law Enforcement and Public Safety Program's "Vo Tech Career Center Curriculum" was presented and the BOE approved implementation of that program during the 1997-98 school year. R-C. On August 26, 1998, the BOE again approved the Law Enforcement and Public Safety Program as part of the "Career Center." R-G.

On August 3, 1999, the BOE approved courses for the 1999-2000 school year for the ABES program and the Law Enforcement and Public Safety Program. The ABES program's courses, e.g., "Algebra I," "Honors English I" and "Honors History II," were more rigorous than the Law Enforcement and Public Safety Program's courses, e.g., "Pre Algebra," "Algebra," "English 9" and "US History II – 20th Century America." R-E.

Substantial differences among the BOE's schools and programs make it difficult if not impossible to reconcile the weights and values of the various courses. Therefore, the BOE has not recognized a valedictorian or salutatorian. Instead, Dr. Adams, the Superintendent of the BOE's school system, has determined an academy's "distinguished student speaker" on the following criteria: (1) at the time of graduation, the academy must have been in operation for a minimum of 4 years, (2) to be eligible a student must have participated in the same academy's program for a minimum of 4 years, (3) the student must have the highest grade point average (GPA) of eligible students, and (4) the student must be of good character. R-1, R-A

In past years, Dr. Adams determined who would be the "distinguished student speaker" and reported the student's name to the BOE. The criteria were not written or formally adopted by the BOE in a policy, etc.

During the 1999-2000 school year, L.M.U. was a freshman in the BOE's school system's Law Enforcement and Public Safety Program, so that she took Law Enforcement and Public Safety Program courses and not the more rigorous ABES program courses. R-F.

During the 2000-01 school year, L.M.U. was a sophomore in the BOE's school system's Law Enforcement and Public Safety Program, so that she again took Law Enforcement and Public Safety Program courses and not the more rigorous ABES program courses. R-F.

During the 2001-02 school year, L.M.U. was a junior in the BOE's school system, she transferred from the Law Enforcement and Public Safety Program to the ABES program and took that program's courses. R-D.

On July 23, 2002, the BOE approved "Career and Technical Programs", including the Law Enforcement and Public Safety Program as a full-time program option. R-C. Thus the BOE has reiterated that the Law Enforcement and Public Safety Program is not an academy program.

During the 2002-03 school year, L.M.U. has been a senior in the BOE's school system's ABES program and she will graduate in a few days.

Dr. Adams, applying the above-described criteria, has determined that I.R. is the ABES program "distinguished student speaker" for the 2003 ABES graduating class.

Petitioners allege that L.M.U. has performed well academically and that she has attained the highest average in her class, so that she and I.R. should both be named "distinguished student speakers." However, unlike I.R., L.M.U. has not been a student in the rigorous ABES program for all 4 of her high school years.

CONCLUSIONS OF LAW

Generally, in administrative adjudication, the claimant bears the burden of persuasion (proof), by the preponderance (greater weight) of the competent and credible evidence of facts essential to his or her claim. See N.J.S.A. 52:14B-10(c); see also N.J.S.A. 2A:84A-1 et seq.; N.J.R.E. 101(b)(1); Atkinson v. Parsekian, 37 N.J. 143, 149 (1962); Snyder v. I. Jay Realty Co., 53 N.J. Super. 336, 347 (App. Div. 1958), rev'd in part on other grounds, 30 N.J. 303 (1959); Collins Realty Co. v. Sale, 104 N.J. Eq. 138, 142 (E. & A. 1929).

To succeed in a motion for a temporary restraint and interlocutory injunction, a movant must show that (1) the parties' rights and duties are clear; (2) when the case is fully heard, he or she will probably prevail; (3) if the relief is not granted, he or she will suffer immediate and irreparable harm; and (4) relief can be ordered and limited so that it will not be unfair to another person or party. See, e.g., N.J.A.C. 1:1-12.6; R. 4:52-1; Crowe v. DeGoia, 90 N.J. 126, 132-34 (1982).

Petitioners here claim that the BOE and respondent school system officials should be ordered to designate L.M.U. as a "distinguished student speaker" for the upcoming graduation.

However, the ABES program's courses are more rigorous than the Law Enforcement and Public Safety Program's courses, which L.M.U. took her first two years in high school. Consequently, the above-described criteria for determination of what graduate will be the "distinguished student speaker" appear to be reasonable and fair. Further, presumably, from the past years' practice, the BOE is well aware of the criteria and that it has accepted if not essentially ratified it and petitioners have cited no law requiring the BOE to, e.g., adopt a written policy setting forth criteria. Further, petitioners have not shown that they will be irreparably harmed if the emergent relief demanded is denied.

Given the above-described circumstances, the petitioners have not proven that when the case is fully heard they will probably prevail. To the contrary, it appears that they will fail to succeed in this claim.

ORDER

Consistent with the above, I **DENY** the motion for emergent relief.

The parties may serve discovery requests, and a telephone conference to discuss the progress of the case and a hearing date will be set.

This order on application for emergency relief may be adopted, modified or rejected by **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

June 16, 2003
DATE

JOHN R. TASSINI, ALJ

EXHIBITS

For Petitioners:

P-1 Board resolution: Approval of New Career Center and Salem County Arts, Science and Technology High School Curricula and Curriculum Modifications for the 2000-01 School Year

For Respondents:

R-1 Affidavit of Dr. Adams

R-A Memorandum (relative to honors distinction) from Superintendent William H. Adams, Ed.D., May 17, 2001

R-B Letter (relative to selection of students for distinguished speaker status) from Superintendent Adams to petitioners, June 11, 2003

R-C Board Minutes: Approval to Establish a Law Enforcement and Public Safety Program for the 1997-98 School Year, December 17, 1996; Board Minutes: Approval of Career Curriculum Changes for the 1997-98 School Year, July 15, 1997; Board Minutes: Board Review and Approval of the 2002-03 District Educational Curriculum, July 23, 2002

R-D Transfer Information, School: Salem County Arts, Science and Technology High School, 2002-03 School Year, Term: Marking Period 3, L.M.U.

R-E Board Minutes: Request and Recommendation for Board of Education Approval of the Career Center and the Salem County Arts, Science and Technology High School Curriculum and Curriculum Modifications for the 1999-2000 School Year, August 3, 1999

R-F Official Transcript, Salem County Vocational Technical Schools, L.M.U.

R-G Board Minutes: Request and Recommendation for Board of Education Approval of the Career Center Curriculum for the 1998-99 School Year, August 26, 1998

WITNESSES

For Petitioners:

K.R.R.

L.L.C.

For Respondents:

Dr. Adams

OAL DKT. NO. EDU 4202-03
AGENCY DKT. NO. 213-6/03

K.R.C. AND N.L.C., ON BEHALF OF MINOR CHILD, L.M.U.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON MOTION
BOARD OF EDUCATION OF THE SALEM COUNTY VOCATIONAL-TECHNICAL SCHOOL DISTRICT, WILLIAM ADAMS AND JOHN CLIFFORD,	:	
RESPONDENTS.	:	

The record of this matter, including the audiotape of proceedings at the Office of Administrative Law, and the recommended Order of Administrative Law Judge (ALJ) have been reviewed.

Upon review, the Commissioner concurs with the ALJ that petitioners have not met their burden of demonstrating entitlement to extraordinary relief. Like the ALJ, the Commissioner finds that petitioners have not generally satisfied established criteria for the granting of such relief, and in particular that they have not shown a likelihood of prevailing on the merits of a claim that respondents' actions in not selecting L.M.U. as a "distinguished student speaker" at graduation were arbitrary, capricious or contrary to law. Consequently, there are no grounds on which the Commissioner may direct interim relief pending a final determination on the merits of this matter.

Accordingly, the Commissioner adopts the ALJ's Order Denying Emergent Relief and directs that this matter proceed, if petitioners wish to continue its pursuit, in accordance with the instructions of the ALJ.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 6/18/03

Date of Mailing: 6|18|03

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

299-03

299-03E

C.M., on behalf of minor child, D.S.	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF WOODBURY, GLOUCESTER COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

June 20, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

OAL DKT. NO. EDU 4147-03

AGENCY DKT. NO. 176-6/03

C.M. O/B/O D.S.,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF WOODBURY, GLOUCESTER COUNTY,

Respondent.

Charles R. Iannuzzi, Esq., for petitioner

Thomas Campo, Esq., for respondent

BEFORE **DOUGLAS H. HURD,** ALJ:

STATEMENT OF THE CASE

Petitioner, C.M., on behalf of her minor son, D.S., appeals from a decision of the Respondent, Board of Education of the City of Woodbury, precluding D.S. from participating in the Woodbury High School graduation ceremony scheduled for the week of June 23, 2003. The Petitioner claims that the Board's determination is arbitrary, capricious and unreasonable. The Board asserts that D.S.'s egregious behavior as a student justifies this action, which is a valid exercise of the Board's authority.

PROCEDURAL HISTORY

Petitioner's appeal petition and request for emergent relief was filed with the Commissioner of Education on June 2, 2003. The Commissioner determined this dispute to be a contested case pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13 and transmitted it to the Office of Administrative Law, where it was filed on June 9, 2003. Oral argument on the emergent petition was scheduled and conducted on June 16, 2003. The parties also advised at that time that no other issues remain once the emergent relief matter is resolved. Witnesses and documentary evidence was presented at that time.

EVIDENCE

Judith Wilson, Superintendent, testified on behalf of the Board. She testified that on January 7, 2003, D.S. appeared before the Board for a disciplinary hearing involving alleged incidents of verbal and physical sexual harassment in December 2002. The Board upheld the sexual harassment charges against D.S. and passed a resolution on January 7, 2003, stating that D.S. be placed in an alternative education program. R-3. The resolution also prohibited D.S. to be on school grounds or participate in school activities or senior privileges. Finally, the resolution states:

> A determination on whether the student may walk in the Woodbury High School Graduation Ceremony is dependent on credit completion and behavior will be made by the Board no later than June 10, 2003.

On January 8, 2003, Wilson sent a letter to C.M. concerning her son D.S. and the actions by the Board on January 7, 2003. The letter outlined the resolution and likewise stated that the "Board will evaluate [D.S.'s] academic and behavioral progress before June 10th in order to determine whether or not he will be permitted to walk in graduation ceremonies, if he has indeed met his credit requirements." R-1.

Wilson testified that the January 7 decision to send D.S. to an alternative school was a result of the sexual harassment charges and also due to his past disciplinary record. D.S.'s suspensions are listed in R-5, and include numerous incidents between September 2002 and

December 2002 such as using profanity, stating there was a bomb during a fire drill, pulling a fire alarm and locking a substitute teacher out of the classroom.

D.S started at the Gloucester County Alternative School in late January or early February 2003. On February 19, 2003, Wilson received a phone call from the Principal of the alternative school. The Principal advised Wilson that he terminated D.S.'s placement at the school because D.S., while on a school bus, possessed a controlled dangerous substance with the intent to distribute. The Principal advised Wilson of this termination in writing on February 20, 2003. R-2. D.S. was then provided homebound instruction for the remainder of the school year.

Wilson testified that it was the fact that D.S. was terminated from the alternative school that resulted in her decision not to allow D.S. to walk in the graduation ceremony. She testified that had he completed his education at that school and had good behavior that he would have been able to walk in the ceremony. Wilson did not speak to D.S.'s tutor in the homebound instruction to see how his behavior was for the remainder of the school year. She admits that there were no behavioral problems reported to her from the tutor.

Wilson advised the Board of the fact that D.S. was terminated from the alternative school and of his placement in homebound instruction. The Board, however, never affirmatively took action prohibiting D.S. from walking in the ceremony, except for its January 7, 2003, resolution on the subject. Wilson testified that she alone made the decision not to allow D.S. to walk at the ceremony because in her opinion there was no basis to allow D.S. to walk at the graduation in light of the Board's January 7, 2003, resolution. Wilson admitted to not advising C.M. in writing or verbally regarding the decision not to allow D.S. to walk in the ceremony.

Wilson testified that it would send the wrong message to the community and to the students if D.S. were allowed to walk in the ceremony. She said that the graduation ceremony is more then just a ceremony but is a forum that reinforces and upholds high academic and civic standards. She said that allowing D.S. to walk in the ceremony would undermine those standards.

C.M. and D.S. testified in support of the Petitioner's case. C.M. testified that she found out about Wilson's decision not to allow D.S. to walk in the ceremony through D.S.'s tutor. She testified that she was never advised by Wilson in writing or verbally. C.M. thought she would be entitled to another hearing before the Board prior to this decision being implemented since the January 8, 2003, letter from Wilson says that the "Board" will re-evaluate D.S.'s behavior to see if walking in the ceremony is appropriate.

Importantly, C.M. testified that D.S. was found not-guilty in a criminal court for the drug possession/distribution charge that resulted in his termination from the alternative school. C.M. testified that she did not appeal the decision by the alternative school to terminate D.S.'s placement because she was happy with the homebound instruction that D.S. was receiving. C.M. also disputed D.S.'s responsibility for the pulling of a fire alarm that resulted in his suspension in the fall of 2002.

C.M. also testified that the tutor of D.S.'s homebound instruction has advised her that D.S. has been working really hard and doing well. She stated that D.S. is going to a college in Pittsburgh on a scholarship. Finally, C.M. testified to how she and her family had been looking forward to D.S. walking in the ceremony.

D.S., a 17-year old student, testified that he wants to walk in the ceremony because of his accomplishments in school, including his contributions to the football and track team. He noted that it is important for him to walk in the ceremony because many of his friends dropped out of school and the ceremony highlights his ability to finish. D.S. testified that the person he was alleged to have sexually harassed in December 2002 will not be at the ceremony.

D.S. denied responsibility for the drug charge that led to him being terminated from the Alternative School. He also denied responsibility for some of the incidents that led to suspensions in the fall of 2002.

ANALYSIS

The Board's action is accorded a presumption of reasonableness and will not be upset unless there is an affirmative showing that the decision was arbitrary, capricious or unreasonable. *Thomas v. Morris Township Board of Education*, 89 *N.J. Super.* 327, 332 (App. Div. 1965), *aff'd*, 46 N.J. 581 (1966).

The evidence before me clearly demonstrates that the action of the Board at its January 7, 2003, meeting was reasonable. There was no affirmative showing by the Petitioner that the Board acted arbitrarily, capriciously or unreasonably in transferring D.S. to an alternative school, prohibiting him from school grounds, and stating that whether he can walk at the graduation ceremony will be dependent on his future behavior.

The future behavior that resulted in Wilson deciding not to allow D.S. to walk was the fact that he was terminated from the Alternative School. The only knowledge she has of what caused this termination was a brief conversation she had with the school's principal who stated that D.S. possessed and intended to distribute drugs on a school bus.

D.S. was charged criminally in juvenile court for this same action that resulted in him being terminated from the Alternative School. Counsel for D.S., who was also his counsel in the criminal drug proceeding, advised me that the drug charges were dismissed against D.S. in juvenile court. Counsel for the Board did not contest this fact.

Despite the charges being dismissed, Wilson thought it was still appropriate to not allow D.S. to walk at the ceremony because he was terminated from the alternative school. Essentially, the Board is contending that the fact that D.S. was kicked out of that school indicates there is some evidence of D.S.'s guilt and this justifies its action in not allowing D.S. to walk. However, the only competent evidence before me is that this charge was dismissed in a juvenile court and that D.S. continues to deny responsibility. The Board, on the other hand, has no competent evidence that D.S. was culpable for the actions that led to his dismissal from the alternative school. The fact that D.S. was terminated from that school, by itself, is not sufficient to show that he engaged in improper behavior, especially in light of the dismissal of the juvenile charge

and D.S.'s denial of culpability. Notably, the Board choose not to present potentially competent evidence on this issue of D.S.'s responsibility in the drug charges, *i.e.* calling the principal of the alternative school as a witness, etc.

Wilson's decision to go ahead with not allowing D.S. to walk in the ceremony in light of the dismissal of the juvenile complaint is arbitrary, capricious and unreasonable. She should have investigated the decision of the alternative school principal further after the juvenile charges were dismissed. Wilson also should have gone back to the Board and had them evaluate D.S.'s behavior since the January 7, 2003, resolution. Indeed, the January 8, 2003, letter to C.M. stated that the "Board would evaluate" D.S.'s behavior before June 10 to determine whether he can walk at the graduation ceremony.

CONCLUSION AND ORDER

I conclude that the Petitioner has established that the Board's action was arbitrary, capricious and unreasonable. I hereby **ORDER** the decision of the Board prohibiting D.S. from walking at the Woodbury High School graduation ceremony be **REVERSED** and that the relief requested by the Petitioner be **GRANTED**.

This order on application for emergency relief may be adopted, modified or rejected by the Commissioner of the Department of Education, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the Commissioner does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

June 17, 2003
DATE

DOUGLAS H. HURD, ALJ

/lam

WITNESSES

For Petitioner:

C.M.

D.S.

For Respondent:

Judith Wilson, Superintendent

DOCUMENTS IN EVIDENCE

For Petitioner:

None

For Respondent:

R-1 January 8, 2003 letter from Wilson to C.M.

R-2 February 20, 2003, letter from Principal of the alternative school

R-3 Board Resolution

R-4 February 27, 2003, memorandum regarding homebound instruction

R-5 D.S.'s suspension record

OAL DKT. NO. EDU 4147-03
AGENCY DKT. NO. 176-6/03

C.M., on behalf of minor child, D.S.	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF WOODBURY, GLOUCESTER COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

The record of this emergent matter, which included the audiotape of the hearing conducted at the Office of Administrative Law (OAL) and the Order of the Administrative Law Judge (ALJ) granting emergent relief, have been reviewed.

Upon such review, the Commissioner agrees with the decision of the ALJ as he is persuaded that, under the circumstances existing here, petitioner has satisfied the requisite standards entitling her to the relief she seeks.

Accordingly, the recommended Order of the ALJ granting petitioner's Motion for Emergent Relief is adopted. In that the parties are in agreement that, with the issuance of the Commissioner's decision herein, there are no remaining issues requiring adjudication, the instant Petition of Appeal is hereby dismissed and the OAL is requested to return the file to the agency.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 6|20|03
Date of Mailing: 6|20|03

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

300-03

#300-03E

VINCENZA RATTO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CARLSTADT-EAST RUTHERFORD REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

June 20, 2003

PAUL S BARBIRE ESQ
9 LINCOLN AVENUE
RUTHERFORD NJ 07070
(201) 939-4868
Attorney for the **CARLSTADT-EAST RUTHERFORD REGIONAL BOARD OF EDUCATION**

Vincenza Ratto, Petitioner vs. Carlstadt-East Rutherford Regional Board of Education, and Dr. Samuel G. Feldman, Superintendent of Schools, Respondents	**ORDER** OFFICE OF ADMINISTRATIVE LAW OAL DKT. NO.: EDU 5636-03 AGENCY DKT. NO.: 214-6/03

This matter having been brought before the Office of Administrative Law by Notice of Motion for Emergent Relief with supporting affidavits and letter brief by Maycher Lynch, LLP attorneys for petitioner and the respondent, Carlstadt-East Rutherford Regional Board of Education through its attorney Paul S. Barbire, Esq. having filed a response to the Motion for Emergent Relief and the Court having read the papers filed and for the reasons stated on the record at the Office of Administrative Law, 33 Washington Street, 15th Floor, Newark, New Jersey **ORDERS** as follows:

The petitioner's request for emergent relief be and is hereby denied.

This Order may be reviewed by the Commissioner of Education either upon interlocutory and/or emergent review pursuant to N.J.A.C.1:1-14.10, or at the end of the contested case pursuant to N.J.A.C. 1:1-18.6.

Dated: June 19, 2003

, A.L.J.

OAL DKT. NO. EDU 5636-03
AGENCY DKT. NO. 214-6/03

VINCENZA RATTO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CARLSTADT-EAST RUTHERFORD REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

Petitioner's application for emergent relief was opened before the Commissioner of Education on June 13, 2003. Therein, petitioner sought to participate in graduation ceremonies scheduled for June 23, 2003, notwithstanding that she has not demonstrated proficiency in the mathematics portion of the High School Proficiency Assessment (HSPA) or the Special Review Assessment (SRA). The matter was immediately transmitted to the Office of Administrative Law (OAL), whereupon, a hearing was conducted on June 18, 2003. At that time, the Administrative Law Judge (ALJ) issued an oral Order recommending that the requested relief be denied, which was memorialized by written order dated June 19, 2003.

Upon review of the audio tape of the emergent hearing conducted at the OAL and the recommended Order of the ALJ, the Deputy Commissioner, to whom this matter has been delegated for hearing pursuant to *N.J.S.A.* 18A:4-33, concurs that emergent relief is properly denied. *Crowe v. DeGioia*, 90 *N.J.* 126 (1982).

Accordingly, the Deputy Commissioner adopts the recommended Order of the ALJ. This matter shall continue at the OAL for those proceedings which may be necessary to bring it to conclusion.

IT IS SO ORDERED.*

DEPUTY COMMISSIONER

Date of Decision: 6/20/03

Date of Mailing: 6/20/03

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

304-03

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

COMMISSIONER OF EDUCATION

DECISION

June 24, 2003

AGENCY DKT. NO. 113-4/03

IN THE MATTER OF THE TENURE HEARING OF LORRAINE BANKS, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY.

COMMISSIONER OF EDUCATION

DECISION

This matter was opened before the Commissioner of Education on April 17, 2003 through the certification of tenure charges alleging excessive absenteeism and unbecoming conduct against a tenured teacher employed by the State-operated School District of the City of Newark (hereinafter, "District").

The Commissioner directed respondent, via both certified and regular mail on April 17, 2003, to file an Answer to the tenure charges against her.[1] This communication from the Bureau of Controversies and Disputes clearly provided respondent notice that, pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4, an individual against whom tenure charges are certified shall have *15 days from the date such charges are filed with the Commissioner* to file a written response to the charges, and that failure to answer within the prescribed period, where no extension has been applied for and granted, or where there has been a submission by the charged employee of a responsive filing indicating that she does not contest the charges, **will** result in the charges being deemed admitted by the charged employee.

[1] The notice sent via certified mail was returned as "unclaimed."

On May 13, 2003, well outside the 15-day period provided by regulation and without obtaining an extension of time in which to answer, Ms. Banks responded to the charges.[2] By letter dated May 14, 2003 from the Bureau of Controversies and Disputes, respondent was afforded the opportunity to provide reasons for her untimely filing and her failure to request an extension, as well as to address why the Commissioner should not, under these circumstances, deem the charges brought by the District to be admitted. Respondent submitted a response to this request by letter dated May 20, 2003. In essence, she states that she has been beset by a series of family losses over the years which have contributed to her poor performance, and that she was away from home when the initial notice of charges was sent by the Bureau of Controversies and Disputes. Respondent reiterates that she has suffered from Post Traumatic Stress, but that she is currently in control of her stress, has undergone counseling and is feeling

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[2] In her responsive filing, respondent states, in full:

> This written letter is my response to the "tenure" charges filed by the Commissioner's office [sic] on April 17, 2003.
> I deeply regrett [sic] that these charges are filed. I've been teaching in Newark for many years – my records of teachings were always "Excellent" if not good. I have always loved children and I am a good person, as well as a good teacher. However, in the past few years of my teaching profession I've sufferred [sic] some misfortunes, and personal illness.
> I deeply hope my tenure isn't taken because I've worked soo [sic] hard to achieve it.
> Please accept my sincerest apologies for any unprofessional behavior or conduct that may have caused the state to file charges against me.
> I would deeply regrett [sic] losing my tenure, even my employment with the Newark School District.
> I still love children, respect them and want to continue to teach should the State Commissioner grant me a second chance.
> Please write me soon so I may know my status ("job") once a decision has been made on my behave [sic]. "Thank you."
> Sincerely, Lorraine Banks ***

Two post scripts from the letter state:

> Currently, I am physically and emotionally stressed – suffering from Post Traumatic Stress, "P.T.S." since the year 2000. I can provide medical records if needed by the State Board of Education proving the poor health I have. Thank you. Lorraine Banks.
> Please excuse my late response to the charges filed against me.

much better. She asserts that she would like "a second chance to prove I am productive, and can teach again." (Banks' Letter, May 20, 2003 at 2)

In reply, the District contends that, pursuant to *N.J.A.C.* 6A:3-5.3(c), the charges against respondent should be deemed admitted. In this connection, the District argues that respondent's filing on May 13 should be considered untimely, as it was submitted 11 days late, with no explanation for such lateness. To the extent respondent argues that she was away from home at the time the charges were certified to the Commissioner, the District counters that respondent was on notice since March 18, 2003, the date the District actually filed tenure charges against her, that the District would consider certifying such charges to the Commissioner. (District's Reply at 3-4)

If, however, respondent's submission is considered, the District asserts that, substantively, respondent does not, in her Answer, "indicate that she disagrees with the charges or that they are false." (*Id.* at 3) The District continues,

> In fact, her Answer amounts to an apology for her excessive absenteeism, blaming "misfortune and personal illness" for her poor attendance record. Instead of challenging the veracity of the charges, Respondent asks the Commissioner to "grant her a second chance." Since there is absolutely no indication that Respondent contests the charges, the District's view is that Respondent's Answer should be deemed an admission of the charges. (*Ibid.*)

Upon review, the Commissioner initially notes that the pertinent regulations regarding answers to tenure charges provide:

> Where no answer is filed within the requisite time period and no request for an extension is made, or such request is denied by the Commissioner, or where the charged employee submits an answer or other responsive filing indicating that he or she does not contest the charges, the charges shall be deemed admitted by the charged employee. *N.J.A.C.* 6A:3-5.3(c).

Therefore, even assuming, *arguendo*, that respondent's submission of May 13, 2003 was timely filed, the Commissioner concurs with the District's view that respondent does not challenge any of the specific facts which underlie the tenure charges in this matter, notwithstanding that she clearly expresses her dismay that such charges were, in fact, filed against her. Consequently, pursuant to *N.J.A.C.* 6A:3-5.3(c), the Commissioner finds that respondent does not contest the tenure charges brought by the District.

The Commissioner's review of the tenure charges certified against respondent by the District and the statement of evidence in support of those charges indicate that from September 1995 through September 2002, respondent was absent from her duties a total of 443 days, as follows:

- In the 1995-1996 school year, respondent was absent 22 days;
- In the 1996-1997 school year, respondent was absent 15 days;
- In the 1997-1998 school year, respondent was absent 26 days;
- In the 1998-1999 school year, respondent was absent 73 days;
- In the 1999-2000 school year, respondent was absent 66 days;
- In the 2000-2001 school year, respondent was absent 83 days;
- In the 2001-2002 school year, respondent was absent 154 days; and
- In September 2002, respondent was absent 4 days.

The District avers, and the record demonstrates, that respondent has been repeatedly advised that her attendance is unsatisfactory and in need of improvement. It further contends that respondent's absenteeism has resulted in a disruption in the continuity of instruction to the pupils in the District. (Tenure Charges at 1-2)

The Commissioner recognizes that the enabling statute provides that tenured staff shall not be dismissed or reduced in compensation "except for inefficiency, incapacity, unbecoming conduct, or other just cause***." *N.J.S.A.* 18A:6-10. Deeming the above charges to be admitted, and noting that respondent does not deny the specific allegations contained therein, the Commissioner finds that the District has demonstrated that respondent's pattern of

excessive absences, and its resultant negative impact on the District, constitutes conduct unbecoming a teaching staff member sufficient to warrant her dismissal.

IT IS ORDERED this 25th day of June 2003 that summary decision shall be granted to the District, and respondent shall be dismissed from her tenured position as a teacher in the District's employ as of the date of this order. This matter shall be referred to the State Board of Examiners pursuant to *N.J.A.C.* 6:11-3.6 for action against respondent's certificate as it deems appropriate.[3]

COMMISSIONER OF EDUCATION

Date Decided 6/24/03
Date Mailed 6/25/03

[3] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

305-03

305-03

IN THE MATTER OF THE TENURE	:	
HEARING OF SABINO VALDES,	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY	:	DECISION
OF UNION CITY, HUDSON COUNTY.	:	
	:	

SYNOPSIS

Petitioning Board certified tenure charges of unbecoming conduct and insubordination against respondent plumber.

Following 25 days of hearing and the testimony of many witnesses, the ALJ determined that on a variety of occasions between April 1999 and extending into early 2002, respondent acted in an unbecoming manner, was insubordinate to his superiors by failing to comply with their lawful directives, abused sick leave and, with his lies and unsubstantiated charges of discrimination and corrupt behavior against the Board, became an obstacle to the efficient operation of the School District. The ALJ concluded that the Board proved by a preponderance of credible evidence that respondent was guilty of the tenure charges and ordered his removal from his tenured position.

Having reviewed the record, including the transcripts of the hearing and the ALJ's credibility determinations and judgments concerning the witnesses, the Commissioner adopted the findings and determination in the Initial Decision as his own. The Commissioner concurred that the appropriate penalty was dismissal. He ordered respondent dismissed from his position as of the date of this decision.

June 24, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3620-01
AGENCY DKT. NO. 328-9/00

IN THE MATTER OF THE TENURE HEARING OF SABINO VALDES, BOARD OF EDUCATION OF CITY OF UNION CITY, HUDSON COUNTY

Thomas R. Kobin, Esq., for petitioner Union City Board of Education (Chasan, Leyner, Bariso & Lamparello, attorneys)

Sabino Valdes, *pro se*, respondent

Record Closed: December 27, 2002 Decided: May 15, 2003

BEFORE **STEPHEN G. WEISS**, ALJ:

PROCEDURAL HISTORY

This matter was transmitted by the Department of Education to the Office of Administrative Law (OAL) on May 7, 2001, for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F1 to -13 and was heard by the undersigned during 2001 and 2002. Several adjournments were granted due to a variety of reasons, including efforts to settle, witness unavailability and changes in counsel.

Posthearing proposed findings of fact and replies thereto have been submitted and the following is my Initial Decision. By Order of Extension, the time within which to submit this Initial Decision was extended to June 26, 2003.

FINDINGS OF FACT

Voluminous posthearing proposed findings of fact and conclusions of law, and replies, were filed totaling hundreds of pages with attachments. The hearing, itself, took up all or part of over 25 days and included testimony of many, many witnesses. Large portions of the testimony turned out to be either repetitive or essentially tangential to the basic issue in the case—whether the Board of Education of Union City proved by a preponderance of the credible evidence that Sabino Valdes was insubordinate and/or engaged in conduct unbecoming a tenured employee as charged. Rather than repeat the testimony, I believe it to be appropriate to make specific **Findings of Fact** in seriatim form which cover the fundamental matters involved and then to discuss their consequences:

1. Petitioner is a body corporate and politic of New Jersey and charged with the statutory and constitutional obligation to operate and administer the public schools within its boundaries in such fashion as to deliver a thorough and efficient system of education to the students attending its public schools.

2. Respondent, Sabino Valdes, is a New Jersey licensed master plumber who was hired by the petitioner in 1994 in the position of plumber and enjoys tenure status.

3. The following persons who testified at the hearing had relevant interactions with respondent:

    a) Carl Johnson, Board Secretary, who has served in that position for over 14 years and employed for over 33 years. Johnson is the Board's chief financial officer and custodian of school records, and also oversees the non-instructional activities of the Board, including maintenance.

b) William F. Hogan, who was Director of Buildings and Grounds prior to June 30, 1999 and was Valdes' immediate supervisor. In July 1999, Hogan became Director of Facility Planning and Development.

c) John E. Knudsen, who succeeded Hogan as Director of Building and Grounds. Like Hogan, Knudsen's primary responsibilities were to manage the maintenance department, which included overseeing maintenance personnel (including Valdes). Prior to becoming employed by the Board, Knudsen had been a member of the Union City Police Department for 22 years where he achieved the rank of captain. During most of his employment with the Board (he left its employ at the end of June 2002), he directly supervised Valdes and in that capacity he met with him and other maintenance staff nearly every morning in the facilities office to distribute work assignments. Knudsen's duties also included supervision of Valdes and others "in the field" where he oversaw their work and determined whether additional equipment or tools were needed. Knudsen, like Hogan, conducted annual evaluations for the maintenance employees and office staff under his control, including Valdes, and typically completed those evaluations in March or April each year.

d) Gerald Caputo has been employed by the Board for over 30 years. He was a teacher for 26 years and the Assistant Principal of Edison Elementary School from August 1999 until December 2000, when he was appointed Executive Director of Facilities and Safety while Knudsen was on leave. Caputo also has been a vice-president of the Union City Education Association since 1988.

e) Alberto Pita was employed by the Board in June 1995 as a maintenance person and later became a plumber.

f) Joseph Chieco was employed as a maintenance person in the facilities department and subsequently was appointed to the position of security guard.

g) Frank Cocuzza is a representative of the New Jersey Education Association (NJEA), Valdes' labor representative. In that capacity Cocuzza assists members in collective negotiations, arbitrations and filing grievances.

4. Prior to the spring of 1999, the Board never had any disciplinary issues with Valdes. However, in the spring of 1999, Valdes was out of work on the following 28 school days: April 5, 6, 28, May 7, 12, 13, 14, 17, 18, 19, 20, 21, 24, 25, 26, 27, 28, June 1, 2, 3, 4, 7, 8, 9, 10, 11, 14 and 16. Some of those absences were covered by notes from a chiropractor who was treating Valdes; many were not.

5. Valdes utilized at least some of those sick days to campaign on behalf of Neftali Cruz who had been a Board employee in the facilities department. Valdes assisted in Cruz's campaign for Hudson County Freeholder in 1999 and was his campaign manager.

6. The Hudson County Freeholder primary election was held on June 8, 1999. Valdes returned to work on June 17, 1999.

7. An independent private investigation firm hired by the Board to surveille Valdes verified some of his activities on behalf of the Cruz campaign. They observed him on May 25, 26 and June 1, 1999, all regular work days. This included videotaping Valdes during work hours on May 25, 1999 when he was traveling to Cruz's home. On that same day, Valdes, dressed in a suit and tie, traveled around Union City interacting with various people without displaying any overt signs of physical problems.

8. On May 26, 1999, Valdes was videotaped leaving his home at 7:58 a.m., driving Cruz's car. He dropped the car off at Cruz's home, and then went to a diner until 9:47 a.m. He did not report for work that day.

9. On June 1, 1999, Valdes was again videotaped. He left his home in Paramus at 9:07 a.m. and traveled to Cruz's home. Cruz and Valdes left Cruz's home at 1:21 p.m. and proceeded to drive to another location in Union City, where Valdes

and Cruz stayed for about 15 minutes. They then came out, picked up additional passengers and drove off. This day, too, was a regular work day.

10. Alberto Pita also observed Valdes in Union City on five separate occasions during work hours on days Valdes allegedly was out sick. One of these days was Primary Election Day, June 8, 1999, a work day.

11. On at least five separate occasions, including Primary Election Day on June 8, 1999, Joseph Chieco also observed Valdes traveling around Union City during work hours.

12. Valdes' explanation for use of some of his sick days in 1999 to campaign for Cruz rather than report for work was that although he had a cervical neck condition which prevented him from doing strenuous physical work, he could engage in campaigning which was not physically stressful.

13. During April-June 1999, Valdez had been relieved of having to perform significant physical labor at work because of his cervical condition and, at that time, basically was working on developing computer software for a preventative maintenance program. He was engaged, as well, in ordering materials and giving out assignments. Thus, virtually all the functions he carried out in this period while at work were non-physical in nature. Indeed, in his evaluation of Valdes in April 1999, Hogan suggested he also spend more time "in the field."

14. Although Valdes produced notes relative to that time frame, they do not support his claim that he was capable of campaigning, but not capable of continuing to carry out the non-physical duties he had been allowed to perform. For example, although respondent produced chiropractor's notes which recommended that he take some days off from work, he proceeded to take many more days.

15. A chiropractor's note, dated May 27, 1999, submitted in response to a request from Johnson, indicated that Valdes "is under care in this office for a spinal related condition" and that "normal work activities as described by the patient are slowing the progress of his healing." However, the note contains no explanation

of what Valdes' "normal" work duties were at that time, which essentially were non-physical.

16. On June 17, 1999, immediately upon his return from sick leave, Valdes and Chieco had a shouting match at Washington Elementary School.

17. During a discussion with Hogan later the same day about this incident, Valdes, according to Hogan, said, "If this is the way it's going to be ... let the games begin." Valdes admits this conversation took place, but claims he stated, "[I]f it is games that you guys want to play, then I'm going to have to defend myself." Hogan sent an e-mail documenting his version of the event contemporaneously with its occurrence.

18. On October 5, 1999, at a hearing held with Valdes and his NJEA representative, Cocuzza, concerning the allegation that Valdes abused sick days by engaging in activity that exhibited he was in good enough health to have come to work instead, Valdes admitted these activities.

19. By letter dated November 16, 1999, the Board, through Johnson, advised Valdes that because of his conduct, his pay would be "docked" for five days (May 25, 26, June 1, 2 and 8, 1999) of the 28 days he was absent.

20. Valdes challenged the five-day pay dock through the contractual grievance process, but the grievance has never been decided due to superseding events.

21. Given the distinctly limited nature of the physical aspects of the duties assigned to him by Hogan, Valdes' utilization of so many sick days during which time he was observed actively engaged in assisting Cruz in his campaign was an abuse of his sick leave entitlement.

22. Prior to November 18, 1999, the Board provided uniforms for custodians. Valdes customarily wore shoes or boots and pants necessary to his type of work.

23. Board policy (not always enforced) required that maintenance and custodial employees wear a uniform, which consists of a T-shirt that says "Union City

Board of Education" and Board-issued paints. In winter, a long-sleeved shirt was supplied and employees could choose to wear jeans.

24. On November 18, 1999, after receiving the November 16 disciplinary letter from Johnson docking his pay for five days, Valdes reported to work wearing a sports jacket, dress shirt, tie, dress slacks and dress shoes. When questioned by Knudsen about his inappropriate attire (he was no longer on limited duty), he replied he was dressing that way in his "supervisory" position.

25. Valdes explained to Knudsen that he interpreted the November 16, 1999 letter from Johnson as describing his position with the Board as "coordinator of plumbing." The letter had noted the primarily non-physical activities which Valdes was performing in April-June.

26. Knudsen told Valdes he was not a coordinator and should resume his normal duties and change back into normal work attire. Valdes disregarded his supervisor's directive, refused to change clothes, remained seated in the office and demanded that Knudsen put his direction in writing.

27. In further disregard of Knudsen's order immediately to change into work clothes and go to work, Valdes sought assistance from his NJEA representative who was not then available.

28. Sometime after 10:30 a.m. that day, Valdes returned to the facilities office still dressed in business-type attire. When Knudsen told him he could not acknowledge him as working unless he changed clothes, Valdes left the office. Only later, after Cocuzza advised Valdes to put his uniform on and return to work, did he do so.

29. On November 18, 1999, Knudsen was Valdes' supervisor and respondent knew or should have known that rejecting or ignoring his supervisor's directive, especially in the manner he did, constituted insubordination. Valdes admitted, "I didn't know too much about insubordination, but I know that when our boss says something, you have to do it."

30. Valdes knew his attire that day was inappropriate and by his obstreperous conduct he further disregarded the directive of his supervisor. In a letter dated November 22, 1999, Valdes admitted that even after being told to change, "My decision was to continue performing my job duties [and not obeying the order] until I spoke with my association representative."

31. On November 24, 1999 at approximately 9:00 a.m., Knudsen saw Valdes at Union Hill High School and observed him wearing a collar shirt, a cloth vest and slacks, which were not Valdes' customary work attire as a plumber. When questioned by Knudsen about his attire, Valdes, again in disregard of the clear direction of his supervisor concerning how to dress at work, responded he first would be obliged to contact his union representative about it, which he did. Valdes later told Knudsen that the representative advised him to change into his customary work clothes.

32. On January 19, 2000, Knudsen twice paged Valdes between the hours of 3:30 p.m. and 3:45 p.m. regarding a broken pipe at Wilson Elementary School. At 3:48 p.m., when Valdes contacted Knudsen on his cellular phone, Knudsen asked where he then was located and respondent replied he was at home because his working hours were from 7:00 a.m. to 3:00 p.m., not 4:00 p.m.

33. To the contrary, all maintenance department personnel, including plumbers, were required by their labor contract to work from 7:00 a.m. to 4:00 p.m., unless the employee received special permission to work through lunch, which Valdes did not do that day. Thus, he was aware he was not permitted to leave work until 4:00 p.m.

34. Previously, at a meeting held on January 11, 2000 with his union representatives, Valdes, according to a letter dated January 18, 2000, from his grievance chairperson, raised a "number of issues surrounding an ongoing dispute with [his] supervisors, a dispute which began when the Board Secretary/Business Administrator challenged sick days taken by [Valdes] in November 1999." One of the issues Valdes raised at the meeting was his hours

of work and the letter, sent one day before the January 19 incident with Knudsen at Union Hill High School, explained that:

> From the first day of your employment you have worked in accordance with the latter posting [7:00 a.m. to 4:00 p.m.], as have all other custodian and maintenance personnel in the district.

35. The letter went on to advise Valdes that the 7:00 a.m. to 4:00 p.m. hours constituted an established practice which had remained static through two separate contract negotiations. Notwithstanding the advice and Valdes' established knowledge of his work hours, and in disregard of the collective negotiations contract, policy and practice, he still left work early on January 19, 2000.

36. At a meeting held with Johnson and others on February 14, 2000, Valdes claimed he always left work between 3:45 and 4:00 p.m. This was not true.

37. On February 2. 2000, Valdes discovered that the heater in his regularly assigned school van was not functioning. Thus, he was given another vehicle (a Dodge pickup truck) to use. Soon thereafter, he called Knudsen and complained the dashboard anti-lock brake lights and directional lights were not functioning properly. Knudsen then instructed Valdes to take the vehicle immediately to a designated service center. Instead, in disregard of the directive, Valdes proceeded to the facilities office to pick up a personal letter.

38. Following a discussion concerning the vehicles later that morning, Knudsen told Valdes to take his lunch from 12:00 to 1:00 p.m. Since he had no assigned vehicle to use, Valdes replied, "You are not going to give me my vehicle? What do you want me to do[,] walk? Why don't you give me your vehicle?" Valdes was pacing back and forth in the office and with a raised voice inappropriately kept stating, "Why don't you give me your vehicle? I mean you want me to walk?"

39. After the lunch hour that same day, at about 1:00 p.m., when Knudsen directed Valdes to go back to work, Valdes objected, claiming that he had worked through lunch (apparently because he did not have a car to drive to lunch, but had stayed in the office) and, therefore, he intended to leave work at 3:00 p.m. that day, not 4:00 p.m. Knudsen warned Valdes he would be "written up" if he persisted in his threat to leave work early.

40. In disregard of Knudsen's clear directive, and having been told he was required to work until 4:00 p.m., Valdes left work an hour early. He also called and left a message for Knudsen indicating that he arrived at Union Hill High School at 2:37 p.m. and since he would be leaving work at 3:00 p.m., Knudsen should send Pita to take over. At 2:53 p.m., Mark Novembre, Valdes' assistant, called in to ask what he was supposed to do because Valdes was leaving work at 3:00 p.m., which he did.

41. Thus, beginning on February 2, 2000, and on subsequent days, Valdes called the facilities office incessantly to report his whereabouts. On February 3, 2000, for example, Valdes called in 16 times between 9:25 a.m. and 3:21 p.m.

42. On February 4, 2000, Knudsen told Valdes to stop unnecessarily calling the office so often and told him he should only call if he had difficulty completing an assignment. On that day, he called approximately nine times between 8:55 and 10:28 a.m.

43. Despite Knudsen's directive, Valdes continued to make incessant, unnecessary telephone calls to the office. Between February 4 and February 8, 2000, Valdes made 27 telephone calls.

44. From time to time, Valdes also wore a baseball-type cap that displayed provocative statements above the brim.

45. Some time after September 19, 2001, Valdes' cap displayed the following: "I was betrayed by my union representative." It referred to Caputo, who not only

was Valdes' union representative, he was, as well, Valdes' immediate supervisor since Knudsen then was on leave.

46. On December 13, 2001, Valdes wore a cap to work which stated, "Union City Board of Corruption." Caputo immediately directed Valdes not to wear this cap to work any further.

47. Nevertheless, Valdes wore it to work on December 14, 2001.

48. Caputo then gave Valdes a written directive not to wear the cap. Rather than follow Caputo's clear oral and written directives, Valdes tried to construe the order as prohibiting his wearing it only in the facilities office. Clearly, it was not so limited, which Valdes knew.

49. On December 20, 1999, Knudsen directed Valdes to repair two pumps in the boiler room at Union Hill High School. Valdes threw the work order back on Knudsen's desk and stated, "This is not within my job description." When Hogan, who also was present, reiterated Knudsen's direction to Valdes to perform the assignment, Valdes continued to refuse and contacted a labor representative who, as before, advised him he must complete tasks assigned to him and to grieve later rather than refuse to do so.

50. Nevertheless, in continuing disregard of the directive, Valdes then told Knudsen he was going home because he did not feel well. Later, he sent Knudsen a letter stating he would only do that type of work, which he defined as involving heating, not plumbing, under protest.

51. Valdes' conduct that day was in disregard of his supervisor's directive to perform the assignment since (a) he had repaired such equipment on prior occasions; and (b) he was obliged to obey such directives and grieve if he wished.

52. On January 7, 2000, Knudsen directed Valdes and his then assistant, Octavio Diaz, to install a water fountain on the third floor of Hudson Elementary School. Valdes telephoned Knudsen from the site and requested he be provided with a right angle drill in order to continue the assignment. Since a right angle drill is a

unique tool, Knudsen asked Valdes why he needed this particular type and whether he could perform the job using some other tool or instrument, such as a cordless gun or a speed bit which he would have had.

53. Valdes responded that previously he had given most of his tools to Pita and the other maintenance employees since, as far as he was concerned, his time now was to be devoted primarily to office work and he therefore did not need them. Knudsen then had to make various telephone calls in an attempt to obtain a right angle drill and also to dispatch another maintenance person to help Valdes.

54. When Valdes then called Knudsen to complain that the person sent to help did not have a drill, Knudsen again inquired why Valdes needed a right angle drill and Valdes explained it was a preference plumbers had.

55. Knudsen then had to send Pita to help Valdes complete the job. In respect to this incident, Valdes again turned what should have been a simple assignment into an unnecessarily confrontational and potentially disruptive episode.

56. On the morning of January 20, 2000, Knudsen gave Valdes an assignment at Columbus Elementary School. When Valdes said he needed a helper, Knudsen inquired why he thought so without even having first reviewed the assignment.

57. Valdes then asked what another plumber, Pita, was then doing and Knudsen replied that he and the other employees were working on other assignments.

58. Valdes then proceeded to go to the job site, but called several times insisting upon an assistant and declaring the situation to be an "emergency." Knudsen eventually did send a helper when he was able to do so. This incident again reflects Valdes' propensity constantly to question authority and to dictate which personnel should be doing which job, conduct which tended to disrupt the efficient functioning of the facilities department. Indeed, later that same day, Knudsen received a page from Edison Elementary School regarding a broken pipe and when Knudsen paged Valdes and requested he respond to the

emergency, Valdes again questioned why another plumber could not respond instead.

59. On March 31, 2000, Knudsen asked Valdes to review the annual evaluation he prepared and to sign and return it so he could forward it to Johnson in accordance with required procedures. Valdes refused, stood directly in front of Knudsen's desk and said, "Let's go outside like gentlemen where there are no witnesses." By refusing even to sign, Valdes rejected the explicit legitimate directive of his supervisor.

60. Valdes has written letter after letter unjustifiably alleging harassing and discriminatory treatment against him by the Board and others. His first letter alleging discrimination was on December 13, 1999, and when Johnson responded on December 30, 1999, Valdes disregarded the response and began to bombard Johnson and the Board with letters accusing employees who were in supervisory positions above Valdes of harassment and discrimination. Valdes simply refused to accept or recognize legitimate Board action choosing, rather, to level charges of discrimination, or worse. The Board, some of its members, Johnson and other Board employees, became inundated with letters from Valdes unjustifiably alleging harassment, discrimination, and other difficulties.

61. When Johnson responded to the initial charges raised by Valdes, respondent replied by disregarding Johnson's response and submitting even more letters raising largely the same allegations.

62. Both on February 8 and February 14, 2000, Johnson arranged meetings with Valdes and his representative (Cocuzza) to try to resolve their issues, but Valdes would accept nothing short of complete exoneration. Valdes' obstreperous behavior then continued as he dispatched letter upon accusatory letter to Johnson.

63. Exemples of Valdes' conduct in this regard is a letter he sent to Knudsen on December 3, 1999, wherein he makes the following comments or accusations:

a) Knudsen was "very offensive."

b) Knudsen decided to "demote" Valdes from "plumbing coordinator"

c) Knudsen harassed Valdes based on the following:

1. the use of an exclamation point;
2. asking Valdes to leave Knudsen's office;
3. asking Valdes if a desk Valdes was sitting on was Valdes' desk; and
4. removing Valdes from his "office."

d) Knudsen exhibited a lack of leadership qualities and displayed managerial ineptitude.

(64) In a letter dated December 13, 1999, Valdes accused the Board and its employees of discriminatory actions – a recurrent theme used by Valdes throughout this case. His so-called "support" for this accusation is as follows:

a) Knudsen's "demoting" Valdes (which he did not).

b) Hogan's annual evaluation of Valdes, dated April 30, 1999, wherein Hogan politely and quite innocuously comments: "Although the [preventative maintenance] program is very important, I would like you to spend more time in the field with the men. I don't feel one "plumbing team" is sufficient to maintain/address deficiencies in the District".

c) The same Hogan evaluation where he honestly rates Valdes' ability to accept criticism as "below average".

d) The November 16, 1999 disciplinary letter from Johnson advising of the docking of Valdes' pay.

e) The Board allegedly not reimbursing Valdes $229.50 for a license renewal seminar.

f) The Board's use of a private investigator to verify whether Valdes was properly utilizing sick days.

g) The "delay" in the Board's decision on his unauthorized use of sick days to campaign for Cruz.

h) Knudsen asking Valdes if a desk he was sitting on was Valdes'.

i) Knudsen not allowing Valdes (one of only two plumbers the Board employs) to spend three to five hours per day doing other type work.

j) Knudsen requesting that Valdes vacate an office Valdes had been using.

k) Knudsen's use of the exclamation point in a written response to Valdes.

There is, in short, a complete absence of illegal discriminatory, harassing or other untoward conduct by Johnson, Hogan, Knudsen, the Board or anyone else against Valdes. Simply put, by late 1999 Valdes had become a resentful, disgruntled employee merely because he was docked five days' pay and because his new supervisor perhaps was more "hands on" and did not allow Valdes to continue to schedule his own assignments. Whereas Hogan often allowed Valdes to schedule his own work and to complete tasks the way he, Valdes, wanted; Knudsen, and later Caputo, managed differently. Valdes chafed under Knudsen's and Caputo's managerial style and chose personally to attack them rather than performing his job.

65. In letters dated December 1 and December 10, 2001, Valdes accused Caputo of joining forces with what he described as a "corrupt" Board of Education. Valdes offered no competent evidence whatsoever to support his allegations. Indeed, while Valdes alleged that his application in March 1999 for the position to which Knudsen was appointed purposely was lost, he never even raised this contention until November 1999, after his pay was docked, and months after Knudsen was hired. No reason was offered for this inexplicable delay with respect to an action which directly impacted his employment status. In any case, even if he did

submit an application (which was never found), no proof was offered to support his claim it was lost in a deliberate effort to harm him.

DISCUSSION

The foregoing demonstrate, I believe, that little doubt exists that on a variety of occasions between April 1999 and extending into early 2002, respondent acted in a manner unbecoming a tenured public school employee, was insubordinate to his superiors by failing to comply with their lawful directives, abused sick leave, hurled unsubstantiated charges of discrimination, corrupt behavior and lying against senior Board personnel and, in general, created an intolerable situation wherein his expected performance as a public employee was swallowed up by his propensity to exalt himself into a supervisory-type position which never existed, except primarily in his own mind. His job no longer was about public service, it primarily became all about him.

That Valdes was insubordinate is clear. When told to stop wearing a hat containing a reference which leveled a scurrilous charge of corruption against the Board, he refused. When told to change into attire commensurate with his title, he refused. When told he was not permitted to leave work at 3:00 p.m., he continued to do so. When told to complete a certain repair, he declined to do so. It was not within Valdes' discretion to decide for himself what he would or would not do. As he conceded, even if he disagreed with an order from a superior he was bound to comply with it and, if necessary, file a grievance to challenge it. The decision to ignore directives was not his to make and he ignored them at his peril.

Regrettably, Valdes, who appears to have been a fine employee from his hiring in 1994 to the spring of 1999, suddenly changed. He became, instead, an obstacle to the efficient operation of the school district rather than an asset to it. Perhaps it was due in part to his belief that he, not Knudsen, should have succeeded Hogan as Director in 1999. Perhaps it was due in part to his having arrogated to himself a non-existent job title and come to the conclusion that this justified a significant modification of his basic plumbing responsibilities which the Board refused to recognize. Perhaps it

was prompted in part by his resentment at having, in his own mind, been "singled out" for participating in the Cruz political campaign during work hours. It is difficult to fathom why he so abruptly changed for the worse, but change he did.

Particularly symptomatic of Valdes' conversion in 1999 from a valued employee to one whose continued employment became problematic were his constant letters to Knudsen, Johnson and others and his eventual "falling out" with Caputo. As noted, after receiving the letter of November 16, 1999 from Johnson regarding the five-day docking of his pay, Valdes embarked on a campaign of letter writing falsely charging discriminatory treatment, harassment, official corruption and lying. The tone and content of those letters became even more strident in 2001 when renewed efforts to settle the tenure case following the Commissioner's rejection in October 2000 of an initial settlement agreement broke down. At that point, Valdes began to unleash a veritable barrage of accusatory missives whose main objective seems to have been an effort to destroy the reputation of those senior Board employees and members who he imagined had wronged him – especially Johnson. The following are exemplars of this intolerable conduct taken from letters dispatched by Valdes to the Board, the Superintendent of Schools, Johnson, Knudsen, Hogan and others:

(a) "In the past year ... I have endured discrimination, harassments, defamation of character and invasion of my families private rights. These actions have been orchestrated by ... Johnson and executed by ... Knudsen [and] ... Hogan...."

(b) "Mr. Johnson has clearly made this a personal quest. I believe all of these actions have been racially motivated..... I believe Mr. Johnson did not want a black employee in a managerial position."

(c) "It makes me feel uneasy [that Johnson] can fabricate evidence, [and] manipulate employees to make false statements...."

(d) "The [Board] has demonstrated a clear pattern of malice in their efforts to take away my achievements.... They are using discrimination tactics to hinder my growth."

(e) "Your [Caputo] participation in the Board's scheme to fire me is obvious.... The Board's actions have been malicious."

(f) "I believe the Board has purchased your [Caputo's] ethics...."

(g) "You [Johnson] instructed [Knudsen] to manufacture evidence to destroy my personnel file.... The ... wrong doings ... spotlight a corrupt organization."

(h) "He [Knudsen] seems to be obsessed with tarnishing my reputation."

(i) "The Board's intentions are to discredit my employment history ... by means of discrimination and character defamation."

(j) "Like in my previous letters, I am asking the Board to stop their discriminatory action."

(k) "My letters have been a way of relieving my pains and suffering from all the Board's malicious actions."

(l) "I hope the harassments discontinues and the Board decides to make use of my abilities instead of striving to tarnish them."

(m) "My allegations of a conspiracy between you ["Caputo"] and the Board I believe have erupted [*sic*] your latest attempts to emulate [Knudsen's]

harassments via fabricate charges.... All I could do at the time is continue to document your unethical behavior."*

(n) "I can't understand your [Knudsen's] decision to handicap a program that has taken almost five years of dedication to establish. I fail to understand [contrary to the collective negotiations agreement] you decide to demote me from plumbing coordinator to the duties of plumber without a just cause."

(o) "Even though I am no longer under the supervision of [Knudsen] his intimidation tactics continue."

(p) "Mr. Hogan outright lies in a letter where he claims Mr. Chieco never confronted him in a violent manner. This letter was written in an attempt to cover up a verbal assault which went totally ignored by Mr. Hogan."

(q) "My working environment continues to become more and more uncomfortable. I have to work around certain employees with bad intentions, a believed unstable supervisor and a Director who lied to possibly cover up violent assaults...."

(r) "Why did you [Hogan] lie in your memo?"

(s) "Now you [Johnson] come out in full armor to defend Mr. Hogan against my accusations, an employee who has obviously lied. Why do you treat my petitions with so much bias and stand up for a dishonest manager, a believed unstable supervisor and an employee who was released from his prior employer for suspicions of theft?"

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* The foregoing examples ((a) to (m)) of false accusations leveled by Valdez against a variety of persons all are extracted from his own exhibits. The remainder are taken from exhibits attached to the Board's amended charges.

(t) "I also avoid any form of communication every morning with [Hogan] or [DiFrancisco]. They tend to take the truth and twist it around to make themselves look like the victims, while protecting their dishonest confidants. This observation is clearly confirmed in Mr. Hogan's deceitful and irresponsible memo. The malicious actions by these individuals have left very little chance for any reconciliation."

(u) "I believe Mr. Johnson has used the misfortune of certain individuals to fabricate certain changes against me after I applied for [Knudsen's] position.... It is not easy being portrayed as a dangerous aggressive person."

(v) "As you [Caputo] know the Board has filed tenure charges against me. These charges were fabricated by an unstable supervisor with a license to carry a gun and co-workers with shady past. [Johnson] hired a private investigator to film my family after I applied for the position of [Director of Building and Grounds]. An ex-convict with a disqualifying record and an employee released from his prior employer for suspicion of theft fabricated a charge that got me suspended. An aggressive employee who threatened a supervisor also accuses me of threatening him and received a promotion following my suspension. A director lied in a letter I believed to protect himself, his confidant and the employee who once threatened him. Your dishonesty was always evident in your total abandonment in proper representation. I was left alone to defend myself against what I believe are tyrants and crooks."

(w) "Your [*sic*] [Caputo] joining forces with what I believe [to be] a corrupt Board, has tarnished what the Association stands for. As an officer of this union body I believe you have disgraced other leaders.... This situation has surpassed unethical behavior. I believe your actions are corrupt and discriminatory. The proof I have will review you conspired with the Board in their malicious attempt to destroy my families well been."

(x) "I believe the Board controls our local union via [Caputo's] none tenure Directors position ... [and] what goes in [Union City] is sad to say the least. I have tried every avenue to seek help and assistance against this corrupt organization.... I hope with time some of the above individuals, and agencies, really meddle into the Boards corrupt affairs and help bring an end, for lack of better words, to your evil empire."

As all the forgoing excerpts demonstrate, including those from Valdes own exhibits, over a lengthy period of time he could not and would not refrain from consistently charging the Board and its employees, both orally and in writing, with discriminatory, malicious and unethical behavior towards him. Certainly, conflicts in relationships between and among Valdes and others existed, some of which were for reasons not always attributable solely to Valdes. Certainly, at times he sincerely felt he was being oppressed. Certainly, he was free to express himself orally and in writing in a reasonable fashion. However, his constant propensity to exult himself in to a phantom position to which he was never appointed, and then continually to take umbrage at what he believed to be (unjustifiably) efforts to interfere with his work, constituted unbecoming conduct in the extreme. The Board and senior employees attempted at first to sincerely deal with his charges. But when Valdes continued over and over and over again to push his unproven claims of mistreatment, he went "over the edge." When this conduct is added to his abuse of sick leave and insubordinate behavior, the outcome was almost preordained.

I have chosen to omit findings and discussion of a variety of events about which several witnesses testified, but which I deem either too tangential to the charges, duplicative or totally irrelevant. These include, for example, confrontational episodes Valdes had with Pita, Caputo, Knudsen, Chieco and others. So, too, there was testimony which involved incidents concerning certain plumbing repairs that Valdes did or did not do, or did not do well. Also, there was substantial testimony about the settlement efforts made in 2000-2001. I have concluded they add little, if anything, to the decision and I have concentrated instead on the events which I believe paint a

picture of the sort of conduct which led to the conclusions I have had to make concerning Valdes' culpability.

During the course of this lengthy hearing I had substantial opportunity to hear and observe respondent. I found him often to be polite, respectful and articulate – the pre-1999 Valdes described by Hogan. That was the Valdes whom Hogan encouraged to qualify himself for greater responsibilities and to whom he gave assignments beyond merely plying his plumbing trade.

Sadly, however, after Knudsen succeeded Hogan in July 1999, and after Valdes was disciplined in November 1999 for his activities involving improper use of sick leave, respondent changed and often became, instead, a negative, sometimes obstreperous, insubordinate and belligerent employee. Again, the forces which precipitated this conversion from a valued employee to a confrontational one could have been due to a number of things – resentment over a perceived failure to be given the recognition he believed he deserved, his belief he had been subjected to disparate treatment in being docked pay, his disgruntlement over not being given a supervisory role over other persons, a belief he was discriminated because of his race or ethnicity, or simply a personality clash with Johnson and/or Knudsen. Further speculation as to why this stark change in attitude and behavior took place in 1999 is not necessary since, at bottom, the preponderance of the credible evidence proves the allegations of misconduct whatever their source. The remaining question, then, is what penalty should be imposed for these defalcations.

As I have noted previously in this initial decision, over time Valdes' job became primarily about him, not the school district. That is an intolerable situation. Perhaps none of the incidents, standing alone, or even some in combination with others justify removal. But, when all of his acts are put together, his abuse of sick leave, his insubordinate behavior, his scurrilous written diatribes and his confrontational attitude and demeanor, he so compromised his position as, in my judgment, to compel his removal. School employees like Valdes first and foremost are public servants whose performance must be devoted to the efficient carrying out of their assigned duties, Self-

aggrandizement, belligerence, disdain of authority and constant verbal and written false charges constitutes conduct which patently is inimical to the interests of the public school district and its employees, be they administrators, supervisors, teaching staff members or plumbers. They are not permitted to conduct themselves at work in such manner as constantly to frustrate and interfere with the operations of the district. As the Board argues, and I agree, between April 1999 and 2002 Valdes:

(1) Inappropriately used sick days to campaign;

(2) Engaged in verbal tirades with Knudsen, his supervisor, over such simple matters as the assignment of a vehicle;

(3) Made harassing telephone calls to the facilities department deliberately to mock and antagonize Knudsen;

(4) Exhibited an inability to work with any supervisor who gave legitimate directives to Valdes which he did not like and with which he disagreed;

(5) Wrote constant falsely accusatory letters to his supervisors, and even Board members; and

(6) Was insubordinate on several occasions.

Beyond that, Valdes self-promoted himself to a position of "coordinator" and, over time, resisted performing his normal plumbing duties. Valdes was a master plumber, and presumably a very competent one. But his vendetta against Johnson, Knudsen, Caputo, Hogan and others, which involved written personal attacks on their motives and characters, was unacceptable. When that pattern of abuse is combined with his other demonstrated misdeeds, his continued employment became untenable. The First Amendment does not insulate respondent, for "free speech ... [does] not endow [school district employees], with a license to vilify superiors publicly." *Pietrunti v. Bd. of Educ. of Brick Twp.*, 128 *N.J. Super.* 149, 166 (App. Div. 1974). So, too,

> [a]n aggressive, contentious and, perhaps, [a] controversial [school employee] working within the structure of a school district ... may confidently look to the First Amendment as a protective shield for his or her activities; however, an intemperate, venomous employee, be he or she a teacher or otherwise, cannot claim constitutional protection when he or she attacks his or her superiors in public in brawling terms for no purpose discernable other than to satisfy some personal needs.
>
> [*Id.* at 168 (emphasis added).]

In this case, the penalty of removal is appropriate.

CONCLUSIONS OF LAW

Accordingly, for the reasons set forth above, I **CONCLUDE** that the petitioner, Board of Education of the City of Union City, has proven by a preponderance of the credible evidence that the respondent, Sabino Valdes, a tenured master plumber, is guilty of the charges certified against him, as amended, and that his removal from his tenured position should be **ORDERED**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box**

500, Trenton, New Jersey 08625-0500, marked **"Attention: Exceptions."** A copy of any exceptions must be sent to the judge and to the other parties.

May 15, 2003
DATE

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

May 19 2003
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

MAY 19 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

md/da/sej/cl

APPENDIX

WITNESSES

For Petitioner:

Carl Johnson
William Hogan
Alberto Pita
Gerald Caputo
John E. Knudsen
Joseph T. Chieco

For Respondent:

Nora Perez
Barbara Johnson
Frank Scarafile
Bruce Sesma
Rene Denis
Robert Gonzalez
Francisco Balzano
Jose G. Falto
Ruth E. Matamoros
Xavier Garces
Benjamin Perez
Louis Fusco
Michael A. Daletto
Raymond G. Vallee
Mark S. Novembre
Herminio Garcia
Frank Cocuzza
Nancy I. Oxfeld
Sabino Valdes

EXHIBITS

For Petitioner:

P-1 Original Tenure Charges, August 2000, with attachments
P-1a Affidavit of Carl Johnson Re: Amended Tenure Charges, January 2002, with attachments
P-2 Valdes Attendance Record
P-3a Videotape, May 25, 1999
P-3b Videotape, June 8, 1999
P-4a Investigative Report, May 27, 1999
P-4b Investigative Report, June 4, 1999
P-4c Investigative Report, June 21, 1999
P-5a Job Posting for plumber position (7 a.m. to 4 p.m.)
P-5b Job Posting for plumber position (8 a.m. to 4 p.m., June 14, 1994)
P-6 Letter, Valdes to Caputo, March 19, 2001
P-7 Memorandum, Knudsen to Valdes, November 24, 1999
P-8 Memorandum, Knudsen to Valdes, November 24, 1999
P-9 Letter, Valdes to Johnson, December 13, 1999
P-10 Organization Chart excerpt, Cruz campaign
P-11 Telephone message slips (February 2, 3, 4, 7, 8, 2000)
P-12 For identification - Memorandum, Knudsen to Johnson and Valdes, January 31, 2000
P-13 For identification - Memorandum, Knudsen to Johnson, March 31, 2000
P-14 Job Activities computer printout, November 29, 1999
P-15 Time Activity Detail computer printout, November 30, 1999
P-16 Letter, Valdes to Knudsen, January 3, 2000
P-17 Resolution Accepting Settlement, Union City Board of Education, September 19, 2000
P-18 Letter, Hespe to Damora and Valdes, October 2, 2000
P-19 Resolution Rescinding Prior Resolution, Union City Board of Education, March 29, 2001
P-20 Letter, Kobin to Judge Weiss, August 1, 2001
P-21 Resolution Modifying Prior Union City Board of Education Resolution, January 10, 2002
P-22 Note from Lawrence I. Livingston, M.D., September 28, 2000
P-23 Note from James R. Cole, M.D., May 2, 2000
P-24 Letter, Johnson to Dr. Cole, May 14, 2001

P-25 Letter, Dr. Cole to Union City Board Counsel, June 13, 2001
P-26 Letter, Johnson to Valdes, June 29, 2000
P-27 Novembre Settlement Agreement, December 1, 2000
P-28 For identification – Verified Petition, *Novembre v. Union City Board of Education*, September 1, 2000
P-29 Recommendations to Board for Approval, June 22, 1999
P-30 Letter, Kobin to Graifman, November 8, 2000
P-31 Attendance Records for John Knudsen, 1999-2002
P-32 Excerpts from Union City Board of Education meetings of January 27, 1998 and January 26 and June 22, 1999
P-33 Verified Complaint, *Valdes v. Union City Board of Education*, New Jersey Division on Civil Rights, Docket EJ10WE-46446-E, October 3, 2000

For Respondent:

R-1 Letter, Johnson to Valdes, September 15, 1999
R-2 Note from Steven J. Dobson, D.C., May 10, 1999
R-3 Excerpt from Collective Bargaining Agreement between Union City Board of Education and UCEA, p. 106
R-3a Videotape of surveillance – See P-3e
R-3b Videotape of surveillance – See P-3b
R-4 For identification – Excerpt from Verified Petition
R-5 Letter, Valdes to Johnson, October 18, 1999
R-6 Letter, Johnson to Valdes, February 2, 2000
R-7 Letter, Hogan to Sandler, NYU Program Director, January 13, 1997
R-8 Letter, Denis to Johnson, January 8, 2001
R-9 Letter, Valdes to Johnson, February 28, 2000
R-10 Minutes of Union City Board of Education meeting, May 26, 2000, with attachments
R-11 Letter, Johnson to Valdes, March 31, 2000
R-12 Letter, Damora to Tumelty, March 20, 2000
R-13 Letter, Valdes to Johnson, January 2, 2001
R-14 Document and Information Request, *Valdes v. Union City Board of Education*, New Jersey Division on Civil Rights, Docket EJ10WE-46446-E
R-15 Letter, Fusco to Johnson, January 3, 2001
R-16 Letter, Johnson to Valdes, February 26, 2001
R-17 Memorandum, Hogan to Johnson, June 12, 1995
R-18 For identification – Extract from Collective Bargaining Agreement, p. 133
R-19 Memorandum, Hogan to Valdes, March 3, 2000

R-20a Non-Instructional Employee Evaluation, April 28, 1995
R-20b Non-Instructional Employee Evaluation, April 8, 1996
R-20c Non-Instructional Employee Evaluation, April 21, 1997
R-20d Non-Instructional Employee Evaluation, May 27, 1998
R-20e Non-Instructional Employee Evaluation, April 30, 1999
R-21a to R-21o Assorted color photograph blowups
R-22a Letter, Valdes to Knudsen, January 28, 2000
R-22b Letter, Valdes to Perez, October 10, 2000
R-22c Letter, Valdes to Johnson, July 19, 2001
R-22d Letter, Valdes to Caputo, August 27, 2001
R-22e Memorandum, Valdes to Knudsen
R-23 Copies of four color photographs of pumps
R-24 Letter, Valdes to Caputo, September 29, 2001
R-25 Schematic of water piping system
R-26 Collective Bargaining Agreement between Union City Board of Education and UCEA (Instructional and Non-Instructional Members), September 1, 1998 to June 30, 2003 and August 31, 2003
R-27 Posting of job opening for Carpenter, January 23, 1992
R-28 Work Order Requisition, December 7, 2001
R-29 Memorandum, Knudsen to Valdes, November 30, 1999
R-30 Letter, Johnson to Valdes, April 27, 2000
R-31 Invoice from Gateway Business Services, December 12, 2000, for computer equipment
R-32 E-mail, Johnson to Cruz, October 24, 2000
R-33 Job posting for Director of Custodial Services, November 7, 2000
R-34 Letter, Caputo to Valdes, March 19, 2001
R-35 Letter, Johnson to Valdes, May 18, 2001
R-36 Letter, Valdes to Caputo, March 12, 2001
R-37 Letter, Johnson to Valdes, April 18, 2001
R-38 Non-Instructional Employee Evaluation, April 8, 2002
R-39 Valdes' hat
R-40 Letter, Valdes to Caputo, December 17, 2001
R-41 For identification – Letter, Dellon Sales Co. to Caputo, August 16, 2001
R-42 Time Activity Detail Printout, November 30, 1999
R-43a Blowup of Color Photograph
R-43b Blowup of Color Photograph
R-44 Schematic of Stand Pipe
R-45a Blowup of Color Photograph

R-45b Blowup of Color Photograph
R-46a Blowup of Color Photograph
R-46b Blowup of Color Photograph
R-47 Photocopy of Page from The Jersey Journal, February 2, 2000
R-48a Blowup of Color Photograph
R-48b Blowup of Color Photograph
R-49 Letter, February 29, 2000, Valdes to Knudsen
R-50 Memorandum of October 24, 2000, Knudsen to Johnson
R-51 Letter, August 7, 2000, Valdes to Highton
R-52 Certificate of Determination, September 19, 2000
R-53 Letter, February 2, 2001, Valdes to Johnson
R-54 Letter, January 8, 2001, Perez to Johnson
R-55 Computer printout of requisition, December 13, 2000
R-56 Recommendations for Board Approvals, April 18, 2000
R-57 Letter, February 28, 2000, Chieco to Valdes
R-58 Letter, October 13, 2000, Johnson, to Perez
R-59 Letter, November 6, 2000, Scarafile – To Whom It May Concern
R-60 Job position opening for Custodian, January 2, 1992
R-61 Job position opening for Maintenance Person, November 22, 1993
R-62 Excerpt minutes of regular meeting June 22, 1999
R-63 Maintenance sign-in sheet
R-64 Photocopy of two photographs
R-65 Letter, February 1, 2001, Matamoros to Johnson
R-66 Letter, February 28, 200, Valdes to Hogan
R-67 Memorandum, May 5, 2000, from Perez - To Whom It May Concern
R-68 Job position opening for Electrician, November 10, 1993
R-69 Job position opening for Maintenance Person
R-70 Custodial supplies budget book excerpt
R-71 Recommendations for Board Approval, May 23, 2002
R-72 Recommendations for Board Approval, August 30, 2001
R-73 Memorandum, Newton to Johnson and Valdes, January 31, 2000
R-74 Handwritten note from "Robert", regarding location of air vent
R-75 Recommendations for Board Approval, February 22, 2000
R-76 Letter, March 6, 2000, Valdes to Johnson
R-77 First report of accidental injury, February 21, 2000
R-78 Memorandum, March 2, 2000, Knudsen to Johnson
R-79 Letter, April 3, 2000, Valdes to Cocuzza
R-80 E-mail, Newton to Johnson, March 13, 2000

R-81 Recommendations for Board approval, December 21, 2000
R-82 Invitation to Christmas luncheon, December 28, 2001
R-83 Letter, June 12, 2001, Johnson to Valdes
R-84 Job position opening for Carpenter, February 4, 1998
R-85 Application for position from Olga Valdes, April 23, 2002
R-86 Memorandum from Vaccarino to all employees, July 30, 2001
R-87 Handwritten notes of meeting, February 8, 2000
R-88 For Identification - Handwritten notes of meeting, February 14, 2000
R-89 Letter, April 3, 2000, Valdes to Cocuzza
R-90 Letter, September 11, 2000, Damora to Oxfeld
R-91 Excerpt of Minutes of Executive Session, September 13, 2000
R-92 Letter, May 16, 2000, Oxfeld to Valdes
R-93 Letter, June 8, 2002, Damora to Oxfeld
R-94 Letter, May 12, 2000, Oxfeld to Johnson
R-95 Letter, June 15, 2000, Oxfeld to Valdes
R-96 Letter, July 19, 2000, Oxfeld to Valdes
R-97 Letter, August 2, 2000, Johnson to Valdes
R-98 Letter, August 7, 2000, Valdes to Highton
R-99 Letter, August 11, 2000, Valdes to Oxfeld
R-100 Letter, August 14, 2000, Oxfeld to Valdes
R-101 Letter, August 18, 2000, Oxfeld to Valdes
R-102 Letter, August 21, 2000, Valdes to Oxfeld
R-103 Letter, August 22, 2000, Kobin to Valdes
R-104 Letter, August 25, 2000, Oxfeld to Valdes
R-105 Letter, August 25, 2000, Oxfeld to Perez
R-106 Letter, August 28, 2000, Valdes to Oxfeld
R-107 Fax, August 29, 2000, Valdes to Oxfeld, with attachments
R-108 Letter, September 5, 2000, Oxfeld to Damora
R-109 Letter, June 10, 2002, Johnson to Valdes
R-110 Letter, September 15, 2000, Damora to Oxfeld
R-111a Purchase Orders, September 23, 1997 and February 1998, for course reimbursement
R-111b Purchase Orders, September 23, 1997 and February 1998, for course reimbursement
R-112 Letter, May 26, 1999, Johnson to Valdes
R-113 Letter, May 26, 1999, Johnson to Ms. Valdes
R-114 Note from Steven J. Dobson, D.C., May 27, 1999
R-115 Letter, November 2, 1999, Valdes to Johnson

R-116 Letter, November 2, 1999, Syrek to Cocuzza
R-117 Letter, November 4, 1999, Valdes to Knudsen
R-118 Letter, November 22, 1999, Dr. Dobson to Valdes
R-119 Job position opening for Plumber, November 22, 1999
R-120 Letter, June 28, 2000, Kobin to Cocuzza
R-121 Letter, December 20, 1999, Valdes to Knudsen
R-122 Letter, December 21, 1999, Valdes to Cocuzza
R-123 Letter, December 27, 1999, Valdes to Johnson
R-124 Letter, January 4, 2000, Valdes to Johnson
R-125 Letter, January 20, 2000, Valdes to Magyar
R-126 Letter, February 2, 2000, Magyar to Valdes
R-127 Job position opening for Affirmative Action/Equity Officer, January 19, 2000
R-128 Invoice, Automated Building Controls Inc., January 11, 2000
R-129a Invoices, AW Myers Company Inc., 1994 and 1995
R-129b Invoices, AW Myers Company Inc., 1994 and 1995
R-129c Invoices, AW Myers Company Inc., 1994 and 1995
R-130a Compensation Claims Medical Report Form
R-130b Compensation Claims Medical Report Form
R-130c Compensation Claims Medical Report Form
R-131 Letter, March 3, 2000, N.J. School Association Insurance Group to Johnson
R-132 Letter, March 6, 2000, Valdes to Hogan
R-133 Letter, Undated, from Consolidated Services Group to Dr. Cole
R-134a Doctors Note, James R. Cole, M.D., March 8, 2000
R-134b Doctors Note, James R. Cole, M.D., March 13, 2000
R-135 MRI, prescription from Dr. Cole, March 13, 2000
R-136 Letter March 15, 2000, Valdes to Johnson
R-137 Letter, March 30, 2000, N.J. School Association Insurance Group to Valdes
R-138 Letter, April 20, 2000, N.J. School Association Insurance Group to Valdes
R-139 Letter, April 24, 2000, Valdes to Dr. Cole
R-140 Letter, May 2, 2000, Dr. Cole to Valdes with attachments
R-141 Letter, May 24, 2000, Valdes to Oxfeld
R-142 Letter, March 31, 1999, Valdes to Johnson
R-143 Job position opening for Director of Building and Grounds, March 24, 1999
R-144 Letter, September 8, 2000, Johnson to Valdes
R-145 Letter, September 2, 2000, Johnson to Valdes
R-146 Notes of Lawrence I. Livingston, M.D., regarding Consultation and Treatment of Valdes (1991, 1993 and 2000)
R-147 Recommendation for Board Approval, October 19, 2000

R-148 Letter, November 1, 2000, Kobin to Graifman
R-149 Settlement Agreement of tenure charges, October 19, 2000
R-150 Letter, December 7, 2000, Oxfeld to Valdes, with attachment
R-151 Letter, December 13, 2000, Oxfeld to Damora, with attachment
R-152 Letter, January 3, 2001, Valdes to Johnson
R-153 Letter, January 26, 2001, Valdes to Johnson
R-154 Letter, February 5, 2001, Valdes to Oxfeld
R-155 Letter, February 16, 2001, Oxfeld to Valdes
R-156 Letter, February 20, 2001, Valdes to Damora
R-157 Letter, February 16, 2001, Valdes to Johnson
R-158 Letter, March 7, 2001, Valdes to Johnson
R-159 Letter, March 8, 2001, Johnson to Valdes
R-160 Copy of bench warrant, March 30, 2001
R-161a Records, *etc.* regarding inquiring N.J. Department of Education Office of Criminal History Review for Eduardo Nunez
R-161b Records, *etc.* regarding inquiring N.J. Department of Education Office of Criminal History Review for Eduardo Nunez
R-161c Records, *etc.* regarding inquiring N.J. Department of Education Office of Criminal History Review for Eduardo Nunez
R-161d Records, *etc.* regarding inquiring N.J. Department of Education Office of Criminal History Review for Eduardo Nunez
R-161e Records, *etc.* regarding inquiring N.J. Department of Education Office of Criminal History Review for Eduardo Nunez
R-161f Records, *etc.* regarding inquiring N.J. Department of Education Office of Criminal History Review for Eduardo Nunez
R-161g Records, *etc.* regarding inquiring N.J. Department of Education Office of Criminal History Review for Eduardo Nunez
R-161h Records, *etc.* regarding inquiring N.J. Department of Education Office of Criminal History Review for Eduardo Nunez
R-162 Letter, August 28, 2001, Valdes to Caputo
R-163 Letter, September 6, 2001, Johnson to Valdes
R-164 Letter, September 17, 2001, Judge Weiss to Mellk and Kobin
R-165 Letter, September 28, 2001, Valdes to Caputo
R-166 Photocopies of color photographs
R-167 Letter, May 15, 2001, Valdes to Ms. Wright, United Water Company
R-168 Letter, June 3, 2002, Wright to Valdes
R-169 Letter, October 5, 2001, Valdes to Caputo
R-170 Letter, August 2, 2001, Johnson to Valdes

R-171 Letter, October 18, 2001, Klausner to Hudson County Prosecutor Theemling
R-172 Letter, October 18, 2001, Kobin to Valdes
R-173 Letter, November 2, 2001, Valdes to Johnson
R-174 Note from Dr. Livingston, November 7, 2001
R-175 Letter, November 2, 2001, Valdes to Caputo
R-176 Letter, December 10, 2001, Johnson to Valdes
R-177 Letter, December 10, 2001, Johnson to Valdes
R-178 Letter, December 17, 2001,.Caputo to Valdes
R-179 Letter, December 31, 2001, Valdes to Caputo
R-180 Letter, January 2, 2002, Valdes to all school principals
R-181 Letter, January 7, 2002, Johnson to Valdes
R-182 Letter, January 7, 2002, Valdes to Highton
R-183 Recommendations to Board, April 25, 2002
R-184 Brochure, Building Construction Management Program
R-185 List of invoices, with attached purchase orders
R-186 Letter, New Jersey Department of Education, Office of Criminal History Review, December 9, 1994
R-187 Minutes of Board meeting, February 24, 1998, with attachments
R-188 Letter, December 18, 2001, Kobin to Judge Weiss
R-189 For Identification – Letter, January 3, 2001, Nunez to Johnson
R-190 For Identification – Letter, January 3, 2001, Nunez to Johnson
R-191 Letter, November 30, 2001, Valdes to Johnson
R-192 Letter, July 17, 2002, Valdes to Johnson
R-193 Recommendation for Board approval, July 25, 2002
R-194 Recommendation for Board approval, August 24, 2000
R-195a Letter, July 19, 2001, Kobin to Valdes
R-195b Letter, March 30, 2000, Perez to To Whom It May Concern
R-195c Letter, May 3, 2000, Hernandez to To Whom It May Concern
R-195d Letter, January 15, 2002, DeConiglio to To Whom It May Concern

OAL DKT. NO. EDU 3620-01
AGENCY DKT. NO. 328-9/00

IN THE MATTER OF THE TENURE	:	
HEARING OF SABINO VALDES,	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY	:	DECISION
OF UNION CITY, HUDSON COUNTY.	:	
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Respondent's exceptions and the Board's reply thereto were submitted in accordance with *N.J.A.C.* 1:1-18.4.[1]

Respondent submits extensive objections to the Administrative Law Judge's (ALJ) findings of fact, as well as the ALJ's failure to include a summary of the testimony from respondent's witnesses who showed him to be "a gentleman that displayed absolutely no signs of a disgruntle [sic] employee***" (Respondent's Letter Memorandum/Exceptions dated May 28, 2003 at 4), or who otherwise corroborated respondent's position (Respondent's Exceptions). With respect to the ALJ's recitation of excerpts from respondent's letters, respondent contends that, in general, the ALJ was either inaccurate in his presentation, or he "withheld all of the relevant evidence" that would tend to prove respondent's allegations. (Respondent's Letter Memorandum/Exceptions dated May 28, 2003 at 5-14) Respondent claims that the "OAL omitted all of the relevant evidence and testimony from [his] witnesses. This action by OAL totally disguised the case by concealing the motive and execution of Petitioner's plot to terminate Respondent's employ." (*Id.* at 15)

[1] Although respondent filed an "answer" to the Board's reply, it was not considered by the Commissioner since there is no provision in regulation for such a submission.

The Board counters that respondent's exceptions attempt "to break down each incident and attack the weight of the evidence by focusing on extraneous details, which are irrelevant to the charges at issue." (Board's Reply at 3) Once again, the Board avers that respondent attempts to blame everyone else for the two years of disruption he caused the facilities department. (*Ibid.*) With respect to how the ALJ weighed the evidence, the Board underscores that

> Valdes had approximately twenty days of testimony, multiple witnesses, and the Board's objections were overruled time and time again. Judge Weiss provided Valdes with [every] opportunity to present his case, and Judge Weiss should be deferred to in assessing the credibility of the witnesses. He was present at all the hearings and observed the witnesses testifying. He was obviously influenced not only by the witnesses' character and demeanor, but by common human experience not transmitted by the record. *** (citation omitted) (*Id.* at 13)

As to respondent's contention that there were errors in the ALJ's recitation of excerpts from respondent's letters, the Board argues that such allegations exemplify the non-substantive distinctions respondent attempts to draw to support his exceptions, a characteristic defense strategy for him. (*Id.* at 7) Finally, to the extent the ALJ did not, in his decision, account for the evidence relating to every event alleged in the tenure charges, the Board asserts that there is no requirement that it must prove every incident asserted in its charges. "In fact," the Board reasons, "there were so many incidents over such a long period of time, that to dwell on each and every one would be overkill." (*Id.* at 14-15) Thus, the Board urges the Commissioner to adopt the Initial Decision.

Upon careful and independent review of the complete record in this matter, including transcripts from 18 days of hearing,[2] together with exhibits, post-hearing briefs,

[2] The record includes transcripts from the following hearing dates in 2002: May 6, 8, 13, 16, 17, 23, 29, June 14, July 22, 23, 25, 26, 30, August 1, 2, 7, 16 and 20.

exception and reply arguments, the Commissioner determines to adopt the Initial Decision of the ALJ. In so doing, the Commissioner first notes that the factual findings issued by the ALJ are each supported by sufficient, credible evidence in the record.[3] In this connection, the Commissioner recognizes that "the ultimate determination of the agency and the ALJ's recommendations must be accompanied by basic findings of fact sufficient to support them." *State, Dept. of Health v. Tegnazian*, 194 *N.J. Super.* 435, 442-443 (App. Div. 1984). The purpose of such findings "is to enable a reviewing court to conduct an intelligent review of the administrative decision and determine if the facts upon which the order is grounded afford a reasonable basis therefor." (*Id.* at 443) Here, the factual findings issued by the ALJ readily provide the Commissioner with a sufficient basis for reviewing his conclusions and recommendations.

Further, the ALJ's credibility determinations and judgments concerning *whose* testimony is to be accorded weight are entitled to the Commissioner's deference. *N.J.S.A.* 52:14B-10(c) "The reason for the rule is that the administrative law judge, as a finder of fact, has the greatest opportunity to observe the demeanor of the involved witnesses, and, consequently, is better qualified to judge their credibility. *In the Matter of Tenure Hearing of Tyler*, 236 *N.J. Super.* 478, 485 (App. Div. 1989) *certif. denied*, 121 *N.J.* 615 (1989)." *In the Matter of the Tenure Hearing of Frank Roberts, School District of the City of Trenton*, 96 *N.J.A.R*2d (EDU). 549, 550. Contrary to respondent's allegations, the ALJ fairly summarized the testimony and evidence before him, notwithstanding that he did not recapitulate the testimony of *each and*

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[3] With respect to Factual Finding No. 11 at page 5 in the Initial Decision, the record herein did not include a transcript of Joseph Chieco's testimony. To the extent petitioner challenges this factual finding, the Commissioner notes that challenges to the factual findings predicated upon credibility determinations made by an ALJ require the party to supply the agency head with the relevant and necessary portion of the transcript. See *In re Morrison*, 216 *N.J. Super.* 143, 158 (App. Div. 1987).

every witness. Moreover, a complete review of this extensive record leaves the Commissioner with no doubt that respondent "received a hearing conforming to principles of fundamental fairness." *In re Kallen*, 92 *N.J.* 14, 26 (1983).

The Commissioner, therefore, concurs with the ALJ's conclusion that the Board has proven that: respondent has engaged in a pattern of conduct that demonstrates a consistent, obstructive and defiant attitude toward Board policies, personnel and particularly a hostile attitude toward his supervisors; that respondent has demonstrated insubordinate conduct; respondent has, on occasion, neglected his duties, thereby demonstrating insubordination; respondent abused his sick leave and was otherwise absent (leaving early) without authorization; and respondent has demonstrated conduct unbecoming an employee for engaging in general harassment and interference with the proper discharge of supervisors' and other employees' duties. (Statement of Charges at 1-13; Exhibit P-1a)

The Commissioner further agrees that the appropriate penalty in this matter is dismissal, noting that tenured custodians have been terminated from employment for conduct that included abusive language and hostile behavior toward supervisors and colleagues in those instances where respondents were found to have exhibited a pattern of belligerent and offensive conduct. *See*, *In the Matter of the Tenure Hearing of John De Maio, School District of the Borough of Elmwood Park, Bergen County*, decided by the Commissioner June 3, 1998, *aff'd* State Board November 4, 1998; and *In the Matter of the Tenure Hearing of Saad Radwan, School District of the Borough of Carteret, Middlesex County*, decided by the Commissioner January 14, 1999, *aff'd* State Board May 3, 2000, *aff'd* 347 *N.J. Super.* 451 (App. Div. 2002). As the ALJ herein eloquently stated:

> [O]ver time, Valdes' job became primarily about him, not the school district. That is an intolerable situation. Perhaps none of

> the incidents, standing alone, or even some in combination with others justify removal. But, when all of his acts are put together, his abuse of sick leave, his insubordinate behavior, his scurrilous written diatribes and his confrontational attitude and demeanor, he so compromised his position as, in my judgment, to compel his removal. School employees like Valdes first and foremost are public servants whose performance must be devoted to the efficient carrying out of their assigned duties[.] Self-aggrandizement, belligerence, disdain of authority and constant verbal and written false charges [constitute] conduct which patently is inimical to the interests of the public school district and its employees, be they administrators, supervisors, teaching staff members or plumbers. They are not permitted to conduct themselves at work in such manner as constantly to interfere with the operations of the district.*** (Initial Decision at 22-23)

Accordingly, the Initial Decision is adopted as set forth herein, and respondent is dismissed from his tenured position with the Board as of the date of this decision.

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: 6/24/03

Date of Mailing: 6/25/03

[4] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

306-03

306-03

S.H., on behalf of minor children, S.H., E.H. AND S.H.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning parent challenged the Board's residency determination. The Board counterclaimed for tuition.

The ALJ determined that even though petitioner desired to move into respondent's school District, she never did. Thus, S.H. and her children were never domiciled within the District and, therefore, did not meet the requirements set forth in *N.J.S.A.* 18A:38-1a. The ALJ concluded that petitioner's children were not entitled to a free public education in the District. The ALJ ordered petitioner's appeal denied and ordered that petitioner be assessed the tuition costs for the period of the children's ineligible attendance.

The Commissioner adopted the findings and determination in the Initial Decision as his own and directed petitioner to reimburse the Board for the period of her children's ineligible attendance.

June 23, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1355-03
AGENCY DKT. NO. 363-11/02

S.H. ON BEHALF OF MINOR CHILDREN
S.H., E.H. AND S.H.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP
OF WEST ORANGE, ESSEX COUNTY,
Respondent.

Daniel Ellis, Esq., for petitioner

Stephen J. Christiano, Esq., for respondent

Record Closed: May 2, 2003 Decided: May 21, 2003

BEFORE **LESLIE Z. CELENTANO,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner S.H. challenges the residency determination made by the West Orange Board of Education ("Board"). The Board has counterclaimed for tuition.

The matter was transmitted to the Office of Administrative Law (OAL) on January 31, 2003, for resolution as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and

N.J.S.A. 52:14F1 to -13. A hearing was held on May 2, 2003, at the OAL in Newark, New Jersey, and the record was closed on that date.

FACTUAL DISCUSSION

Based upon the undisputed facts presented at the hearing, I **FIND** the following **FACTS** in this case.

In or about the summer of 2002, petitioner's brother agreed that petitioner and her three children would move into the four-room carriage house at the premises he was under contract to purchase at 40 Wildwood Avenue, West Orange, N.J. The closing of title was scheduled to take place in or about the third week of August 2002. At the time, petitioner resided at 32 Forest Street, Montclair, N.J., with her three children.

In anticipation of the move into the carriage house, petitioner enrolled her children in West Orange schools. E.H. was enrolled in kindergarten and S.H. in fourth grade, both at the Redwood School, and S.H. was enrolled in the sixth grade at the Edison School. The closing of title on 40 Wildwood Avenue did not take place in August, September or October 2002.

In mid-November 2002, petitioner moved with her three children into a friend's house at 39 Old Indian Road, West Orange. Prior to that time petitioner and her three children had resided continuously with petitioner's mother at 32 Forest Street, Montclair. Petitioner and her children remained at 39 Old Indian Road, West Orange, until approximately mid-January 2003, when it became apparent that the closing on the home at 40 Wildwood Avenue, West Orange, would not take place. Petitioner and her children then moved back to petitioner's mother's home in Montclair. While residing at her friend's home at 39 Old Indian Road, petitioner had no lease, did not pay any rent, did not change her mailing address, and did not change the address on her license. Petitioner also did not register to vote in West Orange. Petitioner's permanent address remained 32 Forest Street, Montclair, N.J. Petitioner's 2002 tax return reflects the Forest Street, Montclair, address. Petitioner never advised the school district that she was residing at 39 Old Indian Road, West Orange.

Petitioner received correspondence from the Board dated October 30, 2002, advising that the Board sought to remove petitioner's children from the schools since she was not domiciled in West Orange. Petitioner was aware of the tuition consequences of leaving her children in West Orange schools. Petitioner is also aware of the amount of tuition the Board is seeking, and, further, that the Board may seek the entry of a judgement against her.

Petitioner has been attempting to secure a lease for a home on Oxford Place in West Orange but had not done so as of the date of the hearing. Petitioner believes the lease may be in place by the summer of 2003.

The tuition for the 2002-2003 school year for E.H., a kindergarten student, is calculated at $42.63 per day, which is $6,437.13 through the date of hearing and $7,844.00 until the end of the school year. The tuition for S.H., a fourth-grade student, is $48.17 per day, or $7,273.67 through the date of hearing and $8,864.00 until the end of the school year. The tuition for S.H., a sixth-grade student, is $64.83 per day, or $9,789.33 through the date of hearing and $11,929.00 until the end of the school year. The tuition for all three children through the end of the school year totals $28,637.00.

LEGAL DISCUSSION AND CONCLUSION

The Board has asserted that S.H., E.H. and S.H. were not domiciled within the district during the 2002-2003 school year and, consequently, are not entitled to a free public education in West Orange.

N.J.S.A. 18A:38-1 provides that the public schools of a district are free to persons domiciled within the district who are over five and under twenty years of age.

Domicile is the place of a person's abode, where he or she has the present intention of remaining and to which, if absent, he or she intends to return. *Mercadante v. City of Paterson*, 111 *N.J. Super.* 35, 39 (Ch. Div. 1970), *aff'd*, 58 *N.J.* 112 (1971). A person may have more than one residence but only one domicile, which is that place that

the person regards as his or her true and permanent home. *Board of Educ. of Middle Township, Cape May County v. K.K.*, 93 *N.J.A.R.*2d (EDU) 461.

The burden of proof rests with petitioner. In a proceeding such as this, the parent has the burden of proof by a preponderance of the evidence to establish that the children meet the eligibility requirements. In this matter, there is no dispute that S.H., E.H. and S.H. are not domiciled within the district. There is nothing more than the articulated desire of petitioner to move into the district.

Based upon the undisputed facts and circumstances, I **FIND** that S.H. and her children have never been domiciled within the district, and therefore do not meet the requirements set forth in N.J.S.A. 18A:38-1(a). I therefore **CONCLUDE** that S.H., E.H. and S.H. are not entitled to a free public education in the West Orange School District. I further **CONCLUDE** that the tuition costs set forth by respondent are uncontradicted. Therefore petitioner is assessed tuition in the base amount of $23,500.13 for the period of September 4, 2002, to May 2, 2003, and at a per diem rate of $42.63 for E.H., $48.17 for S.H. and $64.83 for S.H. for the period of May 3, 2003, to the date of removal from respondent's school district.

ORDER

It is hereby **ORDERED** that petitioner's appeal of respondent's determination is **DENIED**. It is further **ORDERED** that S.H., E.H. and S.H. are ineligible for attendance in respondent's school district. It is further **ORDERED** that petitioner be assessed tuition costs as set forth above for the period of S.H., E.H. and S.H.'s ineligible attendance in respondent's school district.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of

Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

May 21, 2003
DATE

LESLIE Z. CELENTANO, ALJ

Receipt Acknowledged:

May 23 2003
DATE

M. Kathleen Duncan (ea)
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 27 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

da

APPENDIX

Witnesses

For Petitioner:

S.H.

For Respondent:

Josefa Lopez

Exhibits

For Petitioner:

For Respondent:

R-1 Letter from Superintendent of Schools to Petitioner
R-2 Registrar's data including tuition information for E.H.
R-3 Registrar's data including tuition information for S.H.
R-4 Registrar's data including tuition information for S.H.

OAL DKT. NO. EDU 1355-03
AGENCY DKT. NO. 363-11/02

S.H., on behalf of minor children, S.H., E.H. AND S.H., PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY, RESPONDENT.	:	DECISION

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

Upon his full and independent review, the Commissioner agrees with the conclusion of the Administrative Law Judge (ALJ) that petitioner has failed to meet her burden of proving, by a preponderance of the credible evidence, that she was a domiciliary of West Orange during the period from September 4, 2002 through the present time, so as to entitle her children, S.H., E.H. and S.H., to attend the Board's schools free of charge during this time. (*N.J.S.A.* 18A:38-1a.)

Accordingly, the Initial Decision of the OAL is adopted for the reasons expressed therein. Petitioner is directed to reimburse the Board for the period of her children's ineligible attendance in its schools, in accordance with law, at the rate as calculated by the ALJ.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 6/23/03

Date of Mailing: 6/25/03

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

307-03

L.R.R., on behalf of minor child, R.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning parent challenged the District's school placement of her son, R.T., his disciplinary record and his grades.

The ALJ concluded that petitioner failed to carry her burden of proving that the District acted in an arbitrary or capricious manner with respect to R.T.'s education. The ALJ found that the District did not act in a punitive manner, it exercised its sound discretion and acted out of concern for R.T.'s safety by transferring him to East Side where he is doing well. If he continues this, he should return to day high school in September 2003. The ALJ also concluded that, with respect to R.T.'s disciplinary record and grades, the District acted appropriately and in full accord with District policies and procedures. Petition was dismissed.

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

June 19,2003

L.R.R. was told that R.T. could no longer attend the Shabazz Twilight School and she would be provided with a list of the other alternative high schools from which to choose. She claims that Paschall told her R.T. was expelled from Shabazz, could no longer attend school in the Newark District, and she would have to pay tuition to have him attend school somewhere else.

Paschall denied that he would have said such a thing to L.R.R. He explained that he did not have the authority to expel students. The most he could do would be to suspend them temporarily. He further explained that the Shabazz Twilight School does not even suspend students. Its goal is to have them attend, not miss, classes. Behavior problems are addressed by various interventions that do not involve separating students from their education.

All others who attended this meeting on March 10, 2003 and testified at hearing agreed that Paschall never said this to L.R.R.

Paschall provided her with a list of the other alternative programs. He excluded the one at Barringer High School because he thought a certain group of students there would be as bad an influence on R.T. as the ones at Shabazz. As stated above, L.R.R. picked the program at West Side High School but never enrolled R.T. there. She said she did not do it because she thought he could no longer attend school in Newark. For the same reason, she did not respond to efforts of Shabazz to contact her. The only further contacts occurred when the school was able to reach her by telephone. The end result of this situation was that R.T. did not attend school from March 5 through April 29, 2003.

R.T. has been doing well in school since he started to attend East Side. If this continues, he should return to the day high school in September 2003.

E.B. was enrolled in the Twilight Program because he was struggling in high school. The smaller environment and the support provided were more conducive to his learning. At no time has he ever been considered a behavior problem. He appears to

be a sensible young man who is committed to the truth of his story. His demeanor at hearing made him a thoroughly convincing witness.

Similarly, his mother, R.B., made the same impression. She appeared sincerely interested only in assuring herself of her son's safety. She fully cooperated with the school in attempting to seek a solution to the escalating level of confrontation and did not file a police complaint against R.T. until this failed.

L.R.R. testified as a witness at hearing on behalf of her son. She repeated his version of the incident on the record and stated her position with respect to his disciplinary record and his grades. When she was asked repeatedly by the undersigned if she wished to have her son testify, she said that she did not want him to. Consequently, R.T. never appeared as a witness on his own behalf and there is no competent, credible testimony to rebut that of the other witnesses.

Accordingly, I **FIND** the following **FACTS**:

1. R.T.'s transfer from the Shabazz day high school to the Twilight School in September 2003 was neither arbitrary nor capricious. R.T. was not doing well in the day school. The decision to transfer him to the alternative school was affirmed by the progress he was making there until the incident of March 5, 2003.
2. The incident of March 5, 2003 occurred as E.B. described it. R.T. assaulted him from the rear and, if this incident appears on R.T.'s disciplinary record, it is warranted.
3. R.T. was neither expelled nor suspended from Shabazz. His failure to attend school for a significant period of time is attributable to his mother's misunderstanding of the situation and was not the fault of the District.
4. The transfer of R.T. from the Shabazz Twilight School after March 5, 2003 was neither arbitrary nor capricious. It was not punitive. After the failure of its attempts to mediate the dispute and resolve the situation and in an exercise of its sound discretion, the District reasonably determined that, the best way to

ease tensions at Shabazz and to do the appropriate thing for both E.B. and R.T. was to separate them and move R.T.

5. There is no reason to be overly concerned for R.T.'s safety because he is going to East Side rather than Shabazz. He is fifteen years old and will be traveling home from school in daylight. In fact, he appears to have been in more danger at Shabazz based upon the presence of gangs in the neighborhood and upon the students he chose to associate with.
6. The transfer seems to have been an appropriate decision for R.T. who appears to be doing well at East Side.

The remaining issue raised by L.R.R. is that her son received inappropriate grades. This is based upon her belief that he received his report card before the end of a marking period so his grades do not reflect a complete cycle. According to the District's witnesses, the Twilight Schools have cycles rather than marking periods and these are six weeks long. They are shorter than those of the day high school to give the students and their parents more frequent information on students' progress.

L.R.R.'s confusion on this issue is clear from the submissions she attached to her motion for emergent relief. She attached the high schools' list of report card dates for the 2002-2003 school year. The marking cycle dates for the Twilight Schools appear on the same sheet. She circled two report card dates for the day high school marking periods as proof that her son did not receive his report cards at the right time. She attached a copy of his report card for the third cycle which runs from December 12, 2002 to February 5, 2003. I **FIND** that R.T. did not receive inappropriate grades, that is, his report cards were presented at the correct times. She produced no evidence that his grades did not accurately reflect the quality of his work.

Based upon the above, I **CONCLUDE** that L.R.R. failed to carry her burden of proving that the District acted in an arbitrary or capricious manner with respect to the education provided to R.T. *See, K.O.H. obo R.H. v. BOE Township of Edison, Middlesex*, 95 *N.J.A.R. 2d.* (EDU) 275. I further **CONCLUDE** that it acted appropriately

with respect to his disciplinary record and his grades. Accordingly, I **CONCLUDE** that there is no relief to which L.R.R. is entitled as a result of this appeal.

It is, therefore, **ORDERED** that her appeal is hereby **DISMISSED WITH PREJUDICE**.

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

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

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

May 23, 2003
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

May 28 2003
DATE

H. Kathleen Duncan (for)
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 29 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cb

APPENDIX

Witnesses:

For Petitioner:

L.R.R.

For Respondent:

Lamont Webb

E.B.

R.B.

Margaret Robinson

Lannie Paschall

Exhibits:

Petitioner's Affidavit with attachments

OAL DKT. NO. EDU 3596-03
AGENCY DKT. NO. 110-4/03

L.R.R., on behalf of minor child, R.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner concurs with the ALJ that the District acted reasonably and within the scope of its lawful discretionary authority with respect to R.T.'s school placement, disciplinary record and grades. Therefore, like the ALJ, the Commissioner concludes that petitioner has not demonstrated entitlement to relief.

Accordingly, for the reasons expressed therein, the Initial Decision of the Office of Administrative Law dismissing the Petition of Appeal is adopted as the final decision in this matter.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 6-19-03

Date of Mailing: 6-25-03

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

321-05

IN THE MATTER OF THE TENURE	:	
HEARING OF LIGIA PIOQUINTO-OKOSZKO,	:	
BOARD OF EDUCATION OF THE	:	COMMISSIONER OF EDUCATION
VOCATIONAL SCHOOLS IN THE COUNTY	:	DECISION
OF MIDDLESEX, MIDDLESEX COUNTY.	:	

AGENCY DKT. NO. 156-5/03

IN THE MATTER OF THE TENURE	:	
HEARING OF LIGIA PIOQUINTO-OKOSZKO,	:	
BOARD OF EDUCATION OF THE	:	COMMISSIONER OF EDUCATION
VOCATIONAL SCHOOLS IN THE COUNTY	:	DECISION
OF MIDDLESEX, MIDDLESEX COUNTY.	:	

This matter was opened before the Commissioner of Education on May 19, 2003 through the certification of tenure charges alleging incapacity to return to work, excessive absences and tardiness and unbecoming conduct, against a tenured teacher at the Piscataway Campus of the Vocational Schools in the County of Middlesex.

By letter of May 20, 2003, respondent was directed, via both certified and regular mail addressed to respondent at 700 West Avenue, Sewaren, New Jersey 07077, to file an Answer to the tenure charges against her.[1] The May 20 letter provided respondent notice that, pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4, an individual against whom tenure charges are certified shall have *15 days from the date such charges are filed with the Commissioner* to file a written response to the charges, and that failure to answer within the prescribed period, where no extension has been applied for and granted, or where there has been no submission by the charged employee of a responsive filing indicating that s/he does not contest the charges, **will** result in the charges being deemed admitted by the charged employee. No reply has been

[1] The notice sent via certified mail was returned as "unclaimed" on June 6, 2003 following two notifications to respondent by the Post Office that there was certified mail awaiting pickup. The notice sent via regular mail was not returned.

received from respondent in response to the Board's charges. Accordingly, pursuant to *N.J.A.C.* 6A:5-3(c), each count of the charges against respondent is deemed to be admitted.

The Commissioner's review of the tenure charges certified against respondent by the Board and the statement of evidence in support of those charges indicate that respondent was absent 35 days in the 2000-2001 school year, 22 ½ days in the 2001-2002 school year and has accumulated absences of 82 ½ days and numerous instances of tardiness in the 2002-2003 school year from September 2002 through April 8, 2003. Moreover, with respect to the 2002-2003 school year, respondent has been absent from her teaching position from December 12, 2002 to the present.

In reviewing the certifications by the school principal and the superintendent of schools, it is noted that respondent indicated to her school principal and the superintendent that her absences have been due to illness, but she has not provided medical documentation to support her failure to return to work, nor has she submitted any information as to when, or if, she will be able to return to employment. In an effort to assess her situation, the District scheduled appointments for respondent with the school physician on February 12, 2003, March 12, 2003, March 26, 2003 and April 15, 2003. The doctor rescheduled the March 12 appointment to March 26 and the March 26 appointment was rescheduled to April 15 at respondent's request. Respondent did not keep her appointments scheduled on February 12, 2003 and April 15, 2003 and provided no explanation for not doing so.

Accordingly, in that respondent has chosen not to deny the specific allegations contained in the Tenure Charges, the Commissioner deems such charges to be admitted and finds that the Board has demonstrated that respondent is incapable of fulfilling her duties as a teacher

2 The petitioner appeared at a meeting of the West Orange Board of Education on February 10, 2003. At that time she testified that she had moved out of West Orange in March 2002.

3 In addition, as part of her petition, K.L. stated, in a letter attached, that T.O. had been a student at Hazel Avenue School for over a year. Due to housing circumstances, "we were unable to stay in West Orange, but now reside five blocks into Orange".

4 The tuition calculations from March 1, 2002, to the end of the 2002 school year June 28, 2002, totaled $4,120.12 for 73 days at $56.44 per day.

5 For the 2002-2003 school year, from September 5, 2002 to March 17, 2003, the last day that T.O. remained on the school rolls in West Orange, there was a total of 121 days at $59.38 per day for total amount of $7184.98 for 2002-2003. The total for the entire period from March 1, 2002 through March 17, 2003 was $11,305.10.

6 This tuition rate was based on per pupil cost for a special education student. T.O. was a special education student in the West Orange School System. See R-2 attached.

LEGAL DISCUSSION

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

The petitioner has failed to appear to present testimony that she, in fact, lived in the School District with her son during the period in question. In fact, by

her own admission, the petitioner stated that she lived outside of the school district, "due to housing circumstances". She asked permission in the petition for an extension to the end of the school year to reside back in West Orange. However, she did not move back to West Orange. According to the testimony presented by the investigator for West Orange, she has moved to Lake Hopatcong. Further, according to the uncontested testimony of the investigator, she lived outside of West Orange from March 2002. Therefore, it is clear, under the statute, that K.L. and T.O. were not domiciled in West Orange.

CONCLUSION

Thus, I **CONCLUDE** that the student was not entitled to a free public education in West Orange, as he did not reside in West Orange at the time in question.

The petitioner has not contested the tuition figures provided by the District. Hence, I **FIND** that the per diem rate for the year 2001-2002 was $59.38. The tuition due to the end of the 2002 school year amounted to $4,120.12. The per diem rate for the 2002-2003 year is $59.38 and the amount owed as of March 17, 2003 was $7,184.98. Therefore, the total amount owed to the West Orange Board of Education is $11,305.10.

ORDER

Based on the foregoing, it is hereby **ORDERED** that the District's finding that the petitioner child is not entitled to attend the West Orange School is hereby upheld. The District's request for tuition reimbursement is hereby granted.

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

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

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

6/3/03
DATE

Carol I. Cohen
CAROL I. COHEN, ALJ

Receipt Acknowledged:

6-6-03
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JUN - 9 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

ld

EXHIBITS

R-1 Letter of Superintendent to petitioner dated 2/12/03 (2 pages).

R-2 Tuition Calculations. (6 pages).

OAL DKT. NO. EDU. 03309-03
AGENCY DKT. NO. 68-2/03

K.L., on behalf of minor child, T.O.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon his full and independent review, the Commissioner agrees with the conclusion of the Administrative Law Judge (ALJ) that petitioner has failed to meet her burden of proving, by a preponderance of the credible evidence, that she was a domiciliary of West Orange during the period from March 1, 2002 through March 17, 2003, so as to entitle her child, T.O., to attend the Board's schools free of charge during this time. (*N.J.S.A.* 18A:38-1a)

Accordingly, the Initial Decision of the OAL is adopted for the reasons clearly stated therein. Petitioner is directed to reimburse the Board a total of $11,305.10 for the period of her child's ineligible attendance in its schools.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 7/10/03

Date of Mailing: 7/16/03

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

335-03

335-03

TRACIE L. EVANS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF GATEWAY REGIONAL SCHOOL DISTRICT, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	

July 17,2003

WHEREAS, to avoid the burden, expense and uncertainty of future litigation, the parties desire to amicably resolve the issues raised in the Petition of Appeal, as well as to resolve any and all issues arising from Evans' employment with the Board and separation of employment;

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

1. Evans shall withdraw with prejudice her Petition of Appeal.

2. The Board will pay to Evans Three Thousand, Seven Hundred Fifty Dollars ($3,750) in full and complete settlement of any and all claims against the Board asserted in the Petition of Appeal and as more fully described in the following General Release. The settlement draft shall be made payable to "Barbara Riefberg, Esq. and Tracie Evans" and shall be delivered to the law offices of Barbara Riefberg, Esq. within 30 days of full execution of this Agreement and dismissal with prejudice of the Petition of Appeal.

3. Evans hereby **RELEASES AND FOREVER DISCHARGES** the Board, its past, current and future individual board members officers, administrators, agents, and employees, and successor Boards, of and from any and all claims, actions, liabilities, petitions, grievances, causes of actions, suits and/or demands, in law or equity, arising out of or related in any way to Evans' employment with the Board and/or separation of employment, whether known or unknown to me, or suspected or unsuspected, that I may have individually or as a member of a class, including but not limited to: 1) any claim asserted in the Petition of Appeal; 2) any claim for rehire and/or reinstatement, whether asserted under any collective bargaining agreement, the New Jersey Department of

Education laws or otherwise; 3) any claim under the Title VII of the Civil Rights Act of 1964, as amended, the Americans with Disabilities Act, the New Jersey Conscientious Employee Protection Act, the New Jersey Law Against Discrimination, the Employee Retirement Income Security Act of 1974, and any other civil rights statutes at the federal, state or local level; 4) any claim for wrongful discharge; 5) any claim under a collective bargaining agreement, including but not limited to discipline without just cause; and 6) any claim for attorney fees and/or costs, expert witness fees or litigation costs of any kind.

4. Evans understands and acknowledges that her employment with the Board has been terminated, and that she has no statutory, tenure, contractual or common law right to re-employment and/or reinstatement. Evans further understands and acknowledges that she will never sue the Board concerning any claim she may have relating to her employment with the Board or the termination of that employment.

5. This Agreement is not, and shall not be construed to be an admission by the Board, its members, officers, agents, and employees, of any wrongdoing or violation of the Board's constitutional, statutory, contractual and/or common law duties toward Evans. No findings of any kind have been made or issued by any court or administrative tribunal, and Evans does not claim to be a prevailing party.

6. Except as may be required by law, no party or their counsel shall disclose the financial terms and conditions of this Agreement to any person or entity, except to say that the matter has been amicably resolved to the satisfaction of both parties.

7. Evans certifies that: (1) She has read the terms of this Agreement; (2) She has discussed the Agreement with her counsel; (3) She understands its terms and effects; (4)

She is executing this Agreement of her own volition; and (5) Neither the Board nor its agents, representatives, or attorneys have made any representations to her concerning the terms or effects of this Agreement.

IN WITNESS WHEREOF, and intending to be legally bound hereby, the parties execute the foregoing Agreement.

Tracie Lyn Evans 3/17/03
TRACIE LYN EVANS Date

Barbara E. 3/24/2003
BARBARA RIEFBERG, ESQ. Date
Attorney for Tracie Evans

Angelo J. Natoli 4-23-03
ANGELO NATOLI Date
Board President
Gateway Regional High School
District Board of Education

EDGAR KEEPERS Date
Board Secretary/School Business Administrator
Gateway Regional High School
District Board of Education

Joseph F. Betley 1/14/03
JOSEPH F. BETLEY, ESQ. Date
Attorney for Gateway Regional High School
District Board of Education

g:\e&e\Gateway_Evans\359392

OAL DKT. NO. EDU 2835-01
AGENCY DKT. NO. 86-4/01

TRACIE L. EVANS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF GATEWAY REGIONAL SCHOOL DISTRICT, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: July 17, 2003

Date of Mailing: July 17, 2003

336-03

S.H., on behalf of minor child, L.C,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF JACKSON, OCEAN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

July 17,2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 153-03
AGENCY DKT. NO. 7-1/03

S.H. O/B/O L.C.,
Petitioner,
v.
JACKSON TOWNSHIP
BOARD OF EDUCATION,
OCEAN COUNTY,
Respondent.

Thomas W. Sumners, Jr., Esq., for petitioner (Sumners, George & Dortch, attorneys)

Robert A. Greitz, Esq., for respondent (Citta, Holzapfel, Zabarsky, Leahey & Simon, attorneys)

Record Closed: June 19, 2003 Decided: June 19, 2003

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

This matter was transmitted to the Office of Administrative Law on January 16, 2003, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

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

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

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

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

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

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

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

6/19/03
DATE

ANTHONY T. BRUNO, ALJ

Receipt Acknowledged:

6/24/03
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 27 2003
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

tmp

CITTA, HOLZAPFEL, ZABARSKY, LEAHEY, & SIMON
248 Washington Street
P.O. Box 4
Toms River, New Jersey 08754
732-349-1600
Attorneys for Respondent, Jackson Board of Education

S.H., ON BEHALF OF HER MINOR CHILD, L.C., **Petitioner,** **v.** **JACKSON BOARD OF EDUCATION,** **Respondent**	**BEFORE THE COMMISSIONER OF EDUCATION, STATE OF NEW JERSEY** **OAL DOCKET NO:** **AGENCY NO.: EDU-153-03** **CONSENT ORDER REGARDING SUPPLEMENTAL INSTRUCTION**

This matter having been opened to the Court upon consent of the parties through their attorneys, Thomas W. Sumners, Jr. Esq., attorney for the Petitioner, S.H. o/b/o her minor child, L.C., and Robert A. Greitz, Esq., attorney for Respondent, Jackson Board of Education, and both parties having consented to the entrance of this Order; and for good cause being shown:

IT IS _____ day of April 2003:

ORDERED that the supplemental instruction of L.C., which he must complete in order for him to receive credit for the first semester of the 2002-2003 school year, shall be as follows:

a. Supplemental instruction in Spanish I shall continue at its current schedule of every Tuesday, and at its current location and time,

until such time as it is completed and L.C. has met all of the requirements to receive credit for this class;

b. Supplemental instruction in Geo Science shall be suspended until the completion of the school year, and then, within seven (7) days of the last day of school, shall resume at a rate of two (2) hours per day, five (5) days per week until July 15, 2003, or until all coursework is completed. The location of this supplemental instruction shall be at convenient location agreed upon by the parties, and L.C. and his parent shall be responsible to provide any necessary transportation to and from the supplemental instruction location;

c. Supplemental instruction in AlgebraP1 shall be suspended until the completion of the school year, and then, within seven (7) days of the last day of school, shall resume at a rate of two (2) hours per day, five (5) days per week until July 15, 2003, or until all coursework is completed. The location of this supplemental instruction shall be at convenient location agreed upon by the parties, and L.C. and his parent shall be responsible to provide any necessary transportation to and from the supplemental instruction location;

d. In order for L.C. to be entitled to credit for Spanish I, Geo Science, and AlgebraP1 the classes in which he is receiving the supplemental instruction, L.C. must complete all work and regular

attend classes. L.C. shall not receive credit for Spanish I, Geo Science, and/or AlgebraP1 if he ceases to regularly attend such class(es) prior to the completion of the necessary and required coursework in such class(es).

IT IS FURTHER ORDERED that a copy of this Order shall be served upon all counsel of record within seven (7) days of the date hereof.

ANTHONY T. BRUNO, A.L.J.

The undersigned hereby consent
to the form and entry of this Order.

CITTA, HOLZAPFEL, ZABARSKY, LEAHEY, & SIMON

ROBERT A. GREITZ, ESQ.
Attorneys for Respondent, Jackson
Board of Education

SUMNERS GEORGE

THOMAS W. SUMNERS, JR., ESQ.
Attorneys for Petitioner,
S.H. o/b/o Her Minor Child, L.C.

OAL DKT. NO. EDU 153-03
AGENCY DKT. NO. 7-1/03

S.H., on behalf of minor child, L.C,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF JACKSON, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: July 17, 2003

Date of Mailing: July 17, 2003

337-03

337-03

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

July 17, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 5304-00
Agency Dkt. No. 154-5/00

TRUDY SERVEDIO,

Petitioner,

v.

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

Respondent.

Alan S. Porwich, Esq., for petitioner
(Feintuch,, Porwich and Feintuch, attorneys)

Charlotte Kitler, Esq., General Counsel, for respondent

Record Closed: June 2, 2003 Decided: June 20, 2003

BEFORE **MUMTAZ BARI-BROWN**, ALJ:

STATEMENT OF THE CASE

This case was transmitted to the Office of Administrative Law ("OAL") on June 5, 2000 for a hearing pursuant to *N.J.S.A.* 52:14B-1 to 15 and *N.J.S.A.* 52:14F-1 to 13.

The parties entered into an agreement and have prepared a letter withdrawing this matter, which is attached and fully incorporated herein.

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

1. The parties have voluntarily agreed to withdraw this matter.

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

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1(d) and should be approved. I approve the stipulation of settlement and therefore **ORDER** that the parties comply with the agreement.

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

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

June 20, 2003
DATE

MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged:

June 25, 2003
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JUN 26 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

cb

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

TRUDY SERVEDIO, Petitioner, v. STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY, COUNTY OF HUDSON, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY Agency Dkt. No. 154-5/00 OAL Dkt. No. EDUOA 05304-00 STIPULATION OF SETTLEMENT

This Agreement is entered into as a resolution of the within matter regarding petitioner's claim for restoration of certain sick days pursuant to N.J.S.A. 18A:30-2.1 for absences from work from February 10, 2000 through March 17, 2000, alleged to be due to work-related injuries. The petitioner and respondent hereby agree to an amicable resolution of the within matter as follows:

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

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

3. The respondent Jersey City School District has restored eight sick days to petitioner's sick bank as being due to injury on the job (namely, February 11, February 14, March 8, March 13, March 14, March 15, March 16 and March 17, 2000), and agrees to

to restore an additional day (March 7, 2000) to petitioner's sick bank as due to injury on the job.

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

Trudy Servedio
TRUDY SERVEDIO

DATED: 5/22/03

ALAN S. PORWICH, Esq.
Attorney for Petitioner

DATED: 5/28/03

CHARLOTTE KITLER, Esq.
Attorney for Respondent

DATED: 6/2/03

OAL DKT. NO. EDU 5304-00
AGENCY DKT. NO. 154-5/00

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

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: July 17, 2003

Date of Mailing: July 18, 2003

338-03

338-03R

IN THE MATTER OF THE TENURE	:	
HEARING OF PAMELA ZIMIC, SCHOOL	:	
DISTRICT OF THE TOWNSHIP OF	:	COMMISSIONER OF EDUCATION
CRANFORD, UNION COUNTY.	:	DECISION ON REMAND
	:	

July 18, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 11164-02

(EDU 9039-02 – Remanded)

AGENCY DKT. NO. 264-8/02

IN THE MATTER OF THE TENURE HEARING OF PAMELA ZIMIC, SCHOOL DISTRICT OF THE TOWNSHIP OF CRANFORD, UNION COUNTY

Anthony P. Scarillo, Esq., for petitioner
(Lindabury, McCormick & Estabrook, attorneys)

Nancy I. Oxfeld, Esq., for respondent
(Oxfeld Cohen PC, attorneys)

Record Closed: June 19, 2003 Decided: June 19, 2003

BEFORE **KEN R. SPRINGER**, ALJ:

This is a remand of a tenure settlement for development of a more complete record. Originally, on August 26, 2002, the Cranford Board of Education ("Board") certified tenure charges against Pamela Zimic, a music teacher in the district, alleging, among other charges, that she is mentally incapable of performing her duties, that she engaged in conduct unbecoming a teacher and that she was excessively absent. On September 10, 2002, the Commissioner of Education ("Commissioner") referred this

matter to the Office of Administrative Law ("OAL") for hearing. Prior to the holding of any hearing, on October 17, 2002, the Board sought to withdraw the tenure charges as moot since Ms. Zimic had been approved for a disability retirement. By order entered on December 24, 2002, the Commissioner rejected the withdrawal and remanded the matter to the OAL for expansion of the record. In particular, the Commissioner directed that the parties address the standards for settlement of tenure cases established by the State Board of Education in the matter entitled *In Re Cardonic*, 190 *S.L.D.* 842, 846.

Pursuant to the order of remand, the parties have prepared the attached stipulation of settlement applying the *Cardonic* standards to the particular facts of this case. On May 29, 2003, the OAL held a public hearing on the issue of whether or not the proposed settlement should be accepted. Counsel for both parties set forth on the record the reasons why settlement would be in the public interest. Ms. Zimic testified that she fully understood and voluntarily agreed to the terms of settlement.

Based on my review of the proposed settlement terms, I **CONCLUDE** that the proposed settlement fully comports with the Cardonic standards and that acceptance of this settlement is in the public interest. Therefore, it is **ORDERED** that the parties comply with the settlement terms and that the proceedings are hereby concluded.

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

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

June 19, 2003
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

June 25, 2003
DATE

M. Kathleen Quinn
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 26 2003
DATE

Jeff S. Masin
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

al

RESOLUTION

RESOLVED, that the Cranford Board of Education, upon the recommendation of the Superintendent, approves the attached Withdrawal Agreement *In the Matter of the Tenure Hearing of Pamela Zimic, OAL Docket No. EDU 9039-02,* and approval of Ms. Zimic's receipt of her retirement benefits as of May 29, 2003.

Robert J. Carfagno, Board Secretary

DATED: June 9, 2003

LINDABURY, MCCORMICK & ESTABROOK
A Professional Corporation
53 Cardinal Drive
P.O. Box 2369
Westfield, New Jersey 07091
(908) 233-6800
Attorneys for the Cranford Board of Education

IN THE MATTER OF THE TENURE HEARING OF PAMELA ZIMIC, SCHOOL DISTRICT OF THE TOWNSHIP OF CRANFORD, UNION COUNTY.	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY OAL DKT. NO. EDU 9039-02 AGENCY DKT. NO. 264-8/02 **WITHDRAWAL AGREEMENT**

This Withdrawal Agreement (hereinafter "Agreement") is made this ~~30th~~ day of May, 2003, between the Cranford Board of Education (hereinafter known as the "Board") and Pamela Zimic (hereinafter known as "Ms. Zimic").

Whereas, on or about May 23, 2002, the Board filed for disability retirement on behalf of Ms. Zimic; ~~A true and accurate copy of the documentation evidencing such application is attached hereto as Exhibit A;~~ PZ 5/29/03 ARC

Whereas, Ms. Zimic initially did not consent to the application for her disability retirement;

Whereas, on or about August 20, 2002, the Board certified tenure charges against Ms. Zimic; ~~A true and accurate copy of the documents setting forth the nature of the tenure charges are attached hereto as Exhibit B;~~ PZ 5/29/03 ARC

Whereas, there are currently tenure charges pending before the Commissioner of Education, State of New Jersey;

Whereas, Ms. Zimic determined not to contest the disability retirement, was approved for disability retirement on September 5, 2002 and ~~began receiving her re~~retirement benefits ~~as of October~~ 1, 2002; and PJ 5/29/03 ORC

Whereas, there are a significant number of cases holding for the proposition that a disability retirement renders tenure charges moot. (*See* Ramsey Board of Education v. O'Toole, 85 S.L.D. 385 (February 6, 1985), *aff'd* St. Bd. w/opinion 85 S.L.D. 400, *aff'd in part, rev'd in part and remanded* 212 N.J. Super 624 (App. Div. 1986), *cert. den.* 107 N.J. 123 (1987), St. Bd. on remand 86:3115 (disability retirement renders tenure charges moot); Wallace, 89: February 7 (settlement approved in light of disability retirement); Mosley, 99: April 27 (tenure charges dismissed in light of disability retirement, however, board may file additional charges if in the future TPAF determines teacher should return to duty because disability diminished); and Quadrini, 01: July 9 (tenure charges dismissed as moot where teacher retired).

Whereas, the parties after a consideration of all of the circumstances surrounding this matter agree that it is in the best interests of all parties to the withdrawal of the tenure charges filed against Ms. Zimic as these changes are moot in light of Ms. Zimic's disability retirement;

Now, therefore, the parties seek the approval of the Commissioner of Education, State of New Jersey pursuant to N.J.A.C. 6A;3-5.6(a) and the standards established in the matter entitled In re Cardonick, State Board decision of April 6, 1983 (1990 S.L.D. 842), to withdraw the tenure charges for the following reasons:

1. Ms. Zimic ~~hereby represents and provides documentation, a true and accurate copy is attached hereto as Exhibit C, that she~~ was approved for disability retirement on September 5, 2002 and is currently retired; PJ 5/29/03 ORC

2. Ms. Zimic ~~hereby represents and provides documentation, a true and accurate copy is attached hereto as Exhibit D, that she~~ has been receiving her retirement benefits ~~since October 1, 2002;~~ PJ 5/29/03 ORC

3. Ms. Zimic's disability retirement renders the tenure charges moot. *See* Ramsey Board of Education v. O'Toole, 85 S.L.D. 385 (February 6, 1985), *aff'd* St. Bd. w/opinion 85 S.L.D. 400, *aff'd in part, rev'd in part and remanded* 212 N.J. Super 624 (App. Div. 1986), *cert. den.* 107 N.J. 123 (1987), St. Bd. on remand 86:3115 (disability retirement renders tenure charges moot); Wallace, 89: February 7 (settlement approved in light of disability retirement); Mosley, 99: April 27 (tenure charges dismissed in light of disability retirement, however, board may file additional charges if in the future TPAF determines teacher should return to duty because disability diminished); and Quadrini, 01: July 9 (tenure charges dismissed as moot where teacher retired).

4. The Board's concern that Ms. Zimic is not fit to teach due to her mental incapacity and unbecoming conduct, such as, excessive absenteeism, is alleviated by documentation proving her retirement;

5. The Board reserves the right to file additional tenure charges if in the future the Teachers' Pension and Annuity Fund ("TPAF") determines Ms. Zimic can return to duty because her disability is diminished;

6. It is in the public interest to withdraw this matter due to Ms. Zimic's retirement. The result of Ms. Zimic's disability retirement, removing her from employment with the Board, is the same result that would be achieved if the Commissioner of Education and Administrative Law Judge determine that the tenure charges are sufficient. Thus, to require the parties to continue to pursue this matter would be an unnecessary expenditure of public funds;

7. The parties recognize that each has been represented by legal counsel of their own choosing and that they sign this Agreement as their own voluntary act and deed, and that they fully understand his or her rights;

8. Ms. Zimic, a former teaching staff member of the Board, represents that she has been advised by her counsel that the Commissioner of Education has a duty to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible suspension or revocation of certificate;

9. This Agreement shall be subject to the ratification of the Cranford Board of Education;

10. This Agreement shall be subject to the laws of the State of New Jersey; and

11. All terms of this Agreement are deemed material. This document may not be altered, amended or modified or revoked except by an instrument executed in writing by the parties.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the date and year aforesaid.

Cranford Board of Education

By: Mary Venditti
Board President: MARY VENDITTI
Dated: JUNE 9, 2003

STATE OF NEW JERSEY)
COUNTY OF [redacted] UNION)SS.:

I CERTIFY that on JUNE 9, 2003, MARY VENDITTI personally came before me and stated under oath to my satisfaction that:
(a) this person was the subscribing witness to the signing of the attached instrument;
(b) this instrument was signed by MARY VENDITTI, who is the President of the Cranford Board of Education, the entity named in this instrument, and was fully authorized to and did execute this instrument on its behalf: and,
(c) the subscribing witness signed this proof under oath to attest to the truth of these facts.

Signed and sworn to before me on
JUNE 9, 2003.
Robert J. Calfagno
(Print name & title below signature)
ROBERT J. CALFAGNO, SBA/BS

Pamela Zimic
Pamela Zimic
Dated: May 29, 2003

STATE OF NEW JERSEY)
COUNTY OF ESSEX)SS.:

I certify that on May 29, 2003, Pamela Zimic, personally came before me and acknowledged under oath, to my satisfaction, that she is named in and personally signed this document.

Signed and sworn to before me on
May 29, 2003

(Print name & title below signature)
Mary I Oxfeld, Esq.

OAL DKT. NOS. EDU 11164-02 AND EDU 9039-02 (Remanded)
AGENCY DKT. NO. 264-8/02

IN THE MATTER OF THE TENURE	:	
HEARING OF PAMELA ZIMIC, SCHOOL	:	
DISTRICT OF THE TOWNSHIP OF	:	COMMISSIONER OF EDUCATION
CRANFORD, UNION COUNTY.	:	DECISION ON REMAND
	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 7|18|03

Date of Mailing: 7|18|03

355-03

355-03

Z.A., ON BEHALF OF MINOR CHILDREN, A.K. AND J.K.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE VILLAGE OF RIDGEWOOD, BERGEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning parent claimed children were entitled to attend school in the district based on her own domicile there (the children are actually living with a relative in a different district), but contended that she should be excused from providing her physical address because the Board would improperly reveal her whereabouts, thereby placing her and her children in danger.

ALJ found that petitioner provided no evidence whatsoever that would establish domicile within the district subsequent to June 2001, and further discounted petitioner's contention that she should be relieved from statutory requirements. ALJ did not award tuition because the Board had not filed a counterclaim.

Commissioner adopted ALJ's decision, but modified it to award tuition to the Board, noting that a counterclaim was not a necessary precondition for such award where the petitioner failed to demonstrate entitlement to free public education in the district pursuant to *N.J.S.A.* 18A:38-1.

July 23, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1030-03
AGENCY DKT. NO. 349-11/02

Z.A. ON BEHALF OF MINOR CHILDREN
A.K. AND J.K.,
Petitioner,
v.
BOARD OF EDUCATION OF THE VILLAGE
OF RIDGEWOOD, BERGEN COUNTY,
Respondent.

Z.A., parent of A.K. and J.K., petitioner, *pro se*

Lester Aron, Esq., for respondent (Sills, Cummis, Radin, Tischman, Epstein and Gross, attorneys)

Record Closed: June 2, 2003 Decided: June 11, 2003

BEFORE **LESLIE Z. CELENTANO,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner Z.A. challenges the residency determination made by the Ridgewood Board of Education ("Board").

The matter was transmitted to the Office of Administrative Law (OAL) on January 7, 2003, for resolution as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. A hearing was held on June 2, 2003, at the OAL in Newark, New Jersey. At the conclusion of petitioner's case the Board moved to dismiss the petition. The record was closed on that date.

FACTUAL DISCUSSION

Based upon the undisputed facts presented at the hearing, I **FIND** the following **FACTS** in this case.

Petitioner has two children who have been attending Ridgewood schools, A.K., age sixteen and completing the eleventh grade, and J.K., age thirteen and completing the seventh grade. It is undisputed that the children reside in Hawthorne, New Jersey, and not within the Ridgewood school district.

Petitioner and her children resided at 625 Witthill Road in Ridgewood, New Jersey, from November 1999 until June 2001. Petitioner then moved to another location and has declined to provide her address to the Ridgewood school district. Petitioner would not reveal her physical address at the hearing. Petitioner maintains a post office box in Ridgewood. Petitioner testified that the Board is "not trustworthy" in maintaining the confidentiality of her physical address, which she believes it has provided to "unauthorized parties." Petitioner also testified that she believes individuals have hacked into the school computer to obtain her office address, and, further, that the district provided her prior physical address to J.R., the son of a former landlord, who she believes subsequently tampered with her vehicle.

After moving out of the Witthill Road address petitioner rented an apartment in Ridgewood. Petitioner provided no lease, utility bills or other documentation to indicate her current physical address, citing a concern for her safety. Petitioner believes that her ex-husband, P.K., father of A.K. and J.K., poses a physical threat to her. Petitioner and P.K. divorced on July 5, 1990, and petitioner has no idea where P.K. currently resides, but believes he may live in New Jersey. Petitioner indicated that a restraining order is in

place against P.K., but she did not provide a copy of the order. P.K. pays child support to petitioner by sending money orders to her post office box address. Petitioner indicated that police reports were made concerning domestic violence when she and P.K. resided in Upper Saddle River, New Jersey. Petitioner provided no such police reports. Petitioner indicated that there had been no acts of violence since the divorce in 1990.

Petitioner made a partial tuition payment to the district following an agreement reached in October 2002 whereby she agreed to pay tuition in order to keep her children in the Ridgewood school system. An $800 check paid to the district for tuition was drawn against the bank account of petitioner's employer, which petitioner indicates was authorized.

Petitioner testified that there had been no lawsuits against her other than one filed by J.R., who she claimed tampered with her vehicle. However, upon cross-examination petitioner acknowledged that there were numerous judgments against her, including some as recent as 2001. Petitioner indicated that she needed to "address" these judgments and acknowledged that most of them were for credit card debt and other debt. Petitioner testified that having a great many creditors had nothing to do with her need to maintain a post office box address. Petitioner indicated that the relief she is seeking is from the requirement that she reveal where she resides. Petitioner also seeks the return of the $800 she paid for tuition.

LEGAL DISCUSSION AND CONCLUSION

The Board has asserted that A.K. and J.K. were not domiciled within the district during the 2001-2002 and the 2002-2003 school years and, consequently, are not entitled to a free public education in Ridgewood.

N.J.S.A. 18A:38-1 provides that the public schools of a district are free to persons domiciled within the district who are over five and under twenty years of age. Domicile is the place of a person's abode, where he or she has the present intention of remaining and to which, if absent, he or she intends to return. *Mercadante v. City of Paterson*, 111 *N.J. Super.* 35, 39 (Ch. Div. 1970), *aff'd*, 58 *N.J.* 112 (1971). A person may have more

than one residence but only one domicile, which is that place that the person regards as his or her true and permanent home. *Board of Educ. of Middle Township, Cape May County v. K.K.*, 93 *N.J.A.R.*2d (EDU) 461.

In a proceeding such as this, the parent has the burden of proving by a preponderance of the evidence that the children meet the eligibility requirements. Here, there is no dispute that A.K. and J.K. are not domiciled in Ridgewood. Petitioner offered nothing more than an unsupported assertion that she is domiciled in Ridgewood, and that therefore her children are entitled to a free public education in the district. She provided no documentary evidence to indicate residency, rather she suggested that she is the subject of potential violence and therefore has no requirement to provide such proofs. Indeed, petitioner testified, "I can't prove I live in town." The fact that petitioner "needs the relief" is not a sufficient basis for entitlement to a free public education in the Ridgewood school district for A.K. and J.K.[1]

Based upon the undisputed facts and circumstances, I **FIND** that A.K. and J.K. are not domiciled within the district, and have not been since June 2001, and therefore do not meet the requirements set forth in *N.J.S.A.* 18A:38-1(a). I therefore **CONCLUDE** that A.K. and J.K. are not entitled to a free public education in the Ridgewood school district. As the Answer filed by respondent did not contain a counterclaim for tuition, no calculation of tuition costs is set forth herein.

For the foregoing reasons, the Board's motion to dismiss the petition of appeal is **GRANTED** and petitioner's appeal is **DISMISSED**.

ORDER

It is hereby **ORDERED** that petitioner's appeal of respondent's determination is **DISMISSED**. It is further **ORDERED** that A.K. and J.K. are ineligible for attendance in respondent's school district.

[1] Petitioner cites to *N.J.S.A.* 47:4-6 and to *N.J.A.C.* 6A:3-1.6, neither of which have application in this matter.

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

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

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

June 11, 2003
DATE

LESLIE Z. CELENTANO, ALJ

Receipt Acknowledged:

6-13-03
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JUN 16 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

da

OAL DKT. NO. EDU 1030-03
AGENCY DKT. NO. 349-11/02

Z.A., ON BEHALF OF MINOR CHILDREN, A.K. AND J.K.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE VILLAGE OF RIDGEWOOD, BERGEN COUNTY,	:	
RESPONDENT.	:	

The record of this matter, the Initial Decision of the Administrative Law Judge (ALJ), and the transcript of proceedings at the Office of Administrative Law have been reviewed. Timely exceptions were filed by petitioner, as were replies and cross-exceptions by the Board. Because the Board's cross-exceptions included, as a result of particular circumstances set forth below, the first calculation of tuition presented in this matter, petitioner was afforded an opportunity to respond to the Board's submission.

In her exceptions, petitioner reiterates her primary contention that she is, in fact, domiciled in the respondent's school district so as to entitle her children to continue attending school there, but that she must be "relieved" from proving such domicile because doing so would "endanger the welfare of her children as well as put herself in harm[']s way." Petitioner again opines that the respondent Board "is not trustworthy," and "has aligned itself against petitioner***by joining with a very dangerous and unscrupulous family, thereby endangering the lives" of her and her children, so that "giving them my physical address poses a real and present threat to my physical safety." (Petitioner's Exceptions, quotations at 3-4) In support of her

contention in this regard, petitioner includes with her exceptions two documents referenced by her during proceedings before the ALJ, but never entered into evidence.

In reply, the Board urges adoption of the ALJ's conclusion that petitioner has completely failed to meet her burden of demonstrating that A.K. and J.K. are entitled to attend school in the district, or that they were so entitled at any time subsequent to June 2001. (Board's Reply and Cross-Exceptions at 1-2) However, the Board excepts to the ALJ's suggestion that the Board waived its right to seek tuition from petitioner for the 2001-02 and 2002-03 school years. Rather, the Board explains, at the hearing conducted in this matter on June 2, 2003, "in the interests of efficiency and preserving the Court's time, and out of kindness to Petitioner, the Board stipulated on the record that it would only seek tuition if exceptions were filed by the Petitioner, at which point the Board would submit information regarding the outstanding tuition due." Since petitioner did file exceptions, the Board now seeks tuition and submits a certification as to the amount of tuition due, a total of $40,126 for both students. (*Id.* at 3-4)[1]

In response to the Board's cross-exceptions, petitioner revisits her prior argument that the Board's alleged revelation of her address to an unauthorized party "nullifies" any statutory obligation she would otherwise have had to provide her address to the Board. (Petitioner's Reply to Cross-Exceptions at 1-4) Petitioner responds to the Board's demand for, and calculation of, tuition as set forth in its cross-exceptions, by reiterating that she owes *nothing* because she is domiciled in Ridgewood and because the Board has made it impossible for her to prove that contention, so that its demand for tuition is tantamount to "a perpetrator seeking money compensation from his victim." (*Id.* at 4-5, quotation at 4)

[1] For 2001-02, petitioner had one child in middle school ($9,920) and one child in high school ($10,105), and for 2002-03, one child in middle school ($10,465) and one child in high school ($10,456). These amounts (a total of $40,946) are offset by an $800 payment previously made by petitioner.

Upon careful and independent review of this matter, the Commissioner must concur with the ALJ that petitioner cannot prevail on the present record. Petitioner claims that her children are entitled to attend school in the district based on her domicile there, yet she offers nothing more than her own assertion in support of that contention; indeed, as noted by the ALJ at hearing (T 29)[2], petitioner has provided not "a scintilla of evidence," direct or indirect, linking her to a domicile anywhere within the Village of Ridgewood subsequent to leaving her prior residence on June 30, 2001. To the contrary, petitioner's entire appeal is based on the premise that she should not have to provide any such evidence, either to the Board or to the ALJ, because the Board's own unlawful actions have nullified the requirement that she do so.[3] However, even accepting, *arguendo,* that a legitimate fear for her own and her children's safety might in some way mitigate petitioner's obligation to provide a specific physical address as she attempts to demonstrate domicile in the district, petitioner has offered nothing substantial in support of even that claim. Although petitioner asserted at hearing that the referenced threat came from her former husband, it was quickly established on record that any threat of that nature had long since ceased (T 12-19), whereupon petitioner pressed her unsupported belief that the only way a particular person could have gotten her former address (the address in Ridgewood from which she subsequently moved) was by hacking into the school computer system (T 5-7, 17-18, 23). Finally, petitioner repeatedly accuses the Board of being in ongoing collusion with a dangerous and unsavory family from whom petitioner formerly rented a residence, and that the Board previously provided her office address to a member of this family, who subsequently tampered with her vehicle. Although petitioner claims she can prove this latter allegation, no dispositive

[2] The designation "T" indicates the transcript of proceedings before the ALJ on June 2, 2003, followed by the page number referenced.

[3] Petitioner invokes the standards for grant of emergent relief, *Crowe v. DeGioia*, 90 *N.J.* 126 (1982), and the School Ethics Act, *N.J.S.A.* 18A:12-24.1, in support of this contention; however, as noted by the Board and the ALJ, neither of these authorities has any applicability herein. Petitioner also errs in her contention (see, for example, Petitioner's Reply to Cross-Exceptions at 5) that it is the Board's burden to prove that she does *not* live in Ridgewood.

evidence in support of it was brought to the record,[4] and, indeed, even if the Board had improperly released information about petitioner, the appropriate remedy would not be permitting her children's continued enrollment in the district without sufficient proof of domicile. Were the Commissioner to accept petitioner's wholly unsubstantiated assertions for this purpose, he would be setting a dangerous and unmanageable precedent in any effort to determine a student's right to free public education in a district pursuant to *N.J.S.A.* 18A:38-1.

Under the circumstances, therefore, petitioner has left the Board, the ALJ and the Commissioner with no alternative but to conclude that she has not demonstrated her children's entitlement to attend school in the Ridgewood district pursuant to *N.J.S.A.* 18A:38-1 subsequent to June 30, 2001, and the Commissioner adopts the ALJ's decision so finding. However, the Commissioner also observes that, contrary to the suggestion of the ALJ (Initial Decision at 4), in order for a board to be entitled to collect tuition in a residency matter where the petitioner has failed to prevail on appeal to the Commissioner and a tuition calculation for the period of ineligible attendance exists on record, it is not necessary for the board to have actually filed a counterclaim with its Answer to the Petition of Appeal. *N.J.S.A.* 18A:38-1, *N.J.A.C.* 6A:3-8.1(d), *N.J.A.C.* 6A:28-2.10(b). That being so, and the hearing transcript (T 25-31) supporting the Board's representation on cross-exception as to how it indicated it would proceed with respect to the collection of tuition,[5] the Commissioner holds that the Board is entitled to collect tuition in this matter. Nonetheless, because the record clearly demonstrates that petitioner's

[4] In her exceptions, petitioner includes a December 2, 2002 letter from the Board's Director of Human Resources stating that "the school district has not given your work address to any unauthorized person," one page of a transcript from a March 7, 2003 Superior Court proceeding between petitioner and the family in question where an incomplete statement at the top of the page appears to suggest that the complainant's attorney (a family member himself and the person petitioner accuses of tampering with her vehicle) may have obtained petitioner's work address from the Board of Education, and a copy of a police report based on petitioner's allegation of vehicle tampering. However, even if these documents had been entered as evidence, which it appears that petitioner herself may have elected not to do (T 17), and even if the Commissioner were not now precluded from considering them pursuant to *N.J.A.C.* 1:1-18.4(c), they would not alter the Commissioner's determination herein.

[5] At hearing, the Board refers to petitioner filing "appeals," but its references to the matter ending "with this court" in order for tuition to be forgiven clarify its actual intent.

residency was not raised as an issue by the Board until just before the start of the 2002-03 school year (T 25), the Commissioner declines to order payment of tuition for both 2001-02 and 2002-03, and instead directs that petitioner remit to the Board a total of $20,121 in payment for the 2002-03 school year ($10,465 + $10,456 less petitioner's $800 payment; see note 1 above). *N.J.A.C.* 6A:28-2.10(c)

Accordingly, the Initial Decision of the Office of Administrative Law, as modified above with respect to payment of tuition, is adopted as the final decision in this matter. A.K. and J.K. are found ineligible for a free public education in the Ridgewood School District absent a subsequent demonstration by Z.A. that they are, in fact, domiciled there,[6] and Z.A. is directed to remit to the Board $20,121 for the students' attendance during the 2002-03 school year.

IT IS SO ORDERED.[7]

COMMISSIONER OF EDUCATION

Date of Decision: 7|23|03

Date of Mailing: 7|24|03

[6] Petitioner is reminded of her obligation under the compulsory education law to ensure that her children attend a public or private school, or receive equivalent instruction elsewhere. *N.J.S.A.* 18A:38-25 *et seq.*

Additionally, the Board is reminded that, should petitioner subsequently provide information establishing a domicile in the district, address information is a pupil record that may only be accessed in accordance with *N.J.A.C.* 6:3-6.1 *et seq.* and other applicable law, including *N.J.S.A.* 47:1A-1 *et seq.* The Commissioner here concurs with the Board and the ALJ that *N.J.S.A.* 47:4-1 *et seq.*, cited by petitioner in support of her allegation that the Board improperly revealed her office address, has no applicability in this matter.

[7] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

361-03

361-03

BUSINESS AUTOMATION TECHNOLOGIES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MONTGOMERY, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner alleged that its bid to provide internet services was improperly rejected by the Board. The Board contended it revised the specifications and rebid the project.

The ALJ found that petitioner, who offered "brand name equivalent" services, had demonstrated that the Board's actions in rejecting all initial bids and rebidding the contract with even more restrictive specifications were arbitrary, capricious and improper. The ALJ determined that the requirement that potential bidders be Tier 1 or national ISPs discouraged open competitive bidding since the qualification could be met by only one bidder, Sprint. The ALJ found that petitioner should have been awarded the contract. Thus, the ALJ ordered that the contract to provide T1 connections for uninterrupted access to the Internet be awarded to petitioner.

The Commissioner concurred with the ALJ that petitioner, whose services were equivalent to a Tier 1 ISP and whose bid was the lowest opened on December 20, 2002, should have been awarded the contract. The Commissioner emphasized that the second set of specifications did not contain substantial changes and that the decision to reject the three initial bids and rebid the contract was arbitrary and capricious.

July 24, 2003

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 832-03

AGENCY DKT. NO. 83-3/03

BUSINESS AUTOMATION TECHNOLOGIES,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF MONTGOMERY, SOMERSET COUNTY

Respondent.

Bernard M. Reilly, Esq., for petitioner (Dowd & Reilly, attorneys)

James F. Schwerin, Esq., for respondent (Parker, McKay & Criscuolo, P.A., attorneys)

Record Closed: May 21, 2003 Decided: June 18, 2003

BEFORE **ISRAEL D. DUBIN**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter concerns allegations made by Business Automation Technologies (BAT) that its bid to provide Internet services to the Board of Education of the Township of Montgomery (Board) was improperly rejected. BAT's Petition for Emergent Relief was filed with the

Commissioner of Education on March 12, 2003, transmitted to the Office of Administrative Law on March 13, 2003, and scheduled for oral argument on March 14, 2003.

Following oral argument, the parties agreed to convert the Petition for Emergent Relief to a request for hearing as a contested case. The parties further agreed that the Board would be precluded from awarding a contract to any of the providers responding to the second request for bids until such time as the court decided the matter on cross-motions for summary decision or, in the alternative, issued a decision on the merits after conducting a hearing, which was scheduled to be held on March 25, 2003. This hearing date was adjourned due to conflicts on the part of counsel and rescheduled for May 1, 2003, in order to afford this Administrative Law Judge sufficient time to decide the cross-motions for summary decision. The parties' respective motions were denied by Order dated April 3, 2003, and the hearing was conducted on May 1, 2003.

FACTUAL DISCUSSION

In or about November 2002, the Board sought bids for a contract to provide T1 connections for uninterrupted access to the Internet. E-rate application #745750000437332 called for the Internet Service Provider (ISP) to be a Tier 1 or Tier 1A provider. The ISP was to provide a single T1 connection for 2003-2004 and add a second connection for 2004-2005. Among other requirements, the ISP had to guarantee less than three percent downtime per month. In the event service was down for a period of twenty-four hours or more, the monthly bill was to be prorated.

Gail Palumbo, the District's Director of Technology, testified that she conducted preparatory research into Internet access and Internet Service Providers (ISPs) before the District requested sealed bids for the contract. For the most part, this research consisted of reading articles in technical journals or magazines and having conversations with vendors. The primary article upon which she relied was an abstract from *Getting from Here to There*, IDG Books (1998), that provided an overview of dial-up lines, ISDN, using packet-switched networks within a WAN, and designing a network with leased lines. It was this abstract, which she downloaded from www.windowsitlibrary.com, that prompted Ms. Palumbo to focus on Tier 1 ISPs.

The abstract (Exhibit R-1) described a Tier 1 ISP as follows:

> At the top of [the] Internet provider hierarchy, Tier 1 providers connect to each other. Tier 1 providers own the networks that make up what is called the Internet backbone. The backbone of the Internet provides functions similar to interstate highways. While very few people live directly off an interstate highway, many of us use the highway when traveling great distances. Similarly, very few Internet service providers are connected directly to the backbone, but most traffic must traverse it.
>
> It takes a lot of money to be a Tier 1 Internet provider. It takes so much money, in fact, that you'll probably recognize most of the names as some of the largest companies in the world. These are organizations such as Sprint, GTE Internetworking, and MCI. Not coincidentally, many of these companies also provide conventional long-distance and local phone services.
>
> Tier 1 providers connect to each other to exchange Internet data. They connect at several specific points throughout the United States called NAPs, or network access points. ISPs connect their routers together at a NAP, allowing data to be exchanged between providers.

In comparison, an ISP's designation as a Tier 2 or Tier 3 provider was explained in the following way:

> If Tier 1 ISPs are so big and wonderful, why don't most of us dial into them? Probably because they're not all that interested in the home dial-up market. Most people in the United States get their Internet access from smaller ISPs. These ISPs, in turn, get their Internet access from the Tier 1 ISPs.
>
> You can think of tier-2 ISPs as being the smaller roads off a highway. While not as large or as fast as the interstate highways, the smaller roads do more than take you to a particular town or city. They take you to your workplace, a store, or your home.
>
> . . . Unfortunately, the matter doesn't end with tier-2 ISPs. Tier-3 ISPs lease bandwidth from tier-2 ISPs. Tier-3 ISPs tend to be small, local, "mom and pop" type shops. Many people use tier-3 ISPs for dial-up access and for hosting personal home pages on the Web. Additionally, ISPs set up peering relationships with each other.

In other words, Tier 1 ISPs connect to each other; Tier 2 ISPs connect to Tier 1 ISPs; and Tier 3 ISPs connect to Tier 2 ISPs. Given this interconnectivity, if a Tier 1 ISP experiences a problem, the Tier 2 and Tier 3 ISPs down the line will also experience those problems.

Ms. Palumbo stated that as she understood it, the service provided by Tier 2 and Tier 3 ISPs "might" be as good as that provided by a Tier 1. However, because Tier 1 ISPs actually own the Internet backbone, their service will "most likely" be better than that received from the lower tier providers. By way of example, Ms. Palumbo explained that since Tier 1 providers own their backbones, they would, in the event of a problem, make the necessary repairs themselves. A Tier 2 ISP, on the other hand, would have to ask the Tier 1 ISP that owns the backbone, to make any repairs it might require. "It is only logical to expect that the Tier 1 will give priority to its own direct customers ahead of those going through a Tier 2."

Based upon her research, Ms. Palumbo determined that the specifications for the contract under bid should call for a Tier 1 provider. However, "[d]ue to a misunderstanding on my part, I approved the specifications allowing for a category I mistakenly thought existed, that being Tier 1A." None of the potential bidders expressed confusion over the Tier 1A category or objected to the Tier 1/Tier 1A restriction.

The bids were opened on or about December 20, 2002, and BAT was deemed the low bidder. Sprint, the district's existing ISP and the only Tier 1 provider to bid on the contract, submitted a bid $294.20 per month higher than BAT for the first year, and $588 per month higher than BAT for the second year. However, even though none of the bidders had expressed confusion or concern over the Tier 1A category, Ms. Palumbo concluded that the inclusion of a Tier 1A category of ISP was problematic. Therefore, on January 7, 2003, the bidders were asked to provide information regarding their status as a Tier 1 or Tier 1A service provider. As requested, BAT submitted a copy of its contract with Sprint as a supplement to the literature it had attached to its bid. This literature described the facilities and services BAT obtained through its contract with Sprint.

By memorandum dated January 8, 2003, Ms. Palumbo recommended that the Board "go with the lowest bidder that meets the requirement of being a Tier 1 or Tier 1A ISP. Sprint is the bidder that meets these requirements." However, with lingering concerns that there was "a serious question as to whether or not there was a Tier 1A category," she consulted counsel and was advised that the "fairest thing to do in light of the ambiguity created by inclusion of that dubious category was to reject all bids, correct the specifications, and re-bid the project." Respondent's Motion Brief, pg. 2.

The matter was then brought before the Board of Education and item 3.11 on the Board's January 28, 2003 Business Meeting agenda bore the following information:

> Resolution/Rejection of Bids – ISP and T1 Line – Pursuant to advice from Board Counsel, it is recommended the Board of Education reject all bids received; pursuant to N.J.S. 18A:18A-22:
>
> d. The Board of Education wants to substantially revise the specifications for the provision of services.

The Board voted to revise the specifications and re-bid the project.

Beyond the elimination of the Tier 1A category, the specifications set forth in the new request, E-rate application #469830000452893, stated that "[t]he ISP must be a Tier 1 **national** company, defined as one of the primary carriers of Internet traffic in the United States, or a **national** provider with qualified peering relationships with more than one Tier 1 Internet Service Providers (*sic*)." It also included the following modified provisions:

> If the successful bidder resells the services of another ISP, the bidder will be responsible to the school district for any network outage or other interruption of service problems. The ISP must guarantee less than 3% downtime per month. If the downtime exceeds 3% in any given month, Montgomery Township School District will receive one free month of service credit for that month. If service is down for a period of 24 hours or more, the bill will be prorated.

Ms. Palumbo also drafted the new specifications limiting the bidding to Tier 1 ISPs because she was convinced that a Tier 1 provider could best deliver "burstable" service that

would provide the district with consistent access to the Internet. As she understood it, a Tier 2 ISP purchases or leases only a certain amount of bandwidth from a Tier 1 provider. Therefore, the bandwidth it makes available to its clients may be "bottlenecked" by the bandwidth available from the Tier 1 entity. By obtaining service directly from a Tier 1 provider, the risk of a bottleneck is significantly reduced. To her, the most important considerations were capacity and customer service, and she believed a national Tier 1 company would be better able to provide them than a Tier 2 or Tier 3 provider.

Isaac Fajerman, petitioner's president, testified that BAT provides Internet access services and computer networking to schools, governments, and corporate entities in New Jersey, New York, Pennsylvania and Delaware. The company counts among its clients fifteen school districts in this State, including some that are larger than Montgomery Township.

BAT services its clients in the Delaware Valley region under the terms of a multi-year contract with Sprint. Pursuant to this contract, BAT has access to and uses Sprint's facilities. In fact, BAT's "box" or hardware is actually located inside Sprint's facilities and controlled by that company. By virtue of this contract, BAT enjoys and in turn offers to its clients the same services provided by Sprint. These include built-in redundancies and the benefits of any peering relationships Sprint may have with other providers. In other words, BAT is the virtual equivalent of Sprint and provides the same 99.9% reliability of that company. Given its position in the hierarchy, if Sprint were to experience technical difficulties, BAT and the entire Northeast region of the United States would crash along with it. By the same token, once Sprint made the necessary repairs, BAT and the entire Northeast would join it back on line.

According to Mr. Fajerman, Tier 1 status is neither defined nor conferred upon providers by any recognized federal agency or industry association. Rather, the term is generally understood to apply or refer to a company that owns, or has access to, a large network backbone crossing many states. Most Tier 1 providers do not own all of the segments of their national or international backbones. Some of their segments are leased from or jointly owned with other large providers. Such is the case with Sprint.

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In his opinion, instead of focusing on labels, a purchaser of Internet services should look for an ISP matching its business model. For example, companies with offices or clients in multiple states would be well advised to choose a larger company, such as WorldCom, that can provide direct access to sites throughout a vast geographical area. School districts, on the other hand, which do not have offices or branches in other states or otherwise require access outside their political boundaries, need not obtain the services they require from a national Tier 1 provider.

Although it did not meet the commonly understood definition of a Tier 1 ISP, BAT submitted a bid based upon the "Brand Names, Proprietary Goods or Services, Etc." section of the Notice to Bidders. This section reads as follows:

> These specifications for the provision or performance of goods or services have been drafted in a manner to encourage free, open and competitive bidding. The specifications are written to serve as a guide to the bidder as to what the Board of Education wants and in no way intended to exclude bidders.
>
> Whenever a "brand name" is stated in all cases "brand name or equivalent" is implied except that if the goods or services to be provided or performed are proprietary, such goods or services may be purchased stipulating the proprietary goods or services in the bid specification when the special need for such copyrighted proprietary goods or services is directly related to the performance, completion or undertaking of the purpose for which the contract is to be awarded (N.J.S. 18A:18A-15).

Mr. Fajerman added that a close reading of the specifications disclosed that providers other than Tier 1 ISPs could meet them. In this regard, he pointed out that Verizon, which does not qualify as a Tier 1 ISP, currently holds contracts with 75% of the school districts in the State, including some that are larger and have greater needs than Montgomery. Moreover, the State itself obtains its Internet services from FastNet, a regional ISP that would not qualify as a Tier 1 provider.

Following publication of the new specifications, BAT, Sprint and Verizon, as well as Intac, Pan United and Agil Axis submitted bids. When the bids were opened on March 18, 2003, Intac came in with the low bid of $28,368 per year. BAT was the second lowest bidder with a bid of $28,800, an amount unchanged from its original bid. Verizon placed third with a bid of

$31,584 and Sprint followed with a bid of $34,692. According to Mr. Fajerman, Intac had an unfair advantage since it was present but late for the first round of bids and therefore had knowledge of BAT's initial proposal, enabling it to come in with a lower bid. He also stated that Intac is not a national Tier 1 provider and does not even resell the services of a Tier 1 ISP. In fact, to the best of his knowledge, Sprint was the only bidder that fit the definition of a Tier 1 ISP.

As per my Order of March 25, 2003, the Board has been enjoined from awarding a contract to the lowest responsible bidder pending the issuance of this Initial Decision.

DISCUSSION OF THE LAW

Pursuant to *N.J.S.A.* 18A:18A-4(a),

> Every contract for the provision or performance of any goods or services, the cost of which in the aggregate exceeds the bid threshold, shall be awarded only by resolution of the board of education to the lowest responsible bidder after public advertising for bids and bidding therefore, except as is provided otherwise in this chapter or specifically by other law.

In other words, the contract must be awarded to the bidder "whose response is most advantageous, price and other factors considered." *N.J.S.A.* 18A:18A-37. However, a Board may reject all of the bids received if it decides to substantially revise the specifications for the goods or services. *N.J.S.A.* 18A:18A-22.

Specifications must be drafted in such a way as to encourage free, open and competitive bidding. *N.J.S.A.* 18A:18A-15. Therefore, specifications may not, among other things,

> a. Require any standard, restriction, condition or limitation not directly related to the purpose, function or activity for which the contract is awarded; or
>
> . . .
>
> . . .
>
> d. Require, with regard to any contract, the furnishing of any "brand name," but may in all cases require "brand name or

> equivalent," except that if the goods or services to be provided or performed are proprietary, such goods or services may be purchased by stipulating the proprietary goods or services in the bid specification in any case in which the resolution authorizing the contract indicates, and the special need for such proprietary goods or services is directly related to the performance, completion or undertaking of the purpose for which the contract.
>
> . . .
>
> Any specification which knowingly excludes prospective bidders by reason of the impossibility of performance, bidding or qualification by any but one bidder, except as provided herein, shall be null and void and of no effect and shall be readvertised for receipt of new bids, and the original contract shall be set aside by the board of education. *Ibid.*

The initial request for bids, E-rate application #745750000437332, called for the ISP to be a Tier 1 or Tier 1A provider. Although not defined or conferred upon providers by any recognized federal agency or industry association, Tier 1 status is commonly understood to apply or refer to companies that own, or have access to, a large network backbone crossing many states. Sprint is one of a handful of national companies satisfying that informal definition. Based upon her conversations with various vendors, Ms. Palumbo knew or should have known that Sprint, a company with which the district had existing contracts and a working relationship, was the only bidder in the region that could satisfy that definition.

It would appear that the Board was so comfortable with and desirous of awarding the contract to Sprint that it ignored the spirit if not the letter of the "Brand Names, Proprietary Goods or Services, Etc." section of the Notice to Bidders. Included pursuant to *N.J.S.A.* 18A:18A-15d, this section was intended to encourage free, open and competitive bidding by allowing vendors to substitute goods or services equivalent to a stated brand name. In fact, the Notice to Bidders expressly stated that the specifications were meant to be a "guide to what the Board of Education wants and [is] in no way intended to exclude bidders." Although an informal designation lacking an official definition, one may consider the term "Tier 1" to be a brand name, at least in so far as it was used in the Notice. That being so, the bids submitted by BAT and Verizon, ISPs providing services equivalent to those offered by Tier 1 Sprint, should have been considered.

Ms. Palumbo stated she insisted upon a Tier 1 ISP because she believed that such a provider could best deliver the services the district required. Among other things, she was convinced a Tier 1 ISP could more easily provide burstable service, establish peering relationships with other ISPs and offer 24/7 tech support. Having decided that only a Tier 1 ISP would be acceptable, there was no need for her to examine BAT's architecture or infrastructure to see if it could provide the services required.

BAT is a "brand name equivalent" because it services its clients in the Delaware Valley region under the terms of a multi-year contract with Sprint. Pursuant to this contract, BAT has access to and uses Sprint's facilities. In fact, BAT's hardware is actually located inside Sprint's facilities and controlled by that company. By virtue of its contract, BAT enjoys and in turn offers to its clients the same services provided by Sprint. These include built-in redundancies and the benefits of any peering relationships Sprint may have with other providers. In other words, BAT is the virtual equivalent of Sprint and provides the same 99.9% reliability of that company. Had she fully considered the documentation BAT submitted with its bid and in response to her request for additional information, Ms. Palumbo would have seen that BAT offered an equivalent and less expensive alternative to a Tier 1 ISP.

Mr. Fajerman, who possesses Bachelor of Science and Master of Science degrees in Electrical Engineering and Computer Science from Columbia University and has twenty-eight years of experience working with computers and the Internet, testified that a careful reading of the specifications disclosed that providers other than Tier 1 ISPs could meet them. In this regard, he pointed out that Verizon, which does not qualify as a Tier 1 ISP, currently holds contracts with 75% of the school districts in the State, providing them with the very same services set forth in respondent's specifications. He also disclosed that the State of New Jersey, whose needs are substantially greater than those of respondent, obtains its Internet services from FastNet, which is a regional ISP and does not qualify as a Tier 1 provider.

It is possible that Ms. Palumbo did not fully examine BAT's architecture or infrastructure because she was, by her own admission, completely unfamiliar with the brand name equivalent section of the Notice to Bidders. As she put it, that section "was put together by the purchasing agent," and she had nothing to do with it. Rather, her "only responsibility was to put together the

specifications themselves" and, in so doing, she determined that only a Tier 1 ISP should be considered.

Once Ms. Palumbo learned that BAT was not a Tier 1 ISP, her consideration of that company ceased. Since she was the individual who was to make the ultimate recommendation to the Board on the awarding of the contract, her lack of familiarity with the brand name or equivalent provision of the Notice to Bidders, combined with her failure to adequately consider ISPs other than Tier 1 Sprint, rendered the entire bidding process suspect.

Yet, resolution of this matter is not dependent upon a determination that the term "Tier 1" is a brand name or otherwise falls within the "brand name or equivalent" section of the Act, *N.J.S.A.* 18A:18A-15d. Although *N.J.S.A.* 18A:18A-22 no longer expressly prohibits acceptance of a bid "which does not conform to the specifications therefore," the law remains clear that "where a party does not materially respond to the bid specifications he cannot be classified as a bidder at all, since the specifications are mandatory and jurisdictional." *George Harms Constr. Co., Inc. v. Borough of Lincoln Park*, 161 *N.J. Super.*367, 374 (Law Div. 1978). Therefore, it must be determined whether BAT's lack of Tier 1 status constituted a failure to materially respond to the specifications.

To be considered legally acceptable, a bid cannot materially deviate from the specifications set forth by the contracting entity. *Meadowbrook Carting Co., Inc. v. Borough of Island Heights*, 138 *N.J.* 307, 314 (1994). While material conditions contained in bidding specifications cannot be waived, minor or inconsequential discrepancies and technical omissions can be waived. *Cf. Terminal Const. Corp. v. Atlantic County Sewerage Auth.*, 67 *N.J.* 403, 411 (1975). Consequently, the courts of this State have developed the following two-prong test for determining if a deviation is material: (1) will waiver of the deviation deprive the purchaser of its assurance that the contract will be entered into, performed, and guaranteed according to the specified requirements, and (2) will such a waiver adversely affect the competitive bidding process by placing a bidder in a position of advantage over other bidders, or by otherwise undermining the necessary common standard of competition. *Meadowbrook Carting Co., Inc. v. Borough of Island Heights*, *supra*, 138 *N.J.* at 315; *Township of River Vale v. R.J. Longo Const. Co., Inc.*, 127 *N.J. Super.* 207, 216 (Law Div. 1974).

Included among the documents BAT submitted with its bid and in response to Ms. Palumbo's request for additional information were letters of recommendation from three district boards of education. The South Brunswick, Point Pleasant and Bernards Township Boards of Education gave BAT an excellent rating in all respects. Additionally, BAT pointed out that Verizon, which does not qualify as a Tier 1 ISP, currently holds contracts with 75% of the school districts in the State, providing them with the very same services set forth in respondent's specifications. He also disclosed that the State of New Jersey, whose needs are substantially greater than those of respondent, obtains its Internet services from FastNet, which is a regional ISP and therefore does not qualify as a Tier 1 provider. I therefore **FIND** that waiver of the Tier 1 requirement would not have deprived the Board of its assurance that the contract will be entered into, performed, and guaranteed according to the specified requirements.

Based upon her research and conversations with various vendors, Ms. Palumbo knew that Sprint, a company with which the district had existing contracts and a working relationship, was one of only a handful of companies in the country that qualified as a Tier 1 ISP. More than that, it was the only bidder in the region that could have satisfied the Tier 1 requirement. Realistically, there was no possibility of an open competition. Therefore, waiver of the Tier 1 requirement would not have adversely affected the competitive bidding process by placing one bidder in a position of advantage over other bidders, or by otherwise undermining the necessary common standard of competition. In fact, waiver would have "secure[d] competition and 'guard[ed] against favoritism, improvidence, extravagance and corruption,' in order to benefit the taxpayers and not the bidders," and I so **FIND.** *In re Honeywell Info. Sys., Inc.,* 145 *N.J. Super.* 187, 200-01 (App. Div. 1976), *certif. denied*, 73 *N.J.* 53 (1977), quoting *Township of Hillside v. Sternin*, 25 *N.J.* 317, 322 (1957).

Based upon the foregoing analysis of the two-prong test, I **FIND** that BAT's lack of Tier 1 status – to the extent there can be said to be such a status – did not constitute a material deviation from the specifications set forth by the Board. Therefore, I further **FIND** that BAT's bid was and should have been considered legally acceptable. *Meadowbrook Carting Co., Inc. v. Borough of Island Heights*, *supra*, 138 *N.J.* 307.

A school board certainly has the statutory right to reject all bids. *N.J.S.A.* 18A:18A-22. This right serves an important purpose in that it provides a "strong inducement" for bidders to submit as low a bid as possible. *Cardell, Inc. v. Township of Woodbridge*, 115 *N.J. Super.* 442, 450-51 (App. Div. 1971), *certif. denied,* 60 *N.J.* 236 (1972). Although a board's decision to reject all solicited bids and rebid a project is entitled to a presumption of correctness, *Durling Farms, Inc. v. Bd. of Educ. of the Tp. of Montville,* 1975 *S.L.D.* 733, 736, that discretionary privilege is not without limit. Among other things,

> Rebidding a contract is fraught with certain dangers. While it is true that in some instances rebidding will benefit the public through achieving a lower price, the converse result of a higher contract price is also a factor to be considered. This is because the low bidder who may have given his best possible price may drop out of the bidding or other bidders by reason of insight gained through revelation of the competition's bidding strategy may see the weaknesses in their own bids. One cannot presume that rebidding will *ipso facto* bring a lower price. There is also the potential in some instances for rebidding to be demanded until the "favorite son" candidate is awarded the contract.
>
> [*Marvec Constr. Corp. v. Township of Belleville*, 254 *N.J. Super.* 282, 291 (Law Div. 1992)]

In determining whether a public entity has exceeded its authority to reject all bids, courts must first determine whether the conduct was arbitrary and capricious. *Ibid.* Here, there was no reason to reject all of the bids because Sprint's bid fully complied with the Notice to Bidders and the Board's preference was to continue the existing relationship it had with that ISP. Moreover, Sprint was the only qualified bidder and, as such, should have been awarded the contract. In fact, the question did not appear to be if but rather when Sprint would be awarded the contract. Given Sprint's position as the only bidder in the region that could have complied with the Tier 1 requirement, rejection of the remaining bids was a foregone conclusion. Therefore, there would appear to be only two possible explanations for rejecting all of the bids and rebidding the contract. One is that the Board was hopeful that Sprint, by reason of insight gained through revelation of BAT's bidding strategy, would come back with a lower price. The other is that the Board was hopeful Sprint would come back with the lowest price, thereby preempting any complaints that the specifications had been tailored to guarantee an award of the contract to its "favorite son."

The second set of specifications only served to further support BAT's contention that the Board's rejection of the bids was arbitrary and capricious. Careful examination discloses that the only material differences between the first and second set of specifications were requirements that (1) "[t]he ISP must be a Tier 1 **national** company, defined as one of the primary carriers of Internet traffic in the United States, or a **national** provider with qualified peering relationships with more than one Tier 1 Internet Service Providers (*sic*)," and (2) if the successful bidder resells the services of another ISP, the bidder will be responsible to the school district for any network outage or other interruption of service problems.

Again, Sprint was the only potential bidder that could have satisfied this even more limiting set of specifications. Meanwhile, given its contractual relationship with Sprint, BAT stood in the shoes and was the virtual equivalent of that ISP. As such, it was a virtual national company qualified and able to meet all of the requirements or otherwise provide the services set forth in the specifications, and at a substantially lower price. Therefore, other than ensuring the selection of Sprint, hopefully at a better price, the additional restricting of the bidding to Tier 1 **national** companies simply would not provide any real benefit to the district. Yet, the bids were rejected. I therefore **FIND** that the Board's actions were arbitrary and capricious.

On its face, the record supports a conclusion that the specifications were designed to discourage open competitive bidding. Certainly, the Board must have known, if not intended, that the requirement that the potential bidders be Tier 1 or national ISPs could only have resulted in the exclusion of prospective bidders by reason of the impossibility of performance, bidding or qualification by any but one bidder, Sprint, and I so **FIND**. *N.J.S.A.* 18A:18A-15.

DECISION AND ORDER

For the reasons set forth above, I **CONCLUDE** that the Board's actions in rejecting all three initial bids and rebidding the contract with even more restrictive specifications were arbitrary, capricious and improper. I further **FIND** and **CONCLUDE** that BAT should have been awarded the contract because its bid met all of the specifications set forth by the Board and was "most advantageous, price and other factors considered." *N.J.S.A.* 18A:18A-37.

Accordingly, it is **ORDERED** that the Board's actions in rejecting all three initial bids and rebidding the contract be and are hereby **REVERSED**. It is further **ORDERED** that the contract to provide T1 connections for uninterrupted access to the Internet be and is hereby **AWARDED** to Business Automation Technologies.

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

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

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

6/18/03
DATE

ISRAEL D. DUBIN, ALJ

Receipt Acknowledged:

6/24/03
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JUN 27 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

IDD/lam

APPENDIX

WITNESSES

For Petitioner:

Isaac Fajerman

For Respondent:

Gail Palumbo

EXHIBITS

For Petitioner:

P-1 Packet of Documents (49 pages) submitted with initial Petition for Emergent Relief

For Respondent:

R-1 Abstract, *Getting from Here to There*

BUSINESS AUTOMATION TECHNOLOGIES, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MONTGOMERY, SOMERSET COUNTY, RESPONDENT.	:	DECISION

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

In its exceptions, the Board initially charges that the ALJ disregarded its argument that because petitioner failed to object to the Tier 1 condition *before* the bids were opened in December 2002, it waived any right to contest this specification thereafter. (Board's Exceptions at 4) The law in this regard is clear, the Board asserts, "[i]n order to challenge a specification, a bidder must bring that challenge before the bid opening." (*Id.* at 5) Petitioner, however, concedes that he did not do so.

Additionally, the Board underscores that it may decide the level of service it desires, which is not tantamount to calling for a brand name. (*Id.* at 6) Specifically, the Board affirms that it was permitted to ask for Tier 1 providers, as long as this requirement was not

[1] In addition to its exceptions, the Board filed, within 13 days of the date of the ALJ's Initial Decision, correspondence that offered new evidence. However, pursuant to *N.J.A.C.* 1:1-18.4(c), "Evidence not presented at the hearing shall not be submitted as part of an exception, nor shall it be incorporated or referred to within exceptions." Such information, therefore, cannot be considered by the Commissioner.

intended to preclude disfavored bidders. *Citing Michael T. Gavan, Inc. v. Board of Education of the Township of Lakewood*, 94 *N.J.A.R.* 2d (EDU) 307, the Board asserts:

> If one board may insist on qualification statements going beyond what the State of New Jersey requires, certainly this Board can decide it wants the peace of mind of dealing with a Tier 1 provider. This is especially true where the technical literature relied upon by Ms. Palumbo indicated that while service from less than a Tier 1 "might" be as good as that from a Tier 1, there is at least some room for doubt. The Montgomery Board was not arbitrary and capricious in trying to eliminate that doubt, in addition to being more confident of prompt repair service. (*Id.* at 7)

The Board further claims that the ALJ improperly incorporates into his decision a discussion on non-material deviations from specifications. The Board avers that the cases discussing such deviations "all arose in the context of a public entity being challenged for its own decision to waive a requirement. Not one of them," the Board points out, "even posits a duty on a public entity to actively take the initiative to seek if it can rescue a low bidder from non-material compliance by reaching out to declare a condition non-material, a brand new duty this ALJ seeks to create out of whole cloth." (*Id.* at 7-8)

Lastly, the Board contends that the ALJ engaged in an improper analysis by expressing his disagreement with the Board's decision to seek a Tier 1 ISP, rather than just review the legality of the Board's actions. (*Id.* at 11) In this regard, the Board asserts that the Commissioner's sole concern should be whether Ms. Palumbo acted in good faith, and there is no proof on this record that she did not. (*Id.* at 13)

In reply, petitioner stresses that there is no question that it was, and is, fully qualified to bid on and perform the ISP contract at issue. Notwithstanding that the Internet Service Provider (ISP) was to be "a Tier 1 or Tier 1A service provider," petitioner argues that as modified and clarified by the general specifications, "this provision is a 'guide to what the Board

of Education wants and [is] in no way intended to exclude bidders.'" (Petitioner's Reply at 2) Petitioner continues:

> As established beyond any real dispute and as found by the ALJ, the petitioner [Business Automation Technologies, Inc.] BAT provides the functional equivalent of Tier 1 service. Its facility and connection is located in a Tier 1 facility, through a lease with Sprint.
>
> It was further established that actual Tier 1 providers *** are limited to a relative handful of large companies; the only one of which would be interested in and bid on this relatively small contract was Sprint because Montgomery Township is located in a territory serviced by its facility. (*Id.* at 3)

Petitioner maintains that the Board's stated reason for rejecting all bids and deciding to rebid the project is "ludicrous." (*Id.* at 4) "The second bid," petitioner asserts, "was simply an unconscionable and transparent effort to reach a 'favorite son' bidder, and avoid the bid laws. This device is clearly improper. ***" (*Id.*) Petitioner, therefore, urges that the ALJ's decision be adopted by the Commissioner.

Upon careful and independent review of the record in this matter, and mindful that the ALJ's credibility determinations are entitled to the Commissioner's deference, *N.J.S.A.* 52:14B-10(c), the Commissioner determines to adopt the Initial Decision.

Notwithstanding the Board's repeated efforts to portray this matter as a delayed attempt to challenge bid specifications, the Commissioner does not view the issues herein so narrowly. Rather, the Commissioner finds that although the Petition of Appeal indeed takes issue with the Board's Tier 1 condition, it is clear that petitioner was *primarily* challenging the Board's decision to reject the December 2002 bids and rebid the contract.[2]

---

[2] In so doing, petitioner therein alleges that the Board did not substantially revise the specifications for the second bid (Petition of Appeal at paragraphs 22, 25) and requests that:

> The rejection of the lowest responsible bidder BAT in the January 28, 2003 resolution [be] rescinded and the award of the Internet contract B06-36 opened

In this connection, the Commissioner concurs with the ALJ that, under these circumstances, petitioner has demonstrated that the Board's decision to reject all bids resulting from the initial round of bidding was arbitrary and capricious. In so finding, the Commissioner is not persuaded by the Board's claim that its rejection of the initial bids was allowable under *N.J.S.A.* 18A:18A-22(d), that provision of the public bidding statute which permits a Board to reject all bids when it "wants to substantially revise the specifications for the goods or services." (Board's Post-Hearing Brief at 4) Indeed, not only did the second set of specifications contain changes that would *not* be characterized as "substantial," but the Board's proffered purpose for the rebid, to eliminate the Tier 1A category so as to remove the "definite ambiguity" (Board's Exceptions at 11), rings hollow, where "[n]one of the potential bidders expressed confusion over the Tier 1A category or objected to the Tier 1/Tier 1A restriction." (Initial Decision at 4)

Having determined that the decision to reject all three initial bids and rebid the contract was arbitrary and capricious, the Commissioner concurs with the ALJ, for the reasons set forth in the Initial Decision, that petitioner, whose services were equivalent to a Tier 1 ISP (Initial Decision at 10) and whose bid was the lowest opened on December 20, 2002, should have been awarded the contract, because that bid "met all the specifications set forth by the

---

on December 20, 200[2] be made to the lowest responsible bidder BAT who has the financial ability, equipment and personnel to perform the contract.

WHEREFORE, the re-bid to be opened on March 18, 2003 be cancelled.

IN THE ALTERNATIVE, if the Commissioner decides not to award the December 20, 200[2] bid to BAT, then the March 18, 2003 bid should be voided due to improper and non-competitive restrictions and be re-written to encourage free, open and competitive bidding by permitting companies that are not National that provide Internet Access in accordance with the industry standards for similarly sized schools [sic] districts in New Jersey [to bid]. (Petition of Appeal at paragraphs 26-28)

Board and its response was 'most advantageous, price and other factors considered.' *N.J.S.A.* 18A:18A-37" (Initial Decision at 14)[3]

Accordingly, the Initial Decision of the ALJ is adopted as amplified above.

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: July 24, 2003

Date of Mailing: July 25, 2003

[3] Given the foregoing conclusion, to the extent a discussion on waiver is necessary to resolution of this matter, the Commissioner is not persuaded that the ALJ's discussion at pages 11 and 12 of the Initial Decision imposes a *duty* on a public entity to attempt to "rescue a low bidder from non-compliance by reaching out to declare a condition non-material," as argued by the Board. (Board's Exceptions at 7-8)

[4] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

362-03

MARK BOGDANY, :

PETITIONER, :

V. :

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

RESPONDENT. :

:

COMMISSIONER OF EDUCATION

DECISION

July 24, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 211-00
AGENCY DKT. NO. 377-12/99

MARK BOGDANY,

Petitioner,

v.

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

Respondent.

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

George F. Hendricks, Esq. for respondent (Hendricks and Hendricks, attorneys)

Record Closed: June 23, 2003 Decided: June 24, 2003

BEFORE **ROBERT S. MILLER**, ALJ:

This matter was transmitted to the Office of Administrative Law on January 19, 2000, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

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

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

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

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

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

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

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

June 24, 2003
DATE

ROBERT S. MILLER, ALJ

Receipt Acknowledged:

6-26-03
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 30 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

tmp

KLAUSNER & HUNTER, ESQS.
63 East High Street
P.O. Box 1012
Somerville, New Jersey 08876
Attorneys For Petitioner, Mark Bogdany

MARK BOGDANY, Petitioner, vs. NEW BRUNSWICK BOARD OF EDUCATION, MIDDLESEX COUNTY, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OAL DOCKET NO.: EDU 211-00 AGENCY DOCKET NO.: 377-12/99 STIPULATION OF SETTLEMENT

The matter being opened to the Court and the Commissioner of Education by Klausner and Hunter, Esqs., Stephen E. Klausner, of counsel, attorney for Petitioner, Mark Bogdany and Respondent, New Brunswick Board of Education, appearing by its attorneys, Hendricks and Hendricks, Esq., George Hendricks of counsel, in the presence of Ronald Larkin, Superintendent of Schools and the parties, after conferring with the Court, advised the Court that the matter had been amicably resolved on the following terms:

1. Respondent shall remit $6,000.00 to Petitioner for medical insurance that Petitioner paid out of his own pocket between September 1, 1999 and August 31, 2001.

2. Respondent shall remit $31,000.00 as back pay to Petitioner for school year 1999-2000less all lawful deductions including payments to Teachers Pension and Annuity Fund and shall request TPAF to credit Petitioner for that school year.

3. Respondent shall remit $34,682.00 as back pay to Petitioner for school year 2000-2001 less all lawful deductions including payments to Teachers Pension and Annuity Fund and shall request TPAF to credit Petitioner for that school year.

4. Respondent shall restore twenty-six (26) sick days for school years 1999-2000 and 2000-2001 to Plaintiff's accumulated sick leave bank.

4. This settlement is subject to Board approval. A vote will be taken by the New Brunswick Board of Education on January 21, 2003.

Stephen E. Klausner, Esq.
Attorney for Petitioner

Dated:

George Hendricks, Esq.
Attorney for Respondents

Dated:

SO ORDERED:

Honorable Robert S. Miller, A.L.J.

OAL DKT. NO. EDU 211-00
AGENCY DKT. NO. 377-12/99

MARK BOGDANY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: July 24, 2003

Date of Mailing: July 25, 2003

* It is noted that Term 4 on page two of the Settlement Agreement specifies that such agreement is conditioned upon the approval of the Board of Education. Because agency approval renders this settlement a final decision pursuant to *N.J.A.C.* 1:1-19.1(c)2, accord to its terms by all necessary parties must be accomplished prior to the Commissioner's approval. In that the record of this matter includes a resolution indicating that the Board approved the agreement at its meeting on February 25, 2003, the Commissioner finds that approval of the settlement may be granted.

36503

#365-03

D.S., on behalf of minor child, R.K.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RAMSEY, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

July 23, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 5464-03
Agency Dkt. No. 179-6/03

D.S. o/b/o minor child, R.K.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF RAMSEY, BERGEN COUNTY,

Respondent.

D.S., *pro se*

Robert M. Jacobs, Esq., for respondent

Record Closed: June 12, 2003 Decided: June 20, 2003

BEFORE **EDITH KLINGER**, ALJ:

STATEMENT OF THE CASE

This case was transmitted to the Office of Administrative Law ("OAL") on June 6, 2003 for a hearing pursuant to *N.J.S.A.* 52:14B-1 to 15 and *N.J.S.A.* 52:14F-1 to 13.

The parties entered into an agreement and have submitted a letter, which is attached and fully incorporated herein.

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

1. The parties have voluntarily agreed to a settlement of this matter.

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

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1(d) and should be approved. I approve the stipulation of settlement and therefore **ORDER** that the parties comply with the agreement.

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

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

June 20, 2003
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

June 25, 2003
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JUN 26 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

cb

WINNE, BANTA,
HETHERINGTON &
BASRALIAN, P.C. COUNSELLORS AT LAW

ESTABLISHED 1922

COURT PLAZA NORTH
25 MAIN STREET
P.O. BOX 647
HACKENSACK, NEW JERSEY 07602
(201) 487-3800
FACSIMILE (201) 487-8529
(201) 525-9460

www.winnebantalaw.com

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NEW YORK OFFICE
10 EAST 40TH STREET, SUITE 1308
NEW YORK, NEW YORK 10016
(212) 644-1710

ROBERT A. HETHERINGTON II
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THOMAS J. CANGIALOSI, JR.
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KENNETH K. LEHN •
SCOTT K. McCLAIN*
EDWARD P. D'ALESSIO
DOREEN E. WINN+
DOUGLAS J. JONES+
HO EL PARK+
ROMAN VACCARI*

PETER G. BANTA+
ARTHUR J. SIMPSON, JR.+▲
FRANK J. FRANZINO, JR.+
RENATA D. LOWENBRAUN+
ELIZABETH EILENDER+*
STEPHEN A. HERMAN
COUNSEL TO THE FIRM

WALTER G. WINNE (1889-1972)
HORACE F. BANTA (1895-1966)
BRUCE F. BANTA (1932-1983)

•CERTIFIED BY THE SUPREME COURT OF NEW JERSEY AS A CIVIL TRIAL ATTORNEY
+MEMBER NEW YORK BAR ALSO
*MEMBER CONNECTICUT BAR ALSO
*MEMBER PENNSYLVANIA BAR ALSO
▲CPA (NJ)

VIA FACSIMILE

June 12, 2003

Honorable Edith Klinger
State of New Jersey
Office of Administrative Law
33 Washington Street
Newark, New Jersey 07102

rjacobs@winnebantalaw.com

Re: **D.S. v. Board of Education of Ramsey, Bergen County**
OAL Docket No. EDU5464-03N

Dear Judge Klinger:

This letter will serve to confirm my telephone discussion this morning with Your Honor's Chambers in connection with the above-captioned matter. I indicated that I represent the Ramsey Board of Education. I was advised yesterday by telephone that a hearing has been scheduled in this matter for next Tuesday, June 17, 2003 at 1:30 p.m. This morning, I was advised by the Superintendent of Schools that he spoke this morning with a member of the Petitioner's family by phone (the Petitioner is apparently away) and advised her that the Ramsey Board of Education has approved the student's participation in the 2003 Ramsey High School Graduation Ceremony. In this regard, I am enclosing a copy of the Superintendent's letter to the Petitioner confirming this decision. Based upon the foregoing, it would appear that there will not be any need for this hearing next Tuesday. I respectfully request that Your Honor advise me as to how Your Honor wishes us to proceed at this time.

Respectfully submitted,

Robert M. Jacobs

/ft
cc: Denise Smith
S:\Ramsey Bd of Ed\Kluz\Judge Klinger 6-12-03.wpd

OAL DKT. NO. EDU 5464-03
AGENCY DKT. NO. 179-6/03

D.S., on behalf of minor child, R.K.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RAMSEY, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision transmitted to the Commissioner by the Office of Administrative Law have been reviewed. It is noted that this matter was characterized as a Settlement, pursuant to *N.J.A.C.* 1:1-19.1, by the Administrative Law Judge (ALJ) in her Initial Decision. The Commissioner determines that, inasmuch as he did not receive the ALJ's Initial Decision until June 25, 2003 and the Board has granted the relief sought in this matter, *i.e.*, it allowed D.S.'s participation in the 2003 Ramsey High School Graduation Ceremony* (see Letter of June 12, 2003 to the ALJ, appended to the Initial Decision) and given that no settlement terms were brought to the record, this matter is more appropriately dismissed as moot.

Accordingly, the Commissioner hereby dismisses this case.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: July 23,2003

Date of Mailing: July 25, 2003

* Said ceremony was scheduled for June 20, 2003.

#374-03

374-03

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

July 24, 2003

OAL DKT. NO. EDU 07610-00
AGENCY DKT. NO. 275-7/00

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

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: July 24, 2003

Date of Mailing: July 30, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 07610-00

AGENCY DKT. NO. 275-7/00

MARGARET MENTRASTI,

Petitioner,

v.

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

Respondent.

Alan S. Porwich, Esq., for petitioner
(Feintuch, Porwich and Feintuch, attorneys)

Charlotte Kitler, Esq., for respondent
(General Counsel, State-Operated School District of Jersey City)

Record Closed: June 16, 2003 Decided: June 24, 2003

BEFORE **THOMAS E. CLANCY**, ALAJ:

This matter was transmitted to the Office of Administrative Law (OAL) on August 24, 2000, for resolution as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F1 to -13.

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

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

Accordingly, I **CONCLUDE** that the attached Stipulation of Settlement meets the requirements of *N.J.A.C.* 1:1-19.1(d) and I hereby **APPROVE** same. In conjunction therewith, I **ORDER** that the parties comply with its contents and that these proceedings be (and are hereby) **TERMINATED**.

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

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

6/24/03
DATE

Thomas E. Clancy
THOMAS E. CLANCY, ALAJ

Receipt Acknowledged:

6-27-03
DATE

M. Kathleen Duncan
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 30 2003
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

da

FEINTUCH, PORWICH & FEINTUCH
721 Newark Avenue
(201) 656-8600
Attorneys for Petitioner

MARGARET MENTRASTI, Petitioner	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY
vs.	OAL DKT NO. EDU 07610-00 Agency Ref. No. 275-7/00
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, COUNTY OF HUDSON, Respondent	STIPULATION OF SETTLEMENT

THIS MATTER having been brought before the office of Administrative Law by Feintuch, Porwich & Feintuch, attorneys for petitioner, with Charlotte Kitler, Esq., appearing for respondent, and the parties having adjusted the differences between them as a result of the Division of Workers' Compensation's ruling on the length of petitioner's temporary disability in Margaret Mentrasti vs. Jersey City Board of Education, C.P. No. 2000-24317, and for good cause being shown,

IT IS on this 16th day of June, 2003,

STIPULATED AND AGREED that Respondent shall restore to Petitioner's sick leave bank all days which Respondent deducted for Petitioner's absences on from April 25, 2000 through June 6, 2000, inclusive.

WE HEREBY CONSENT TO THE FORM AND ENTRY OF THE ABOVE STIPULATION.

FEINTUCH, PORWICH & FEINTUCH
Attorneys for Petitioner

By: _____
ALAN S. PORWICH
DATED: 5/30/03

_____
CHARLOTTE KITLER, ESQ.
Attorney for Respondent
DATED: 1/27/03

#387-03

5871-03

GRETCHEN M. EVIGAN,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

July 24, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 330-02

AGENCY DKT. NO. 386-9/01

GRETCHEN M. EVIGAN,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,

Respondent.

Wayne J. Oppito, Esq., for petitioner

David Rubin, Jr., Esq., for respondent

Record Closed: May 5, 2003 Decided: June 26, 2003

BEFORE **ANA C. VISCOMI**, ALJ:

STATEMENT OF THE CASE

This matter was transmitted to the Office of Administrative Law for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to –13 on June 30, 2002. This matter was scheduled for a hearing on January 29, 2003. Because of ongoing settlement discussions, a joint request for an adjournment was granted and the matter was rescheduled for March 12, 2003, if

necessary. Prior to March 12, 2003, the parties indicated they had reached a settlement and I consented to another adjournment in order to allow the parties time to finalize their settlement discussion and reduce it to writing. The parties have agreed to a settlement and prepared a written agreement indicating the times thereof, which is attached and fully incorporated herein. (J-1)

I have reviewed the record and the terms of the settlement and I find:

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

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

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

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

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

June 26, 2003
DATE

Ana C Viscomi
ANA C. VISCOMI, ALJ

Receipt Acknowledged:

June 30, 2003
DATE

MK Duncan (JB)
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 1 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/jck

EXHIBITS

Jointly Submitted

J-1 Stipulation of Settlement

DAVID B. RUBIN, P.C.
Attorney At Law
44 Bridge Street
P. O. Box 4579
Metuchen, New Jersey 08840
(732) 767-0440
Attorney for Respondent

GRETCHEN M. EVIGAN,	:	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY
Petitioner,	:	Agency Docket No. 386-9/01
vs.	:	STIPULATION OF SETTLEMENT
BOARD OF EDUCATION, TOWNSHIP OF PISCTAWAY, MIDDLESEX COUNTY,	:	
Respondent.	:	

The within matter having been amicably resolved by the parties, the petition of appeal herein is withdrawn with prejudice, on the following terms:

1. Respondent will pay to petitioner a lump sum of $3,000, in full satisfaction of all claims which were or could have been asserted by petitioner in this matter.

2. The moneys referred to in the preceding paragraph shall deemed in the nature of a longevity payment, and not considered an increase in petitioner's annual salary for purposes of computing any future salary increases.

3. This settlement does not constitute an admission of wrongdoing on the part of respondent, and is entered into solely to avoid the expense and inconvenience of continued litigation.

WAYNE J. OPPITO, ESQ.
Attorney for Petitioner

DAVID B. RUBIN, ESQ.
Attorney for Respondent

Dated:

OAL DKT. NO. EDU 330-02
AGENCY DKT. NO. 386-9/01

GRETCHEN M. EVIGAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: July 24, 2003

Date of Mailing: August 1, 2003

#386-03

386-03

P.P.M., on behalf of minor child, S.S., :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

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

DECISION

RESPONDENT. :

SYNOPSIS

Petitioning uncle challenged the Board's residency determination that his niece, S.S., was not entitled to a free public education in the District.

The ALJ concluded that S.S. resided in the District with her uncle solely for the purpose of receiving a free public education there. Petitioner failed to demonstrate that S.S.'s parents, who relocated to Florida, were not capable of supporting or caring for her due to family or economic hardship. The mother provided medical coverage and the father still claimed S.S. as a dependent. Moreover, the parents have another child living with them and they indicated that S.S. would be moving in with them during the summer. The ALJ ordered the petition denied and ordered petitioner to reimburse the Board $7,611.87 in tuition for the period of S.S.'s ineligible attendance in the District.

Based on the record and the ALJ's credibility assessments (no transcript was provided), the Commissioner adopted the findings and determination in the Initial Decision as his own. The Commissioner directed that petitioner reimburse the Board the tuition owed.

July 31, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1839-03
AGENCY DKT. NO. 365-11/02

P.P.M. ON BEHALF OF THE MINOR CHILD, S.S.,
Petitioner,
v.
BOARD OF EDUCATION OF THE SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,
Respondent.

P.P.M., *pro se*, petitioner

Joanne L. Butler, Esq., for respondent (Schenck, Price Smith & King, attorneys)

Record closed: June 16, 2003 Decided: June 26, 2003

BEFORE **ROBERT J. GIORDANO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, P.P.M., appealed the determination by respondent, Board of Education of the South Orange-Maplewood District (District), that his minor niece, S.S., was not entitled to a free public education in the District. Petitioner claimed that the minor child was entitled to a free public education pursuant to *N.J.S.A.* 18A:38-1(b).

Respondent answered that the application had not shown family or economic hardship or otherwise satisfied the requirements of *N.J.S.A.* 18A:38-1b(1). On October 31, 2002, the District denied petitioner's application to have his niece, S.S., admitted to school in the District. On November 5, 2002, petitioner filed a petition pursuant to *N.J.S.A.* 18A:38-1 concerning this residency dispute. S.S. was permitted to attend school in the District during the pendency of the appeal, commencing November 11, 2002. On January 13, 2003, the District filed an answer denying the allegations in the petition, with a counterclaim for tuition. On March 4, 2003, the Department of Education transmitted the matter to the Office of Administrative Law for a hearing as a contested case. A hearing was held on May 20, 2003. The record was left opened in order for the District to submit documentation. On June 5, 2003, the District submitted the affidavit of tuition charges. Thereafter, no opposition was received from petitioner by June 17, 2003, and the record closed on that date.

FACTUAL DISCUSSION

Testimony

Tiffani Barnes

Tiffany Barnes testified for respondent. She has been employed by respondent as District Registrar since December 2002. Before that she was a confidential secretary responsible for the duties of the registrar since April 2002. She is responsible for the processing of documentation related to students seeking to attend school in the district. Among the documentation are birth certificates, custody papers and affidavits submitted in support of applications. She is responsible for the investigation of residency related to such applications. She also handles the matters of withdrawals of students from the district.

The witness reports to the Director of Planning and Assessment, Dr. Patricia Barker. She also is under the supervision of the Superintendent of Schools. Dr. Barker oversees the residency process. She also assists the witness with the processing of the affidavit applications.

The witness is familiar with the facts and circumstances of this matter. The registration form was submitted as part of the application packet (R-1). The witness reviewed this registration form. Several things on the registration stood out in the mind of the witness. She noticed the home address of the parents as Coral Springs, Florida. The mother is currently on leave from her job. The father is a self-employed musician. The petitioner is not identified as the legal guardian. As part of the application process, the affidavit of the parents was submitted (R-2). The present address of the parents is in Coral Springs, Florida. They have another child residing with them and attending school in Coral Springs Elementary school. The parents indicated that they relocated to Florida and would take a while to settle down. It is in the child's best interest to stay with her uncle. On page 4 of the affidavit, the mother circled "will" at number 7. At page 4, the mother indicated, "care for daughter". At page 5, the mother indicated she would provide medical insurance for the child. At page 6, the mother indicated that the child would move out of the district resident's home in the summer of 2003. At G-1, there was an indication that the father will continue to claim the child as a dependent. At page 7, I-4 indicates that the child will live with the parents during the summer. The witness referred to a handwritten statement from petitioner (R-4). This is an affidavit of resident that was submitted by petitioner. Exhibit R-1 reflects the parents' residence as Coral Springs, Florida. Exhibit R-3 indicates that the parents were relocating to Florida, but they stated in the affidavit that they are capable of caring for their daughter. At Exhibit R-4, petitioner indicated that the child would not be residing with him for the sole purpose of receiving a free education in the District. This is inconsistent with the parent's affidavit that stated at page 7 that the pupil will be residing with petitioner for the sole purpose of receiving a free education in the District. Petitioner stated at page 5 of his affidavit (P-4) that he would be financially responsible for the child. But it also indicates that the child will move out at the end of the school year, June 30, 2003. The affidavit further indicates that the child will reside with the parents during the summer. Petitioner submitted a letter dated October 28, 2002 along with the affidavit (R-5). This letter indicated to the witness that the parents had personal reasons for moving to Florida.

Based on the documents reviewed, the witness had sufficient information to make a determination regarding residency. She decided to deny the application. She stated that a hardship was not proven. As a result of the determination, a letter was sent to petitioner, dated October 31, 2002. The determination was that the application does not establish either a family or economic hardship. It does not establish that petitioner will be supporting the child *gratis*. It also does not establish that the pupil will be in attendance for longer than the school year.

The witness identified the resolution of the April 15, 2002 board of education meeting that reflected the cost of tuition for grades 9-12 to be $10,001 for the 2002-2003 school year.[1]

Ms. Barnes testified that there were further communications from the petitioner after the determination. He sent a letter to the Superintendent dated November 2, 2002. There was nothing in that letter that would cause her to change her determination. There was also a response from the Superintendent to the petitioner dated November 4, 2002. This reflected that the Superintendent received the November 2, 2002 letter. The witness received a copy of the letter. There was nothing else that was provided by the petitioner to establish the basis for the child attending school in the District.

On cross-examination, the witness explained her reason for stating there were contradictions in the documents submitted. Again, she testified about the inconsistencies she saw. The father stated he would take the child as a dependent. The petitioner stated that he would take the child as a dependent during the time the child resides with him. The parent affidavit indicated that the mother would provide medical insurance. It also indicated that the child would reside with the parents during the summer.

[1] After the hearing was concluded, the Court requested an affidavit from the respondent District regarding the number of school days the child was in attendance, and the *per diem* tuition rate. Respondent submitted the affidavit of Tiffani Barnes, which is marked as Exhibit R-13 in evidence, with no objection being received from petitioner.

P.P.M.

The witness testified that this was not a matter of convenience. It was in the child's welfare to reside with him. It was not an easy decision to make. He explained that he did not seek guardianship because it was a lengthy and costly process with lawyers. The child came to South Orange for an education. The parents moved to Florida because they felt it would be better financially. He also indicated that he could not declare the child as a dependent in 2002 but he will in 2003. The mother already paid for the child's insurance. The parents moved for a better life. They could not find jobs in New York. He will provide support *gratis* for the child. At the time he took the child in, he thought it was only for the school year. But now he testified that she would stay with him until she graduates. This is not a convenience. There was no work for the father in New York after September 11. He is a musician and he lost his band. There was little work in New York. The witness stated that the mother has a part-time job in Florida. She is still looking for work. They could not live in New York. It was too expensive.

FINDINGS OF FACT

Based on the testimonial and documentary evidence presented, and having had the opportunity to observe the demeanor of the witnesses and to assess their credibility, I make the following **FINDINGS** of **FACT**:

1. Petitioner resides in the City of South Orange, New Jersey.

2. He is the uncle of the minor child, S.S.

3. S.S. is the daughter of R.S. and R.S.

4. S.S. lived with her parents in Uniondale, New York, until about October 2002.

5. The parents moved, along with their other child, R.S., to Coral Springs, Florida. The child, R.S., attends Coral Springs Elementary School.

6. On or about October 28, 2002, the mother, R.S., submitted an affidavit of parent to the District in support of the request to register the child, S.S., as a student in the tenth grade at Columbia High School. S.S. has been attending school there since November 11, 2002.

7. The mother explained that the purpose for requesting that the child be registered in the District was to permit the parents to settle down in Florida after their move from New York.

8. The parents expect this arrangement to be temporary and expect S.S. will move in with them in Florida during the summer of 2003.

9. The father will declare S.S. as a dependent during the time she resides in the District with petitioner.

10. Petitioner also submitted an affidavit of resident dated October 28, 2002, in support of the request to register the child, S.S., in the District.

11. Petitioner acknowledged he is not the legal guardian of S.S.

12. He stated that the parents are capable of caring for S.S., but it would be in her best interest to finish the school year in a more stable environment.

13. He further stated that he would be the sole means of support for S.S.

14. The affidavit of petitioner indicated that S.S. would be moving out of his home at the end of the school year, June 30, 2003.

15. Tuition for Columbia High School for the 2002-2003 school year is $10,001.

16. The total number of school days in the District from November 11, 2002 to the end of the school year is 137 days.

LEGAL DISCUSSION

The State of New Jersey provides that "public schools shall be free to ... any child who is domiciled within the school district." *N.J.S.A.* 18A:38-1(a). The domicile of

a minor child follows that of his parents. *See V.R. on behalf of A.R. v. Bd. Of Ed. of Hamburg*, 2 *N.J.A.R.* 283, 286. The applicable statute, *N.J.S.A.* 18A:38-1(b)1, reads in pertinent part:

> Any person who is kept in the home of another person domiciled within the school district and is supported by such other person gratis as if he were such other person's own child, upon filing by such other person with the secretary of the board of education of the District, if so required by the board, a sworn statement that he is domiciled in the District and is supporting the child gratis and will assume all personal obligation for the child relative to school requirements and that he intends so to keep and support the child gratuitously for a longer time than merely through the school term, and a copy of his lease if a tenant, or a sworn statement by his landlord acknowledging his tenancy if residing as a tenant without a written lease, and upon filing by the child's parents or guardian with the secretary of the board of education a sworn statement that he is not capable of supporting or providing care for the child due to a family or economical hardship and that the child is not residing with the resident of the District solely for the purposes of receiving a free public education in the District. The statement shall be accompanied by documentation to support the validity of the sworn statement, information from or about which shall be supplied only to the board and only to the extent that it directly pertains to the support or nonsupport of the child. If in the judgment of the board of education the evidence does not support the validity of the claim by the resident, the board may deny admission to the child.

Therefore, the evidence must show that: (1) petitioner is domiciled within the District; (2) petitioner is supporting S.S. *gratis*; (3) S.S.'s parents are not capable of supporting or caring for her due to family or economic hardship; and (4) S.S. is not residing with petitioner solely for the purpose of receiving a free public education in the District. Petitioner has the burden of proof to demonstrate family or economic hardship.

Where no hardship exists, the law requires that the resident shall be assessed tuition prorated to the time of the student's ineligible attendance in the school district. The statute, *N.J.S.A.* 18A:38-1(b)1, further reads in pertinent part:

> Tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance and shall be collected in the manner in which orders of the commissioner are enforced.

Where the facts are contested, the trier of fact must weigh the credibility of the witnesses in order to make factual findings concerning the disputed facts. Credibility is

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

CONCLUSIONS

There is no real dispute that S.S. currently resides with her uncle in South Orange. There is equally little doubt that through the generosity of her uncle, S.S. is staying with him *gratis*. However, beyond that, petitioner has failed to establish that there is either an economic or family hardship. There was no testimony of the parents of the child, S.S., other than the affidavit of the mother. She acknowledged that they have another child living with them in Florida. There was no explanation as to why they would have a hardship as it related to S.S., but not the other child. The affidavit merely stated that it would be in the best interest of S.S. while they settled down in Florida. Her affidavit indicated that they expected S.S. to move in with them during the summer. I **CONCLUDE** that there is no family hardship preventing S.S. from residing with her parents.

Petitioner attempted to explain the inconsistencies between the affidavit of the mother and the requirements in establishing entitlement to free admission to the school District. Although he testified that this was not a matter of convenience, the evidence compels a different conclusion. Certainly, the uncle is attempting to assist the family, and his efforts are laudable. However, it is clear that such instances of convenience are not contemplated under the statute. The evidence clearly establishes that the parents placed S.S. with her uncle temporarily while they settle down in Florida. They have all intentions of having her return as soon as possible. There was no convincing

evidence to establish that the parents have financial difficulties that create a hardship warranting that S.S. lives with her uncle. The efforts at such at the hearing are belied by the facts as asserted in the affidavits. The mother still provides medical coverage for the child. The father still claims her as a dependent. I **CONCLUDE** that there is no financial hardship rendering the parents incapable of providing support for S.S.

Finally, while there may be other unarticulated reasons for the child to reside with her uncle, no evidence was adduced other than the purported hardship. I am left to **CONCLUDE** that S.S. resides in the District solely for the purpose of receiving a free public education there. Petitioner has failed to meet the four-prong test of eligibility in the instant matter.

ORDER

For all of the foregoing reasons, it is hereby **ORDERED** that the appeal of petitioner is and shall be **DENIED**. It is further **ORDERED** that petitioner reimburse respondent in accordance with tuition rates calculated pursuant to the formula established by the New Jersey Department of Education and as set forth in the testimony and affidavit of Tiffani Barnes, annexed hereto as Exhibit R-13 in evidence, as modified in accordance with *N.J.S.A.* 18A:38-1(b)1, in the amount of $7,611.87 (137 x 55.56)[2] through the end of the school year.

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

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

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[2] The affidavit of Tiffani Barnes utilized 183 days to calculate the *per diem* tuition. Inasmuch as the statute provides for a formula utilizing 180 days, the calculation of tuition here is based on the total number of days S.S. will attend school in the District divided by 180.

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

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

6/26/03
DATE

ROBERT J. GIORDANO, ALJ

Receipt Acknowledged:

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

6/26/03
DATE

M. Kathleen Duncan/CA

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JUL 2 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

md

APPENDIX

WITNESSES

Tiffani Barnes

P.P.M.

EXHIBITS

For Respondent:

R-1 Registration Form, October 28, 2002
R-2 Affidavit of Parent/Guardian, October 28, 2002
R-3 Letter, R.S. and R.S. to District, October 28, 2002
R-4 Affidavit of Resident, October 28, 2002
R-5 Letter, Petitioner to District, October 28, 2002
R-6 Letter, District to petitioner, October 31, 2002
R-7 District Resolution 1495, April 15, 2002
R-8 Letter, Petitioner to District, November 2, 2002
R-9 Letter, District to petitioner, November 4, 2002
R-10 Letter, Petitioner to District, November 5, 2002
R-11 Letter, Petitioner to Commissioner of Education, November 5, 2002
R-12 Letter, District to petitioner, November 5, 2002
R-13 Affidavit of Tiffani Barnes, June 2, 2003

OAL DKT. NO. EDU 1839-03
AGENCY DKT. NO. 365-11/02

P.P.M., on behalf of minor child, S.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

In his exceptions, petitioner challenges the factual findings of the Administrative Law Judge (ALJ), asserting that the ALJ ignored crucial evidence that demonstrated family or economic hardship. In this connection, petitioner avers that he did not have the resources to enable S.S.'s parents to fly to New Jersey from Florida to provide testimony, that his testimony was unfairly portrayed and that the Board's affidavits and forms relied upon by the ALJ were misleading and inadequate. The assessment of tuition, petitioner therefore argues, is "unconscionable." (Petitioner's Exceptions at 4)

The Board, in reply, objects to petitioner's attempts to insert facts into the record which contradict his testimony under oath. Contrary to petitioner's assertion, the Board argues that "[i]t is apparent from pages 8 and 9 of the Initial Decision that Judge Giordano considered Petitioner's testimony, but was not persuaded by it, believing it to be tailored to address the deficiencies in the application." (Board's Reply at 2) The Board also asserts that petitioner issues "spurious allegations" with respect to it residency forms and procedures, which, the Board maintains, are consistent with case law and State regulation. (*Id.* at 2, 3) Finally, the Board argues that petitioner cannot object to the

amount of tuition ordered by the ALJ, since, "[t]he annual tuition rate is set by the Board and approved by the Department of Education." (*Id.* at 3) Moreover, as the Board points out, the method for determining the amount of tuition which is owed in such matters is set by statute. The Board, therefore, urges that the Commissioner adopt the Initial Decision in its entirety.

Upon careful and independent review of the record in this matter, and based on the ALJ's credibility assessments, *N.J.S.A.* 52:14B-10(c), the Commissioner finds no cause to disturb the factual findings and legal conclusions of the ALJ. In so doing, the Commissioner underscores that challenges to the factual findings rendered by an ALJ require the objecting party to provide the Commissioner with relevant portions of the transcript of the hearing in order to permit him to assess the merits of those exceptions. *In re Morrison*, 216 *N.J. Super.* 143, 157-158 (App. Div. 1987) Here, however, no transcript was provided.

Accordingly, the Initial Decision of the ALJ is adopted for the reasons expressed therein, and the within Petition of Appeal is dismissed. The Commissioner directs that petitioner reimburse the Board for tuition in the amount of $7,611.87 for the attendance of S.S. in the District from November 11, 2002 until the end of the 2002-2003 school year, as set forth in the Initial Decision.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7/31/03

Date of Mailing: 7/31/03

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

389-05

398-03

S.G., on behalf of minor child, F.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning grandmother challenged the Board's residency determination that F.W. was not domiciled in the District.

In light of the credible presentation by petitioner that she was fully responsible for F.W. and that he lives with her in Ewing and stays with his mother for convenience when petitioner works at night, the ALJ found that F.W. lives with petitioner. S.G. has legal custody of F.W. and has claimed him as a dependent for income tax purposes since he was born. The ALJ ordered that F.W. be permitted to attend school in the District free of charge.

The Commissioner concurred with the ALJ that F.W. was domiciled in Ewing with his grandmother, S.G., and that he is entitled to attend school in the District free of charge.

August 1, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 737-03

AGENCY DKT. NO. 29-1/03

S.G. ON BEHALF OF MINOR CHILD, F.W.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,

Respondent.

S.G., petitioner, *pro se*

Jeffrey F. Belz, Esq., for the respondent

Record Closed: May 19, 2003 Decided: June 16, 2003

BEOFRE **SOLOMON A. METZGER**, ALJ:

This matter arises out of respondent's determination that F.W. is not domiciled in Ewing Township and is therefore not eligible to attend school within the district free of charge, under *N.J.S.A.* 18A:38-1. The matter was transferred to the Office of Administrative Law as a contested case pursuant to *N.J.S.A.* 52:14B-1 to –15. A hearing was conducted on May 19, 2003, after which the record closed.

Certain facts are undisputed. F.W. was born on June 4, 1991 to I.C., who was fourteen years old at the time. S.G. is I.C.'s mother and F.W.'s grandmother. S.G. resides on Parkway Avenue in Ewing Township a block from the Parkway School, where F.W. has attended from kindergarten forward. S.G. has claimed F.W. as a dependent on her income tax returns since he was born. When respondent raised questions about F.W.'s true home in 1999, S.G. obtained legal custody with I.C.'s consent (R-3).

The issue resurfaced in 2002. Surveillance undertaken in June and September of that year revealed a number of instances in which F.W. slept at an apartment leased to I.C. on Martin Luther King Boulevard in Trenton. He was brought to S.G.'s home early in the morning and then went to school at the Parkway School (R-7). Respondent once again entertained the question of whether F.W. was properly enrolled in the District. In her testimony before the Board, I.C. indicated that her children live with her in Trenton, but that for reasons of safety and convenience F.W. should continue at the Parkway School (R-5). The Board of Education then voted to exclude F.W. as a student entitled to a free education (R-8). Respondent now also makes a demand for tuition from June 14, 2002, the date on which it began surveillance, through the hearing date and beyond at a per day cost of $48.72.

S.G. testified that she works nights and that her husband who has two jobs also works many nights. For this reason, F.W. often sleeps over at I.C.'s apartment in Trenton. However, she has retained full responsibility for F.W. from birth. S.G. testified that her daughter I.C., has had drug and instability problems since she was a teenager and is not capable of properly caring for F.W. I.C. has a second child, W.R., who also lived with her, but is cared for now by his other grandmother, who resides in Trenton. S.G. testified that F.W. is an A student because of the stable environment that she and her husband provide. S.G. testified that she was ill in November 2000, when the Board convened on this question, and I.C. attended without consulting her. I.C., was simply cowed by the process and made inaccurate statements. This is the substance of the record.

The burden of persuasion in this matter rests with S.G. and she must show that her Parkway avenue address is F.W.'s one true home, *In re Jaffe*, 74 N.J. 86 (1977). This has been

done. S.G. has legal custody of F.W. and she has claimed him as a dependent for income tax purposes since he was born. These are significant indicia. S.G. testified that she works most nights and that her husband also often works at night. When I.C. resided with her she could baby sit, but F.W. is still too young to be left alone all night. For this reason he often sleeps over at his mother's apartment. She or her husband then pick him up in the morning, bring him home, and get him ready for school. While this arrangement raises a reasonable suspicion that the family dynamics have changed and that I.C. has now taken on a primary role as mother, it is not enough to overcome the otherwise credible presentation by S.G. to the effect that this is done as a convenience. There are no other signs in the record suggesting that the locus of F.W.'s activities, have shifted to Trenton. Although I.C. made some statements before the Board of Education that might be read as an admission, S.G. explained that I.C. did not fully understand the situation and neither party called I.C. as a witness.

Based on this record, I accept S.G.'s declaration that she is fully responsible for F.W. and that he lives with her. It is therefore **ORDERED** that F.W. be permitted to attend school in-district as a domiciliary.

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

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

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

6/16/03
DATE

SOLOMON A. METZGER, ALJ

Receipt Acknowledged:

June 17, 2003
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 25 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

/cad

WITNESSES

For Petitioner:

S.G.

For Respondent:

David Mikalauskas

Bob Smith

EXHIBITS

For Petitioner:

None

For Respondent:

R-1 Board of Education Resolution

R-2 Investigative Report

R-3 Superior Court, Chancery Division-Family Part, Consent Order for Custody

R-4 Residency Verification/Registration Form, dated September 11, 2000

R-5 Letter of Iris Carmichael

R-6 Letter of Iris Rogers, dated April 8, 1999

R-7 Investigative Report

R-8 Board of Education Resolution

OAL DKT. NO. EDU 737-03
AGENCY DKT. NO. 29-1/03

S.G., on behalf of minor child, F.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon careful and independent review of the record in this matter, the Commissioner determines to adopt the Initial Decision. In so determining, the Commissioner notes that S.G., F.W.'s grandmother, has legal custody of F.W.[1] and has claimed him as a dependent for income tax purposes since he was born.[2] Although the fact that F.W. sleeps at his mother's residence in Trenton while S.G. and her husband work nights, on its face, raises a reasonable question as to whether F.W. is, in fact, domiciled in Ewing,[3] S.G.'s explanation that this sleeping arrangement is for convenience is plausible in this particular instance, given the

[1]S.G. obtained legal custody of F.W. by Consent Order, Docket No. FD-11-604-00, Superior Court, Chancery Division, Family Part, on September 20, 1999.

[2] S.G. testified that F.W. has lived with her since his birth in 1991 to her daughter, I.C., who was fourteen years old at the time.

[3]This arrangement obviously means that F.W. spends a considerable amount of time with his mother in Trenton. In that regard, it is noted that I.C. indicated to the Board by way of a letter and testimony at a Board hearing that F.W. lives with her in Trenton. S.G. testified that I.C. had attended the Board meeting alone due to S.G.'s illness at the time and that I.C. didn't understand the situation.

history of F.W.'s living arrangements with his grandmother.[4] Moreover, as noted by the Administrative Law Judge, there are no other indications in the record that F.W.'s activities have shifted to Trenton.

The Commissioner, therefore, concurs that F.W. is domiciled in Ewing with his grandmother, S.G., and is entitled to attend school in the Ewing School District free of charge.

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

IT IS SO ORDERED.[5]

COMMISSIONER OF EDUCATION

Date of Decision: 8|01|03

Date of Mailing: 8|04|03

[4] S.G. testified that her daughter has had drug and instability problems since she was a teenager and is unable to care properly for F.W.

[5] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

399 03

#399-03

M.O., on behalf of minor child, K.J.O.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

July 24, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

DECISION
SETTLEMENT
OAL DKT. NO. EDU 9722-02
AGENCY DKT. NO. 273-9/02

M.O., on behalf of minor child K.J.O.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,

Respondent.

M.O., petitioner, *pro se*

Joseph A. DeFuria, Esq., for respondent
(Gaccione, Pomaco & Malanga, P.C., attorneys)

Record Closed: June 25, 2003 Decided: June 26, 2003

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

On or about September 9, 2002, petitioner, M.O., filed a petition of appeal with the Commissioner of Education, challenging respondent's residency determination in regard to her niece, K.J.O. On October 21, 2002, respondent filed its answer seeking dismissal of the petition and counterclaiming for tuition for the period of ineligible attendance. On November 27, 2002, the Department of Education, Bureau of Controversies and Disputes, transmitted this matter to the Office of Administrative Law

as a contested case for hearing pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to -13.

The matter was assigned to the undersigned judge on December 20, 2002, and a telephone prehearing conference scheduled for January 27, 2003. On that date, a discussion was held regarding legal representation for M.O., and a telephone conference was scheduled for March 4, 2003. During settlement discussions on March 4 and 5, 2003 it appeared that a probable settlement had been reached. Additional discussions were held in an effort to fully resolve this matter. As a result of settlement conferences held between the parties, a settlement was reached, and a hearing was not held.

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

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

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

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

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

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

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

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

June 26, 2003
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

7-1-03
DATE

M. Kathleen Duncan /CJ
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 2 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

al

GACCIONE, POMACO & MALANGA
A Professional Corporation
524 Union Avenue
P.O. Box 96
Belleville, New Jersey 07109
(973) 759-2807
Attorneys for Respondent

M.O., on behalf of minor child, K.J.O., Petitioners, v. BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY, Respondent.	STATE OF NEW JERSEY DEPARTMENT OF EDUCATION COMMISSIONER OF EDUCATION OAL DOCKET NO. EDUOS 9722-02 AGENCY REFERENCE NO. 273-9/02 **STIPULATION OF SETTLEMENT**

The above-referenced matter having been amicably resolved between the parties, it is hereby stipulated and agreed as follows:

1. Petitioner, M.O., on behalf of K.J.O., agrees to a dismissal with prejudice of the petition filed in the above-referenced docket number against respondent, Board of Education of the Township of Bloomfield.

2. Petitioner further agrees to pay to the Board of Education of the Township of Bloomfield the total amount of $1,600.00, in full satisfaction of respondent's counterclaim for back tuition.

3. Respondent agrees to dismissal with prejudice of the counterclaim upon receipt and satisfaction of the $1,600.00 payment.

4. The parties further agree that this agreement shall constitute the entire agreement between the parties, and completely resolves and disposes of any and all claims, rights or causes of action that were or could have been asserted in the above-referenced matter.

MARGARITA ORTIZ, Pro Se
Attorney for Petitioner

By: _____
MARGARITA ORTIZ

DATED: 6/19/03

GACCIONE, POMACO & MALANGA
Attorneys for Respondent

By: _____
JOSEPH A. DeFURIA

6/22/03

OAL DKT. NO. EDU 9722-02
AGENCY DKT. NO. 273-9/02

M.O., on behalf of minor child, K.J.O.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 7/24/03

Date of Mailing: 8/04/03

400-03

400-03

A.M.K., on behalf of minor children, S.K., L.K. AND A.K.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE CITY OF BURLINGTON, BURLINGTON COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning parent challenged the Board's residency determination that her children were not entitled to a free public education from the Board because she and her children did not reside in the District before they moved to a shelter in Mt. Laurel.

In light of petitioner's testimony, which the ALJ found credible, and the lack of satisfactory evidence from respondent (the Board did not include any extended observations), the ALJ determined that until petitioner and her children went into the shelter, they were domiciled in Burlington in petitioner's parents' home and, therefore, the Board was responsible for providing them a free public education. Petitioner's appeal was granted; the Board's claim for tuition was dismissed.

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

August 1, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 00734-03S
AGENCY DKT. NO. 18-1/03

A.M.K., ON BEHALF OF MINOR CHILDREN, S.K., L.K. AND A.K.,
Petitioners,
v.
BOARD OF EDUCATION OF THE CITY OF BURLINGTON,
Respondent.

A.M.K., petitioner, *pro se,* on behalf of S.K., L.K. & A.K.
Thomas J. Scattergood, Esq., for respondent

Record Closed: May 14, 2003 Decided: June 12, 2003

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

The Burlington City Board of Education ("Board") determined that the children of A.M.K. were not entitled to a free public education from the Board because the children and their mother did not reside in the City of Burlington. It therefore seeks tuition payments from Ms. K.[i] Ms. K. challenges that determination, pursuant to *N.J.S.A.* 18A:38-1. The Commissioner of Education transferred the matter as a contested case for hearing before the Office of Administrative Law on March 6, 2003. This judge conducted a hearing was by on April 30, 2003, and following the hearing, additional information regarding cost per pupil was submitted at

[i] Although the Board contends that the family has not been domiciled in Burlington City since well before December 17, 2002, at hearing its counsel conceded that the Board had delayed pursuit of this claim for tuition and had not notified Ms. K. of its claim until December 17, 2002. It therefore limits its claim for reimbursement to the period starting December 17, 2002.

the judge's direction. This information was received on May 14, 2003, on which date the record closed.

A.M.K. testified that she and her children are now residing in a shelter in Mt. Laurel. Except for the years 1992-95, she lived at the home of her parents located at an address on West 6th Street in Burlington City until February 3, 2003. The home in Burlington has five bedrooms and one bathroom. Her three children lived at that address all of their lives. Her brother, mother and father each resided there. It is the address to which her mail is addressed and from which she is licensed to drive, although her license is suspended. It is also the address from which she is registered to vote and which is included in her tax records. Her parents are now selling their home and there are problems between Ms. K. and her parents.

Ms. K. explained that her son was struck by a car in July 2001 and her parents' insurance rates went up as a result. Ms. K. did not have her own insurance. She then changed her address to the home of her "best girlfriend T.M.," located on 3rd Street in Beverly, New Jersey. However, she never lived at the Beverly address, although she did on occasion stay overnight during the summertime, but she did not do so "a lot." She also stayed over " a couple of times" during the school year. She never moved out of her parents home. She had to have a Burlington address in order to register as a provider for childcare.

Ms. K. denied that she has ever lived in the City of Camden. She never lived with her ex-fiancée, D.F. However, on occasion she did stay overnight at his residence. She has never lived with the father of her boy's, L.R., who resides in Burlington. Her daughter's father, M. D., is "somewhere in Delaware." She also has never lived with him, nor have the children, although he does have visitation rights. She has never served in the military.

On those occasions when Ms. K. and her children did stay overnight in either Camden or Beverly, the children either received a ride to school or rode a bus.

G.K., the mother of A.M.K., testified that her daughter and grandchildren lived at her home on West 6th Street until February. She did sometimes stay overnight at a "friend's" house,

but she did not know if Ms. K. ever lived with him. She claimed not to know about her daughters' personal life. Both she and her daughter bought groceries at the West 6th Street home.

William Joseph Blackmon, an attendance officer at the James Lawrence School in Burlington City, testified that A.K. and L.K. attend that school. In September 2001 the children were constantly late for school. He approached them and they told him that they were coming to school from Camden. This pattern of lateness went on for months. He then spoke to Thomas Howard, Jr., the school's principal, but "nothing happened." He spoke to Leonard G. Burr, the attendance officer at the Wilbur Watts Intermediate School where S.K. was a student. Mr. Blackmon presented attendance records for the 2002-2003 school year for A.K. and L.K., detailing their frequent tardiness from October 2002 through early March 2003. He and the school secretary attempted to call Ms. K. and Mr. F., who, along with Ms. K.'s mother, was listed on the school's Emergency Medical Information form as an emergency contact. However, no one answered the phone at either Mr. F.'s or at the phone number provided for grandmother K.

Blackmon related that in conversations with the two children in October/November 2002, they told him that they had moved to Beverly and had a key to a house there. A.K. was "happy to have a key."

In September 2002 Mr. Blackmon and Mr. Burr sat at the bus stop at Broad and High Streets in Burlington City and observed the children exit the public #419 bus, which travels to Beverly. The bus travels in a different direction than the West 6th Street address. There is a different bus that goes in the direction of West 6th. After the children got off the 419 bus, they walked to school. He noted that the bus does pass the Roger Wilco store at Route 130 and Salem Road.

Leonard G. Burr, who served for twenty-five years as a police officer in Burlington City before he became a school attendance officer, testified that the Roger Wilco store is one and one-half miles from the West 6th Street address. Mr. Blackmon contacted him concerning the attendance and tardiness of the K. children on September 17, 2001. He checked the S.K. emergency records and determined that that child was from the same family as were L.K. and

A.K. S.K.'s records also indicated a significant incidence of lateness. He signs the children in to school if they are late and one day when S.K. arrived late he said, "again, why can't you get to school on time." She said that she had to ride the bus. He asked why that was and she related that she came from Camden, where "we live." He looked at the emergency record and saw that Mr. F. lived in Camden. As a result he contacted Ms. K. and asked that she produce "residency papers." He also contacted Principal Howard. Burr then received a "loud and belligerent" phone call from Mr. F., received by a secretary who asked that Burr take the call. He did so and F. continued to speak loudly, asking why Burr was harassing his stepchildren's mother. Burr advised F. that he had simply asked her for "residency papers" and invited F. to come into the school. To this day no such papers have been produced.

On October 15, 2001, Mrs. K., the children's grandmother, came to school and spoke with Mr. Burr. She asked him why he had told her daughter that she, Mrs. K., had said that her daughter was not living in Mrs. K.'s home. He denied that he had made any such statement. However, he did ask Mrs. K. if her daughter did live with her and the grandmother then replied that he would have to ask her daughter that question. When she said this she "had her head down."

Mr. Burr contacted the school nurse at the Watts school and learned that there was a note in the child's records that on February 3, the nurse had been unable to contact Ms. K. When she contacted Mrs. G. K., Mrs. K. provided her with a number for contacting her daughter. The number was Mr. F.'s. According to the note, Mr. F. denied that the children lived with him, but the note also records that the "child states that they live with D." The note also states "each time I have had to call, I start with a number listed as home number. It is grandmom's number. She always says mom is not there. I then try her work number. She has not usually arrived at work until after 12. I then call D.F.'s number and leave a message for mom. When I asked student for home #, she recites D.F.'s number. Student says she lives at F.'s house."

On October 22, 2001, Mr. Burr conducted surveillance on the West 6th Street home. He did so on many other days thereafter and maintained a log of his observations. It must be stressed that his "surveillance" did not include any lengthy stay in sight of the home, but instead involved observations made on each of the several days as he drove by the home at some time

approximately just before 7:00 a.m. or occasionally in the early evening either at 7:15 or 8:10 p.m. His notes recorded and his testimony reported that on each day at the time he made his observation he observed no car in sight at the house, and he testified that he was looking for the car that Ms. K. always was observed in when she would drop her children at school, a vehicle with the license plate number VE185E. Mr. Burr never was able to obtain a registration lookup for the vehicle, as the local police declined to conduct a lookup. One day at 7:00 a.m. he noted "no lights on." These observations were made on approximately 25 days from October 22, 2001 until November 27, 2001. The only time he did see this car at the house was on October 29 at 6:53 a.m. Mr. Burr never knocked on the door.

Mr. Burr went to the water company that supplied water to the home, which he described as a privately owned residence owned by Mr. H. and Mrs. G. K. He found that the water consumption from June to September 2001 was 17,000 gallons, which he calculated meant about 51,000 gallons over the course of a year, a figure he said did not seem appropriate if the children and their mother lived in the house because from prior court cases he was aware that the average consumption was 26,000 gallons per person per year. Thus if the house were occupied for the year by the parents, daughter and three children the consumption should have been about 156,000 gallons. However, it must be noted that the witness was never qualified as an expert regarding issues of water consumption.

Craig H. Wilkie, business administrator for the school district, testified that he met with Ms. K. in 2003 and requested that she provide certain documentation. She claimed that there was a temporary certificate of occupancy for the West 6th Street home and he told her that if she did not choose to appeal the Board's determination of non-residence she would have to produce the temporary certificate. He never received a tax bill or a phone bill or any other documentation, nor did the school principals to whom Ms. K. was directed to provide the documents.

Ms. K. testified that the car bearing the license plate identified by Mr. Burr was a borrowed vehicle owned by Mr. F., who had two cars at the time. She explained that in order to get to the Watts School from the West 6th Street address it was necessary to cross Route 130 North and South. The school district had advised Ms. K. that it was not going to provide

transportation for the children, who had to be at school at different times, and she was told by the Superintendent, Dr. Gola, that she had to get the children to school "the best way I could." She explained that it was quicker and easier to get the children to school on the #419 bus because the route went by S.K.'s school and she could then get off with the boys and no one would be late. The bus stop was "not that far away." It takes about nine minutes to walk to the stop from her parents' house. If she walked to S.K.'s school and then to James Lawrence School it takes about 25-30 minutes, as the children are young and her daughter is overweight. She denied that her children had volunteered anything, claiming that they had told her that they had been "interrogated" every day and that they never told anyone that they lived in Camden.

Ms. K. has no checking or savings account.

N.J.S.A. 18A:38-1(b)(2) states, in pertinent part:

> If the superintendent . . . of a school district finds that the parent or guardian of a child who is attending the schools of the district is not domiciled within the district and the child is not kept in the home of another person domiciled within the school district and supported by him gratis as if the child was the person's own child as provided for in paragraph (1) of this subsection, the superintendent or administrative principal may apply to the board of education for the removal of the child. The parent or guardian shall be entitled to a hearing before the board and if in the judgment of the board the parent or guardian is not domiciled within the district or the child is not kept in the home of another person domiciled within the school district and supported by him gratis as if the child was the person's own child as provided for in paragraph (1) of this subsection, the board may order the transfer or removal of the child from school. The parent or guardian may contest the board's decision before the commissioner within 21 days of the date of the decision and shall be entitled to an expedited hearing before the commissioner and shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in this subsection. The board of education shall, at the time of its decision, notify the parent or guardian in writing of his right to contest the decision within 21 days. No child shall be removed from school during the 21-day period in which the parent may contest the board's decision or during the pendency of the proceedings before the commissioner. If in the judgment of the commissioner the evidence does not support the claim of the parent or guardian, the commissioner shall assess the parent or guardian tuition for the student prorated to the time of the student's ineligible attendance in the schools of the district. Tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local

> district multiplied by the number of days of ineligible attendance and shall be collected in the manner in which orders of the commissioner are enforced. Nothing shall preclude a board from collecting tuition from the parent or guardian for a student's period of ineligible attendance in the schools of the district where the issue is not appealed to the commissioner. [emphasis added.]

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

In this matter, the burden of proving where the schoolchildren were domiciled rests with Ms. K. In seeking to meet her burden, she testified unequivocally that until her parents and she had a falling out and they prepared to sell their home, thereby forcing her to enter a shelter in another town, she and her three children were domiciled in her parents' home in Burlington. The Board concedes that if the children were actually domiciled in Burlington prior to their removal to the shelter the district is legally responsible to provide them with a free public education. However, if the parent and the children were not domiciled in Burlington, as Ms. K. insists, then tuition is due for the period from December 17, 2002, when the Board gave her notice of its claim.

Ms. K. testified that on some occasions she may have stayed overnight at her girlfriend's house in Beverly, but she denied that she ever lived at that house. Similarly, she denied that she had lived at the home of her then fiancée in Camden. In its attempt to undermine Ms. K.'s testimony and demonstrate her failure to meet her burden by a preponderance of the credible

evidence, the Board presented evidence that on occasion the children were seen getting off of a bus that ran from Camden; that they were often late for school; that they said that they lived in Camden; that the use of the particular bus route in question as a means of transporting children to the two schools involved made no sense if the children did reside on West 6th Street, and that a month long "drive-by" examination of the West 6th Street home did not reveal the presence of the car that Ms. K. was seen to use to drop her children off at school. The "drive-by" examination did not include any extended observations: indeed, the witness acknowledged that in the main he merely looked to see if the car was there at the time he drove by. No surveillance of either the Beverly or the Camden address occurred. The minor children, who purportedly made statements to school personnel as to where they lived, were not called as witnesses by either party. Neither the former fiancée nor the girlfriend were produced.

The fact that a person who lives in a particular place may on occasion spend time, even may sleep overnight, in a different place does not automatically mean that the person has abandoned his or her initial place of domicile for some new domicile. As the definitions quoted above indicate, one may have several residences, but can have only one domicile. Staying at a friend's house in Beverly or even staying occasionally at a fiancee's home, does not prove that one has an intention to stay at either of those places permanently, or that one has forsaken one's normal place of domicile in her parent's home for a floating existence, moving between one and another residence with no fixed place at which one intends to remain or to return. Here, Ms. K. has denied that she uprooted her family for a new, permanently intended place where she intended to remain. The Board's evidence that she and the children might have commuted on occasion by bus on a route that seems to make little sense (at least to the Board) may indicate that the children did sometimes come to school from Camden, but by itself that tells us little about their mother's domicile. The children certainly cannot be expected to understand the legal implications of the terms "residence," "domicile" or even as far as its legal ramifications, "live at." The "surveillance," such as it was, adds little to the analysis. Certainly, if the record included some evidence of the dates and times when the children were observed in Camden (or Beverly), when Ms. K. was there, where her belongings were kept, and such, the record might more readily assist the Board in overcoming Ms. K.'s assertions.

It is true that in presenting her case, Ms. K. testified to an explanation as to the reason for her children using the bus to go to school that on the face of it seems strained. Whether an explanation about walking a distance to a bus stop in a different direction from the schools in order for the children to take the bus "back" to get to those schools makes logical sense to most people may be debatable, but a course of conduct that is not logical to most is not necessarily a course of conduct that is not true. No one ever observed the K. home long enough to see who emerged there from and at what time, or perhaps who did not emerge.

The statute places the burden of proof on the parent by a preponderance of the credible evidence, not by clear and convincing evidence. Here, a parent of three children asserts that she, and they, were domiciled in her parent's home. Perhaps she did not stay there always, perhaps her mother, whose testimony was at times vague, was not happy with her daughter's lifestyle or embarrassed by the attention placed upon her home. In the end, while the evidence here is not entirely satisfactory and might well not pass the higher burden of proof that the statute could have, but did not, impose, I **FIND** Ms. K.'s testimony is on the whole sufficiently credible and that as of and after December 17, 2002, and until she went into the shelter, Ms. K. and her children were at least domiciled in Burlington. The Board was therefore responsible for providing them with a free public education. Its attempt to obtain tuition must therefore fail. The appeal is **GRANTED** and the Board's claim is **DISMISSED**.

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

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

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

June 17, 2003
DATE

JEFF S. MASIN, ACTING CHIEF ALJ

Receipt Acknowledged:

June 17, 2003
DATE

M. Kathleen Duncan (Ea)
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 25 2003

Jeff S. Masin
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

mjm

EXHIBIT LIST

FOR THE PETITIONERS:

None

FOR THE RESPONDENT:

R-1 Letter dated 9/20/02 from Thomas Howard, Jr., to A.K.

R-2 Letter notice of ineligibility dated 1/2/03 from Edward Gola, Jr., to E.K. with attachments

R-3 Student Detail Report for A.K. & L.K. dated 4/2/03

R-4 Printout dated 4/28/03 regarding H.K.

R-5 Package of information on S.K. & A.K.

OAL DKT. NO. EDU 00734-03S
AGENCY DKT. NO. 18-1/03

A.M.K., on behalf of minor children, S.K., L.K. AND A.K.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF BURLINGTON, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon careful and independent review of the record in this matter, and mindful that the Administrative Law Judge's (ALJ) credibility determinations are entitled to the Commissioner's deference, *N.J.S.A.* 52:14B-10(c),[1] the Commissioner determines to adopt the ALJ's conclusion that, notwithstanding petitioner's admission that on some occasions she and her children may have stayed overnight in Beverly and Camden, petitioner and her children were *domiciled* in Burlington City as of and after December 17, 2002, and until she and her children moved into the shelter at Mt. Laurel. It was and is, therefore, the Board's responsibility to

[1]Acknowledging that the evidence presented by petitioner in the instant matter was not entirely satisfactory, the ALJ's conclusion that petitioner and her children were domiciled in Burlington City as of and after December 17, 2002, turned on his credibility determination that petitioner's testimony was "on the whole sufficiently credible***." (Initial Decision at 9)

provide S.K., L.K. and A.K. with a free public education. *N.J.S.A.* 18A:38-1(f) and *N.J.S.A.* 18A:7B:12(c).

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

IT IS SO ORDERED. [2]

COMMISSIONER OF EDUCATION

Date of Decision: 8|01|03

Date of Mailing: 8|04|03

[2] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

J.B. AND D.B., ON BEHALF OF A.B., :

PETITIONERS, :

V. :

BOARD OF EDUCATION OF THE BOROUGH OF PINE HILL, CAMDEN COUNTY, :

RESPONDENT. :

COMMISSIONER OF EDUCATION

DECISION ON MOTION

August 5, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING
EMERGENT RELIEF
OAL DKT. NO. EDU 4399-03
AGENCY DKT. NO. /03

J.B. AND D.B. ON BEHALF OF
A.B.,

Petitioners,

v.

BOARD OF EDUCATION OF THE
BOROUGH OF PINE HILL, CAMDEN
COUNTY,

Respondent.

J.B. and D.B., petitioners, *pro se*

Anthony Padovani, Esq., for the respondent (Sahli & Padovani, attorneys)

BEFORE **SOLOMON A. METZGER**, ALJ:

This matter arises out of a petition filed with the Commissioner of Education, pursuant to *N.J.S.A.* 18A: 6-9, which includes an application for emergent relief. The matter was referred to the Office of Administrative Law as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to –15 and oral argument on the application for emergent relief was heard on July 16, 2003. The parties were given a brief opportunity to submit additional materials until July 23, 2003. A plenary hearing is scheduled for September 5, 2003.

The basic facts are undisputed. A.B. has completed his junior year at Overbrook High School and during the year applied for admission to the National Honor Society (NHS). His application was denied by the local chapter, which operates under the auspices of the high school. A faculty council appointed by the Principal established the procedures by which A.B. was considered.

Petitioners argue that the denial was arbitrary and that the matter is emergent because A.B. will not be able to attend a summer camp open to NHS members, and will be disadvantaged in the competition for scholarships and early admission to various colleges. Petitioners believe that the procedure used by the district is contrary to NHS rules for a few reasons. First, the entire faculty was asked to respond to a questionnaire regarding candidate qualifications and these responses were scored against a threshold that A.B. did not meet. Petitioners argue that NHS guidelines require an evaluation and decision by the five-member faculty council and that the questionnaire that goes to the faculty generally cannot substitute for that exercise of discretion. Second, information regarding the NHS process was not disseminated in advance during the school-year as required.

Respondent submitted a certification by Jane Windle, a teacher in the district who has been the advisor to the local NHS chapter for the past twenty-five years. Ms. Windle states that the faculty council voted to permit all students with a grade point average of 3.5, or higher to receive initial consideration. A questionnaire was then sent to the entire faculty regarding each such student and they were asked to provide ratings for the virtues promoted by the NHS - character, leadership, scholarship and service. These qualities were measured on a scale of one-to-four, based on personal knowledge of the student. The faculty council determined that a rating of 3.30 was necessary to reach the next level of evaluation and the grading system is rounded to 100^{th} of a decimal point. In the case of A.B., the weighted average of questionnaires returned was 3.276, which was rounded to 3.28. The faculty counsel then eliminated A.B. as a candidate from further review because he did not achieve this threshold score.

The school principal, Paul J. Harmelin, submitted a certification in which he acknowledged that NHS information was not adequately disseminated this past year. He

explained that respondent had been part of a regional district until last year and on becoming independent it substantially revised the student handbook. The NHS material was inadvertently omitted. Mr. Harmelin notes, however, that A.B. was not disadvantaged as he submitted an application timely and received full consideration. This is the substance of the record.

To establish entitlement to emergent relief, petitioners must show that the law is settled, that the facts are not in issue, that they are likely to prevail on the merits, and that on balance the benefits of granting relief outweigh the burdens of denying it, *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). This has not been done. Although petitioners make multiple arguments, at the core they think the NHS guideline requiring the faculty council to evaluate and vote on each candidate, was violated by the 3.30 hurdle in the application process. This is a general attack upon the procedure used by the faculty council and, if correct, may effect the results for many students. As such petitioners should be clearly right before emergent relief is granted, lest unnecessary tumult be created.

Petitioners have submitted materials from the NHS website indicating that although questionnaire's to the faculty are permitted, these should not be sole determinants and that ultimately, the faculty council must evaluate the merits of each candidate. These materials suggest that after the objective cutoff provided by GPA, the remaining task is evaluative and may not be avoided by an additional numerical cutoff. There are a few problems with this presentation thus far. Without the benefit of an affidavit from someone in authority at the NHS, it is hard to say whether this material represents current, or complete policy. Moreover, even if the District procedure deviates some from NHS policy, it is not clear whether this would be of moment to the NHS. It would be useful at a plenary hearing to have the NHS view.

Seen from the District's perspective, the 3.30 threshold established in advance by the faculty council is not appreciably different then the 3.5 GPA requirement, established as a first hurdle. Undoubtedly the high GPA requirement excluded many fine students, but that is the nature of the task and the NHS constitution gives local chapters discretion to establish procedure within certain broad guidelines. Without the specter of inconsistency with NHS policy, the procedure devised by respondent seems generally calculated to yield the most qualified candidates and would be well within its discretion. The only precedent I have found that is

factually close is not entirely useful. In *D.W. v. Pompton Lakes Board of Education*, (SLD 77:1240), the Commissioner approved a similar rating scale, but it appears that the faculty council there made the evaluation. Thus, it is not the use of a scale, but how it is used that is the rubbing point.

Petitioners are also not satisfied that the 3.30 standard and the rounding decision were arrived at fairly, nor do they know how the calculations were tabulated for their son specifically. They may seek this information in the course of preparing for the plenary hearing, but at this stage they have merely surmised that there was a problem.

Petitioners exposed a procedural flaw regarding the dissemination of information about the NHS. Mr. Harmelin explained, however, that this was an oversight and that A.B. was not disadvantaged by this omission; there is no evidence to the contrary.

Based on the foregoing, it is **ORDERED** that emergent relief be **DENIED**.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the Commissioner of the Department of Education does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

7/30/03
DATE

SOLOMON A. METZGER, ALJ

/cad

OAL DKT. NO. EDU 4399-03
AGENCY DKT. NO. 172-5/03

J.B. AND D.B., ON BEHALF OF A.B.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF PINE HILL, CAMDEN COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

The recommended Order of the Administrative Law Judge (ALJ), together with the audio tape of the emergent hearing conducted at the Office of Administrative Law (OAL) on July 16, 2003 have been reviewed.

Upon such review, the Commissioner concurs that petitioners have failed to satisfy the four-pronged standard set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982) necessary to warrant the extraordinary remedy of emergent relief. Accordingly, the recommended Order of the ALJ is adopted for the reasons expressed therein. This matter shall continue at the OAL with a plenary hearing scheduled for September 5, 2003.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: August 5, 2003

Date of Mailing: August 7, 2003

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*

434-03

434-03

IN THE MATTER OF THE TENURE :

HEARING OF BRENDA MAPP, : COMMISSIONER OF EDUCATION

SCHOOL DISTRICT OF THE CITY OF : DECISION

TRENTON, MERCER COUNTY.

:

SYNOPSIS

The Board certified tenure charges of unbecoming conduct against respondent teacher based on criminal offenses, teacher performance infractions, and failure to follow proper procedures related to tardiness and absences. Respondent's increment was withheld for the 1999-2000 school year.

The ALJ found that respondent's conduct adversely affected the morale or efficiency of the District, violated standard of good behavior and destroys public respect for teachers. She admitted allowing drug dealers to use her residence for storing, selling and cooking cocaine and she herself received money and cocaine, which she sold. This conduct which resulted in Charges 1 and 2 was so egregious in and of itself as to justify her removal. The ALJ concluded that in the best interest of the students in the District, respondent should be removed as a teacher.

The Commissioner concurred with the findings and conclusions of the ALJ. The Commissioner stressed that ultimate disposition of the criminal matters was irrelevant; rather, the focus of the inquiry in this matter was solely concerned with respondent's fitness to teach. The Commissioner ordered respondent dismissed from her tenured teaching position as of the date of this decision and referred the matter to the State Board of Examiners for action as that body deems appropriate.

August 5, 2003

Charge One: That respondent is guilty of unbecoming conduct based on allegations that on or about July 10, 2000, respondent committed the offenses of resisting arrest, eluding police, driving on the revoked/suspended list, and careless driving.

Charge Two: That respondent is guilty of unbecoming conduct based on allegations that on or about June 6, 2001, respondent committed the following eight offenses: (1) possession of a controlled dangerous substance; (2) possession with intent to distribute; (3) possession with intent to distribute in a school zone; (4) maintaining a narcotics nuisance; (5) possession of an assault weapon while committing a narcotics offense; (6) possession of an assault weapon with a defaced serial number; (7) possession of hollow-nosed bullets; and (8) possession of a large-capacity magazine; and that from April 2001 to June 2001, respondent allowed her residence to be used for the preparation and distribution of a controlled dangerous substance for personal and compensatory gain.

Charge Three: That respondent is guilty of unbecoming conduct based on allegations that on November 22, 1999, Hill School principal Nancy Puri reprimanded respondent for a number of infractions, including falling asleep in class and failing to submit a plan book in a timely manner; that on December 14, 1999, Ms. Puri again reprimanded respondent for sleeping in class while students were unsupervised; that on January 19, 2000, Ms. Puri received correspondence from a parent, Carlene Moore, requesting that her daughter be removed from respondent's classroom, the basis for the request being that respondent had called the child a "moron" on one occasion and on another referred to her as "stupid"; and that respondent was previously disciplined for similar conduct when on August 30, 1999, the Board withheld her increment for the 1999-2000 school year for sleeping in class during instructional time, as well as other reasons.

Charge Four: That respondent is guilty of unbecoming conduct based on allegations that on October 5, 1999, Ms. Puri reprimanded respondent for failing to follow proper call-out procedures – respondent had originally stated her intention to come in for half of the school day and then failed to call in until 1:15 p.m.; that on November 3, 1999, respondent failed to follow proper call-out procedures when taking a personal illness day; that respondent was reprimanded

by Ms. Puri on November 22, 1999, for, among other infractions, failure to notify the school of her absence in a timely manner, unauthorized late arrival after time required for one-half day, frequent absences and tardiness, and failure to meet with the principal to discuss monthly attendance notice; that on November 24, 1999, respondent failed to notify the school of her tardiness in a timely manner and respondent was docked for her 10:08 a.m. arrival (she is required to report to work at 8:20 a.m.); that on November 29, 1999, respondent failed to notify the school of her tardiness in a timely manner and respondent was docked for her 9:05 a.m. arrival; that on December 23, 1999, respondent failed to notify the school of her tardiness (10:55 a.m. arrival) in a timely manner; that on January 10, 2000, respondent failed to notify the school of her tardiness (1:10 p.m. arrival) in a timely manner; that on January 12, 2000, respondent failed to report to work after indicating to the principal that she would arrive at approximately 11:00 a.m.; and that respondent was previously disciplined for similar conduct when on August 30, 1999, the Board voted to withhold respondent's 1999-2000 increment for the following reasons, among others: absent 29 days, with respondent reporting her absence too late to procure a substitute on 22 of those days; tardy 70 days; refusing to sign in – 12 days; refusing to sign out – 25 days.

ISSUES TO BE RESOLVED

The issues to be resolved in this matter are:

1. Is respondent guilty of the charges by engaging in the conduct alleged by petitioner?

2. Is the conduct specified in the Statement of Tenure Charges and alleged by petitioner to have occurred on the part of respondent unprofessional and unbecoming a tenured teaching staff member under the laws of the State of New Jersey and the Rules of the State Board of Education?

3. If respondent is guilty of one or more of the charges, what is the appropriate remedy/penalty to be imposed?

FACTUAL DISCUSSION

Summary of Testimony

The following is not intended to be a verbatim recitation of the testimony. It is intended to summarize those facts that are not in dispute and to identify relevant portions of the testimony of the witnesses and the evidence presented in this matter.

Detective Robert Cowan testified for the school district. He has been employed as a detective by the Mercer County Prosecutor's Office for thirteen years, and is assigned to the Special Investigations Unit. Among his duties are investigations of mid-level and upper-level drug dealers in Mercer County.

Detective Cowan testified to his involvement with respondent. Sometime prior to June 2001, the Special Investigations Unit conducted an investigation involving the distribution of drugs from premises located at 31 Kirkbride Avenue, Trenton, New Jersey, which was respondent's place of residence. Based on the investigation, a search warrant was issued and executed for the premises, and more than one-half ounce of cocaine and an assault weapon with a defaced serial number were seized from the premises. Based on an affidavit of probable cause prepared by Detective Cowan (P-3) and based on complaints issued by Detective Cowan against respondent (P-1; P-2), respondent was arrested on June 7, 2001.

Detective Cowan testified that following her arrest on June 7, 2001, respondent was asked to provide a statement (P-5). According to Detective Cowan, respondent acknowledged that she understood her rights and voluntarily agreed to provide the statement. She provided answers to questions asked of her, initialed her responses, and signed the document. Detective Cowan also signed the statement at that time, and respondent then swore to the statement before an assistant prosecutor.

In her statement, respondent stated that all of the cocaine and assault firearms found in

her residence belonged to Jamar Tucker, and that she allowed Jamar Tucker to use her residence for the purpose of storing and selling his cocaine. She also stated that she personally observed Jamar Tucker "cook" powdered cocaine into crack cocaine in her residence approximately fifty times and that she saw him conduct a 90-gram cocaine sale in her residence. She also stated that she allowed Eric Lacey to utilize her residence for the purpose of selling drugs. In exchange for this, she would receive money and cocaine from Jamar Tucker and Eric Lacey. She also admitted that, in the past, she had sold cocaine that Jamar Tucker had given her. Respondent stated that if she did not cooperate, he "would hit her off," or kill her. She also stated that she had been subjected to violence, they had punched her in the face and threatened to kill her, and that they were out of control.

On cross-examination, Detective Cowan testified that he had spoken to an assistant prosecutor about the status of the criminal charges against respondent the day prior to his testimony in this matter. He learned that all of the charges that he had filed against respondent had been dismissed and that she had pled guilty to a downgraded disorderly persons offense. He was not aware of the exact offense she pled guilty to. Although he had never seen the document before, he acknowledged that an Order Dismissing the Complaint against respondent was entered on June 20, 2002 (R-1), on the basis that there was insufficient evidence upon which to predicate successful prosecution of the charges, and that respondent had pled guilty to and been sentenced on other charges, and that no useful purpose would be served by further prosecution. The original criminal charges had subjected respondent to the possibility of substantial jail time. He also acknowledged that it was not unusual to dismiss criminal charges, because they must be proven beyond a reasonable doubt.

Detective Cowan acknowledged that the targets of the original investigation were Lacey and Tucker, and he questioned respondent in order to pursue charges against them rather than against respondent. At the time, he felt that respondent could provide information helpful in prosecuting Lacey and Tucker. He acknowledged that the statement signed by respondent (P-5) probably did not reflect the entire conversation between them. He acknowledged that respondent stated that she had called the Trenton Police Department a number of times. He also acknowledged that he did not check out her self-serving statements. He denied ever suggesting

any answers to respondent.

On re-direct examination, Detective Cowan testified that he identified 31 Kirkbride Avenue, Trenton, New Jersey, as respondent's residence based on letters and other items found in that location showing that she lived there.

Nancy C. Puri also testified for petitioner. Ms. Puri has been the principal at the Patton J. Hill School on East State Street in Trenton, New Jersey, since August 1999. She has been an employee of the school district for thirty-two years and has served as a teacher, assistant principal, vice principal and principal. She testified to her educational background and certifications, including certificates in elementary education, reading specialist, principal, and supervisor.

Ms. Puri testified that prior to her coming to the Patton J. Hill School, Howard Colvin was the principal. Ms. Puri first met respondent one day prior to the beginning of the 1999-2000 school year. On that occasion, she observed an exchange between respondent and Mr. Colvin and respondent was quite unpleasant toward Mr. Colvin.

Ms. Puri indicated that although there may have been earlier incidents, she first gave respondent written notice of failure to follow proper procedures on October 5, 1999 (P-6). On October 4, 1999, respondent called in to say that she had a personal matter to take care of and that she would be in work for one-half day in the afternoon. Ms. Puri explained that for a teacher, working a half day in the afternoon requires that the teacher arrive at 11:30 a.m. Respondent did not show up at 11:30 a.m., and did not call until 1:15 p.m., when she advised that she would not be in for the entire day. Because petitioner had indicated that she would be in for a half day, Ms. Puri did not arrange for a substitute teacher. Often in a situation like this, the children are divided up among the other classrooms. As a result, the continuity of the instruction of the students is hindered. Ms. Puri does not recall what was done with respondent's class on October 4, 1999. Because respondent failed to follow proper call-in procedure, Ms. Puri prepared a memo to respondent. They then spoke informally and respondent said that she would try to follow the proper procedure from that point on.

Ms. Puri testified that on November 3, 1999, respondent neglected to call the school until 8:40 a.m. to advise that she was taking a personal illness day. All teachers are required to call by 8:00 a.m., prior to the opening of the school day, and the school district then attempts to hire a substitute teacher. Failure to comply with this procedure causes chaos and confusion. She recalls giving a memo to respondent documenting this incident (P-7), but cannot recall if they had a follow-up conversation.

Ms. Puri identified a memorandum that she gave to respondent on November 22, 1999 (P-8). This memorandum lists a number of serious concerns that she had as to respondent's performance. The memorandum was the result of a conference, and during the conference Ms. Puri indicated that she was concerned whether respondent had some personal problems. Ms.-Puri suggested that respondent contact the Family Guidance Service. She also advised respondent that this memorandum was a step in progressive discipline and that the next step would be to recommend the withholding of an increment.

Ms. Puri wrote another memorandum to respondent on November 24, 1999, because respondent was again tardy for school (P-9). Respondent is required to report at 8:20 a.m., but she reported at 10:08 a.m. on that date. Ms. Puri explained that if a teacher is tardy, she must arrange to have a certified staff member cover the class until the tardy teacher arrives, or the children must be divided among other classes. In either event, the continuity of instruction is interrupted. Ms. Puri explained that no matter how good a substitute teacher is, the substitute cannot fully replace the regular classroom teacher.

Ms. Puri testified that on November 29, 1999, respondent was again tardy, arriving at 9:05 a.m. (P-10). On December 23, 1999, respondent failed to show up for work and failed to notify the school district of her absence until 10:55 a.m. Based on this, Ms. Puri notified respondent that it would be her recommendation to the school district's Human Resources office that respondent be removed from the classroom (P-11). She explained that staff members are not required to explain why they are late, but they are required to notify the school if they will be late. She testified that on January 10, 2000, respondent was again tardy when she arrived at 1:10

p.m. (P-12). She explained that students are let out at 3:00 p.m. and teachers leave at 3:05 p.m. Thus, respondent was not present for the majority of the work day.

Ms. Puri testified that she and respondent had ongoing conversations. She was concerned about respondent and her well-being, but was also concerned about the children in respondent's class and the continuity of their instruction.

Ms. Puri testified that on January 12, 2000, respondent contacted her at 9:05 a.m. and stated that she would be late because of a furnace repair, and that she would report to school in approximately two hours. However, respondent never reported for work. Ms. Puri does not recall what she arranged for class coverage on that day. As a result of this incident, she wrote the memo of January 13, 2000 (P-13).

Ms. Puri testified to an incident that occurred on December 14, 1999. She stated that she was making her rounds of the school at approximately 9:15 a.m. and entered the back of respondent's classroom. She observed respondent sitting in her chair with her back to the students, sleeping. She watched respondent for ten minutes to make sure that she was asleep, leaving the students unsupervised. Ms. Puri acknowledged that the students were sitting quietly and working on their assignments. She gave a memorandum to respondent concerning this incident on December 14, 1999 (P-14).

Ms. Puri identified a letter written to her by a parent of a student alleging that her daughter was suffering academically by being in respondent's class (P-15). The parent's letter indicated that respondent would never call the parent to advise her of any deficiencies, and that respondent called her daughter a moron and stupid in class. The parent asked that her daughter be taken out of respondent's class. Ms. Puri indicated that the student was transferred. She testified that the class size is approximately twenty-five students, and she admitted that this was the only parent who put her complaint her in writing.

Respondent was eventually removed from the classroom, but Ms. Puri did not recall the date. Ms. Puri testified that from October 1999 through January 2000, she had many

conversations with respondent. However, things did not improve over time. She testified that respondent never mentioned to her any medical reason for her inability to perform her duties.

Ms. Puri acknowledged on cross-examination that coverage problems occur on a daily basis, because there is a large staff. Her job is to provide supervision. She reiterated that the first time she felt it necessary to discuss respondent's problems with her was on October 5, 1999 (P-6). The memo was written when respondent was tardy and neglected to call in. If she had simply been tardy, but had called in appropriately, there would have been no memo written. She acknowledged conversing with respondent at the beginning of the school year, but she has no recollection of any mention by respondent of a medical condition that was affecting her conduct.

Ms. Puri acknowledged that respondent did ask that "specials" for her class be scheduled at the beginning of the day because it was hard for her to get through a whole day. However, she does not adjust schedules to accommodate staff. She also indicated that any disability or handicap accommodation is done through Human Resources, but this was never requested by respondent. It was at some point shortly after the January 19, 2000, letter from a student's parent (P-15) that Human Resources advised her that respondent would be reporting to them. Respondent was then taken out of the school. Ms. Puri acknowledged writing a memo to the teaching staff stating that they could not leave a classroom unattended to go to the bathroom.

On redirect examination, Ms. Puri testified that there is no question that she authored nine memos between October 5, 1999, and January 13, 2000, and gave them to respondent (P-6 through P-14). She first met with respondent when she was with former principal Colvin and respondent used profanities in addressing him. Ms. Puri opined that respondent had a bad relationship with Mr. Colvin.

Robert Cochran, a lieutenant with the Trenton Police Department, also testified for petitioner. Lieutenant Cochran testified that he has been a police officer for twenty-eight years. He is presently assigned as commander of the Northwest Narcotics Bureau. Prior to that, he was a lieutenant in the Patrol Division. He testified that around July 10, 2000, while he was assigned to the Patrol Division, he issued an arrest warrant for respondent for resisting arrest and eluding

police. He identified the arrest warrant (P-16), the indictment (P-17), and his investigation report (P-18).

Lieutenant Cochran testified that on July 10, 2000, just after midnight, he was stopped in traffic on Market Street in Trenton when he observed a vehicle being driven around two vehicles that were in the left lane, designated for left turns. The vehicle continued north on South Broad Street and he activated his lights and siren and stopped the vehicle near the intersection of South Broad and Market. He indicated that he initially pulled the vehicle over because of reckless driving, but the driver, the respondent, did not appear to be under the influence of anything. She gave her name and date of birth, but stated to him that she did not have her purse or her driver's license. He called into headquarters and learned that her driver's license was revoked. He advised her that a motor vehicle summons would be mailed to her residence for operating a motor vehicle with a suspended license. He also told her that she could not drive the vehicle, and she assured him that she would contact a friend and have the friend drive her home. Lieutenant Cochran testified that he advised respondent that if she did operate a vehicle, she would be placed under arrest and her car would be towed. He stated that respondent was cooperative and that he was not concerned about her safety when he left.

Lieutenant Cochran testified that approximately ten minutes later he observed respondent driving her vehicle on South Broad Street. He observed her approaching the intersection of South Broad and Front streets and he exited his vehicle and ordered her to pull over to the side of the road. He told her that she was under arrest, but she disregarded his instructions and accelerated away. He then gave chase in his police vehicle by activating his emergency lights and siren and notifying other officers. He testified that respondent went through several red traffic lights and that eventually a patrol sergeant and he blocked respondent with their vehicles so that she could not proceed any farther. The respondent refused to open the door and struggled when they attempted to handcuff her. She was placed under arrest and charged with resisting arrest and eluding the police.

Lieutenant Cochran testified that he does not recall if he spoke to the prosecutor about respondent attending pretrial intervention (PTI). The parties stipulated that the charges filed

against respondent by Lieutenant Cochran were eventually dismissed.

The parties stipulated at the hearing that on August 30, 1999, the Board voted to withhold respondent's 1999-2000 increment for sleeping in class during instructional time (Charge Three, paragraph 7), 29 days of absence, 70 days of tardiness, 12 days of refusing to sign in and 25 days of refusing to sign out (Charge Four, paragraph 16).

Respondent Brenda D. Mapp testified that she is a product of the Trenton School District. She has a degree from Trenton State College in secondary English and has teaching certificates in English, secondary education, elementary education and theater. She became a full-time teacher at the Skillman School of the Department of Corrections in September 1982. She then taught at St. Paul's Catholic School and has been teaching in the Trenton School District since 1991.

Respondent addressed the testimony of Lieutenant Cochran concerning the events of July 10, 2000. She explained that the incident occurred on a Sunday morning. She was returning home from driving someone from her home to Kingsbury Apartments. She came to the intersection of Broad Street and Market Street and stopped behind an old, beat-up, dirty car with no taillights sitting in the left-turn lane. The car sat there as the light changed twice. She believed that the car in front of her had stalled, so she pulled around the car in order to pass it on the left. Lieutenant Cochran, who was driving the car respondent had driven around, then pulled her over by flashing his headlights and a portable emergency light. When he approached her, he was in uniform. She told him her name, and after he called in her information, he told her that her license was suspended. She explained that she had gotten a speeding ticket in Virginia, but had paid it nine months before, and she attempted to tell him that her license could not be suspended. However, Lieutenant Cochran told her that he was going to be mailing her a ticket and that she should not drive her car since her license was suspended.

After Lieutenant Cochran left her, she started to walk home, but realized that it was too far. She admitted to using poor judgment and attempting to drive her car home. As soon as she started driving her car and made a right turn, she saw Lieutenant Cochran again, and she heard him say, "Stop the vehicle, you are under arrest." She admitted to driving away, but denied

going through any red lights. She admitted that the lights on Lieutenant Cochran's car were flashing. She also admitted knowing that he was a police officer. However, she thought that he overreacted to her actions. When she eventually stopped her car, she got out of the car and was brutalized by Lieutenant Cochran and another officer. She was picked up, handcuffed and thrown into the police car. She was eventually indicted. Because she had no previous record, an order of dismissal was entered as to these charges.

Respondent also addressed the testimony of Detective Cowan concerning her drug arrest. She admitted that on June 6, 2001, she resided at Kirkbride Avenue, but said that her sister owned the house. The house had been vacant for three years before respondent moved in sometime in October 1997. She did not realize it at first, but there were problems with people in the neighborhood. They came into her yard and kicked in her door once. Many times windows were broken. There were drug activities going on in the neighborhood and crap games were being held on the house's front steps. At first, she was not aware that people were coming into the house. She testified that things started getting dicey six or seven months after she moved in. She called the police two or three times a week, but the police told her that if she did not press charges they could do nothing. On one occasion, an officer told her that she must realize what the neighborhood is like and if she does not like it, she should move out.

Respondent admitted that on one occasion, the police searched the house and found drugs, drug paraphernalia, weapons and bullets. She testified that none of these belonged to her. She eventually learned that many times intruders would break into her home and they had many avenues of escape. They knew how to get in and out of her home, and they would even remove windows to get in and out.

Respondent was asked about the sworn statement she gave to Detective Cowan in June 2001. She admitted that the statement contained her signature. She recalls giving this statement, but she indicated that not all of her conversation with Detective Cowan is reflected in the statement, and that many of the responses attributed to her are inaccurate. She indicated that Detective Cowan changed at least ten or fifteen of the responses. Detective Cowan wanted her cooperation, and the objects of his criminal investigation were Tucker and Lacey.

Respondent testified that she was not home when the search warrants were executed. She had moved many of her valuables out of the home and she was planning on leaving it because of the poor neighborhood and the drug problem. She had seen Tucker and Lacey on the street, but she never invited them into her home. She testified that she was physically brutalized by Tucker and Lacey. She identified the order dismissing the criminal complaints against her (R-1). The criminal charges against her were dismissed in return for a guilty plea to a disorderly persons offense.

Respondent testified that in March 1998 she underwent a complete hysterectomy. Her incision did not heal properly and sections of it leaked. She had continuing medical problems related to this procedure during the 1999-2000 school year. Following her operation, she could not walk up steps, she could not lift any heavy objects, she could not hold her bladder, she could not sit or stand, and wearing any type of clothing caused irritation and pain. She had a great deal of difficulty lifting the teacher's editions of textbooks, and during the hearing she brought in one of the textbooks to demonstrate its weight and bulkiness. She acknowledged that an increment was withheld because of her absences. All of her absences related to the surgery. She explained that she had not had any absences for four years and had carried over a significant number of sick days. The operation was necessary because she had been hemorrhaging, and due to blood loss she had to stop working in January 1998 to build up her strength in order to have the operation in March 1998.

Respondent also testified that she returned to work prematurely, and it was very difficult for her. Howard Colvin was the principal in 1998 and 1999. Respondent was happy when Principal Puri, a female, started in July 1999. In addition, the schedule that she had for several years was very difficult for her and she needed time between classes. Ms. Puri indicated that she would see what she could do for her. When respondent received her 1999-2000 school year schedule in September 1999, she discussed it with Ms. Puri, and Ms. Puri was again really nice and said that she would try to help. However, the schedule was identical to that of the prior year. Respondent identified her schedule (R-3), which showed that she was required to be on her feet in class from the 8:20 a.m. arrival time through 1:20 p.m. Further, Ms. Puri issued a

memorandum to all teachers saying that they could not leave the classrooms during the day even to go to the bathroom. On one occasion, she was forced to have her entire class wait in the hallway outside of the bathroom while she used the bathroom. On that occasion, she was so upset she was crying and it was necessary for another staff member to calm her down in order for her to continue teaching.

In September 1999 Ms. Puri said that she would try to change respondent's schedule. However, when respondent questioned Ms. Puri about it the following week, Ms. Puri said there was nothing she could do, despite having changed the schedules of at least two other teachers. The schedule of teacher Ellen Stillitano was completely changed. Ms. Puri also changed the schedule for teacher Pat Robinson. Respondent was very upset because she had asked Ms. Puri four or five times to change her schedule, but Ms. Puri would not accommodate her.

Respondent explained that teachers have prep time during "specials," which are classes taught by other teachers, such as gym or music. In her case, her prep time is at the end of each day.

Respondent identified the memo she received on October 5, 1999 (P-6). She indicated that this was the first time that Ms. Puri had ever notified her of any kind of problem. There were no memos addressed to her prior to this one. There was also no discussion with Ms. Puri concerning this memo. She said that from September through November 1999, she was still having difficulties resulting from her surgery.

Respondent testified that on November 3, 1999, she successfully called the substitute office, which arranges for substitutes for teachers who are absent. She then attempted to call the main office of the Patton J. Hill School from 7:50 a.m. until 8:40 a.m. and could not get through. Until 8:05 a.m. the phone rang repeatedly without being answered, and the line was busy from 8:05 until 8:40. A substitute was appointed for her classroom as a result of her call to the substitute office.

Respondent testified that a couple of times in late November she either called in late or

came in late. On one day she could not call in because she had no phone, and on another day she was late because she was having electrical problems in her home and her alarm clock did not go off on time. During the same period of time she still had abdominal pain and leakage of her incision, she could not go up stairs and she had to use the bathroom frequently. She testified that she told Ms. Puri about her medical problems, but Ms. Puri's response was simply to issue a memo to her.

Respondent denied Ms. Puri's allegation that she was sleeping in class on December 14, 1999. She testified that she was sitting with her back to the students, who were quietly working. She described the classroom area as open spaces with the classes being separated by partitions. She saw Ms. Puri outside of her class, and when Ms. Puri confronted her, she told Ms. Puri that she had not been asleep. Her class was not unsupervised, because she was present and there was no disruption to the class.

Respondent testified about the parent's written complaint concerning her (P-15). The first time she ever saw this was when she received the charges, and it was never discussed with her, nor was she ever given an opportunity to dispute the parent's allegations. She denied the allegations and indicated that the student in question, S.M., was removed from her classroom in September 1999. Therefore, the incidents in question could not have happened in January 2000. She explained that she had problems with S.M. from the first day of school, when S.M. refused to stand for the flag salute. On the second day of school, the parent came in and confronted respondent and Mr. Bethea came to the classroom to calm things down. The parent removed the child from respondent's class within three weeks of the start of the school year

Respondent testified that in January 2000 she was asked to leave her teaching assignment. She responded to this request by stating that she was not physically able to continue to teach with the schedule she was required to keep. She was not aware that she was to be suspended by the school district. She denied that her inability to continue teaching was because of drug use or that she needed to attend the Employee Advisory Service.

On cross-examination, with respect to the allegation that she was sleeping in her

classroom on December 14, 1999, respondent admitted that she had her back turned to the class for six or seven minutes. However, she stated she was not sleeping and Ms. Puri's memo is not accurate. She was aware of what was occurring, and the children were quiet and cooperative. With respect to her calling in on November 3, 1999, and the line being busy, respondent said that the school has no answering service. With respect to her inability to carry heavy books or objects, she testified that she did not use a cart because she did not have one. She admitted that she did not provide medical documentation to Ms. Puri concerning her medical problems. However, she did give a copy of her letter requesting schedule changes to Ms. Puri and it should be in the files at the school. She never sought the assistance of the teachers' union as to the schedule changes. She also never took action to challenge the refusal of the school district to accommodate her disability.

Respondent testified that she had problems for one and a half years after her March 1998 surgery. She was undergoing medical treatment in September 1999 at Ewing Medical Associates with Drs. Walker and Refinski. She admitted that in her answers to interrogatories no one is listed in response to the question asking her to name any doctors she saw from July 1999 through January 2000.

With respect to the statement that she gave to Detective Cowan, respondent stated that she does not know if it was truthful and accurate. Detective Cowan wanted her to cooperate. She did not recall specific answers she gave in that statement. She called the police concerning break-ins and entries into her home about one year prior to her arrest. She never told police that anyone was cooking crack in her home prior to her statement. She indicated that when Lieutenant Cochran arrested her, she was brutalized, but she did not file a complaint.

Respondent admitted that there was a meeting on November 22, 1999, and she also admitted that there was a conference on September 23, 1999, with Ms. Puri and Mr. Bethea. However, she denied receiving a document confirming that meeting (P-23 for identification).

Respondent testified that Mr. Colvin was the principal in the school year of her hysterectomy and the year thereafter, and that she provided medical documents concerning her

condition to Mr. Colvin. She testified that there is no question that she had discussions with Ms. Puri concerning her medical condition.

On re-cross examination, respondent admitted that she did not appeal or challenge the withholding of her increment and that the union did not advise her.

Petitioner called Nancy C. Puri as a rebuttal witness. She testified that the phone system in the school in the fall of 1999 had answering machines on both lines. However, she was not sure if the answering machines would pick up a call if both lines were busy. She also identified a memo given to respondent concerning the meeting on September 23, 1999 (P-23 for identification). She denies ever issuing a memo stating that teachers could not use the bathroom. She testified that having another teacher cover the class while a teacher goes to the bathroom is permissible. However, she would never not permit a teacher to use the bathroom.

DISCUSSION OF APPLICABLE LEGAL PRINCIPLES

The Commissioner of the Department of Education has jurisdiction to hear and determine all controversies and disputes arising under the school laws. *N.J.S.A.* 18A:6-9. The discipline of tenured school employees is authorized by *N.J.S.A.* 18A:6-10, which generally provides that no tenured school employee shall be dismissed or reduced in compensation during good behavior and efficiency except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing.

Respondent argues that petitioner produced no evidence of gross and harmful conduct on the part of respondent. In order to determine whether the petitioner met the elements of this charge, it is necessary to discuss what is intended by the term "unbecoming conduct."

There is no single definition of the term unbecoming conduct. In *Laba v. Newark Board of Education*, 23 *N.J.* 364, 384 (1957), it was made clear that the touchstone of the charge is fitness to discharge the duties and functions of one's office or position. *See also In re Tenure Hearing of Grossman*, 127 *N.J. Super.* 13, 28-29 (App. Div.), *certif. denied*, 65 *N.J.* 292 (1974).

There are numerous cases in which specific conduct was found to be unbecoming conduct. For example, the use of physical force by a teacher to maintain discipline was held to be unbecoming conduct. *In re Fulcomer*, 93 *N.J. Super.* 404 (App. Div. 1967). A teacher with an uncontrollable temper who verbally and physically abused students was found to have engaged in unbecoming conduct. *In re Tenure Hearing of Cowan*, 224 *N.J. Super.* 737, 741 (App. Div. 1988).

Outside the field of education, unbecoming conduct on the part of public employees is conduct which adversely affects the morale or efficiency of the agency of which the employee is a member, which has a tendency to destroy public respect for government employees and confidence in the operation of governmental services, or which violates an implicit standard of good behavior. *In re Emmons*, 63 *N.J. Super.* 136, 140 (App. Div. 1960). A finding of unbecoming conduct does not require a violation of any specific rule or regulation, but may be based primarily on a violation of an implicit standard of good behavior. *Ibid.*; *see also City of Asbury Park v. Department of Civil Serv.*, 17 *N.J.* 419, 429 (1955); *Newark v. Massey*, 93 *N.J. Super.* 317, 323 (App. Div. 1967).

In an educational setting, unbecoming conduct has been held to be demonstrated by a series of incidents indicating a pattern of behavior, or by a single incident if sufficiently flagrant. *See Redcay v. State Board of Educ.*, 130 *N.J.L.* 369 (Sup. Ct. 1943), *affirmed o.b.*, 131 *N.J.L.* 326 (E. & A. 1944). In *Redcay*, a school principal was found guilty of the charges of inefficiency, incapacity, insubordination, lack of cooperation, unfitness and conduct generally unbecoming a principal. *See* 128 *N.J.L.* 281, 282 (Sup. Ct. 1942). The Court stated:

> 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 might also be shown by many incidents. Fitness may be shown either way.
>
> [*Redcay, supra*, 130 *N.J.L.* at 371.]

Generally, in order for the charging party in a tenure hearing to prevail, the truth of the charges must be established by a preponderance of the credible evidence. *In re Phillips*, 117 *N.J.*

567, 575 (1990); *In re Polk*, 90 *N.J.* 550, 560 (1982); *Atkinson v. Parsekian*, 37 *N.J.* 143, 149 (1962).

FINDINGS OF FACT

1. Respondent Brenda Mapp is a tenured teaching staff member in the school district of Trenton, Mercer County.

2. From October 1997 through June 2001 respondent resided at 31 Kirkbride Avenue, Trenton, New Jersey.

3. In June 2001 more than one-half ounce of cocaine and an assault weapon with a defaced serial number were seized from respondent's place of residence.

4. Respondent was arrested, and following her arrest she was asked to provide a statement.

5. In respondent's statement dated June 7, 2001, respondent admitted that she allowed Jamar Tucker to use her residence for the purpose of storing and selling cocaine, she personally observed him cook powdered cocaine into crack cocaine in her residence approximately fifty times, and she saw him conduct a 90-gram cocaine sale in her residence. In addition respondent admitted that she allowed Eric Lacey to utilize her residence for the purpose of selling drugs, and in exchange for this she would receive money and cocaine from both Jamar Tucker and Eric Lacey. She stated that she sold cocaine that Jamar Tucker had given to her.

6. Respondent admitted that the statement she gave to the police contains her signature, and recalls giving the statement, but asserted that she said things that were not in the statement and that many of the responses reflected in the statement are inaccurate. When she was questioned about this on cross-examination,

respondent could not recall details of her involvement in the activities in question, and did not refute the truth of the contents of the statement.[1]

7. In her statement respondent said that if she had not cooperated with Jamar Tucker and Eric Lacey she would have been killed, and that she had been subjected to violence and threatened by them.

8. The weapons and drug possession charges against respondent were dismissed as a result of an agreement where she pled guilty to a downgraded disorderly persons offense.

9. Respondent testified that she called the police two or three times each week concerning drug dealings in her neighborhood, but was told to press charges or the police could nothing. Respondent also testified that none of the drugs, drug paraphernalia, weapons or bullets found in her home belonged to her. This testimony was not disputed at the hearing.

10. On October 4, 1999, respondent called her place of employment to say she would be in work for one-half day in the afternoon, requiring her to report at 11:30 a.m.; she did not report and did not call until 1:15 p.m., when she advised that she would be out the entire day. As a result, there was no arrangement for a substitute teacher and the continuity of instruction of the students was hindered.

11. On November 3, 1999, respondent neglected to call in to advise that she was taking a personal illness day until 8:40 a.m., rather than the required call-in time of 8:00 a.m., which would have permitted the school district to hire a substitute.

[1] It should be noted that during respondent's direct examination, it appeared as if she were about to deny the truth of the contents of her statement of June 7, 2001. I advised her counsel that if this were the case, I felt obligated to warn respondent that she had the right to remain silent and that any admission by her that she had given a false sworn

12. On November 24, 1999, respondent failed to report by 8:20 a.m. as required; she reported at 10:08 a.m., resulting in the interruption of the continuity of instruction.

13. On November 29, 1999, respondent was tardy, arriving at 9:05 a.m.

14. On December 23, 1999, respondent failed to show up for work and failed to notify the school district of her absence until 10:55 a.m.

15. On January 10, 2000, respondent was tardy, arriving at 1:10 p.m.

16. On January 12, 2000, respondent called in at 9:05 a.m. and indicated that she would report to school in approximately two hours, but never reported for work that day.

17. On December 14, 2000, respondent was observed at approximately 9:15 a.m. sitting in her chair with her back to the students, inattentive to her duties as a teacher for approximately six or seven minutes. Her school principal, Ms. Puri, observed this and testified that respondent was sleeping. Respondent admitted to having her back turned to the class for approximately six or seven minutes, but denied being asleep. At the very least, the facts support a finding of inattentiveness.

18. Even if respondent's testimony concerning her severe medical problems during the 1999-2000 school year is accepted as true, her repeated tardiness and failure to follow required call-in procedures and her inattentiveness cannot be excused in view of the clearly negative impact on the continuity of instruction of the students assigned to her.

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statement to the police leading to the arrest and conviction of Jamar Tucker and Eric Lacey would be immediately forwarded to the prosecutor. Ultimately, she did not deny the contents of her statement.

19. On July 10, 2000, respondent was driving her vehicle while her driver's license was revoked, as indicated by the records of the State Division of Motor Vehicles. Respondent denied that her license had been revoked. She was stopped by a police officer, who gave her a ticket and instructed her not to operate her vehicle. Respondent disregarded this instruction after the police officer left and operated the vehicle. When she was subsequently observed by the same police officer, he directed her to pull to the side of the road and stated to her that she was under arrest. Respondent admits that she disregarded these instructions, and drove away. The police officer then gave chase in his vehicle, activating his emergency lights and siren. Respondent admits that the lights on the officer's vehicle were flashing and admitted knowing that he was a police officer. Eventually, respondent was forced to stop by another police vehicle and was placed under arrest. She was charged with resisting arrest and eluding the police, which charges were eventually dismissed.

Based on the foregoing findings of fact, I **FIND** respondent guilty of the following:

Charge One – unbecoming conduct. On or about July 10, 2000, respondent resisted arrest and attempted to elude the police.

Charge Two – unbecoming conduct. Respondent admitted on June 7, 2001, to committing the following offenses: (1) possession of a controlled dangerous substance; and (2) possession with intent to distribute. From April 2001 to June 2001, respondent allowed her residence to be used for the preparation and distribution of controlled dangerous substances for personal and compensatory gain.

Charge Three – unbecoming conduct. On December 14, 1999, respondent was inattentive to her duties in class, resulting in the students being unsupervised. It was stipulated at the hearing that respondent was previously disciplined for similar conduct when on August 30, 1999, the Board withheld her increment for the 1999-2000 school year for sleeping in class during instructional time, as well as other reasons.

Charge Four – unbecoming conduct. On October 4, 1999, respondent failed to follow proper call-out procedures – respondent had originally stated her intention to come in for a half-day and then failed to call in until 1:15 p.m.; on November 3, 1999, respondent failed to follow proper call-out procedures when taking a personal illness day; on November 24, 1999, respondent failed to notify the school of her tardiness (10:08 a.m. arrival) in a timely manner; on November 29, 1999, respondent failed to notify the school of her tardiness (9:05 a.m. arrival) in a timely manner; on December 23, 1999, respondent failed to notify the school of her tardiness (10:55 a.m. arrival) in a timely manner; on January 10, 2000, respondent failed to notify the school of her tardiness (1:10 p.m. arrival) in a timely manner; on January 12, 2000, respondent failed to report to work after indicating to the principal that she would arrive at approximately 11:00 a.m. It was stipulated at the hearing that respondent was previously disciplined for similar conduct when on August 30, 1999, the Board voted to withhold respondent's 1999-2000 increment for the following reasons, among others: absent 29 days, with respondent reporting her absence too late to procure a substitute on 22 of those days; tardy 70 days; refusing to sign in – 12 days; refusing to sign out – 25 days.

PENALTY

The appropriate remedy or penalty based on the foregoing findings of guilt must now be determined. In *In re Tenure Hearing of Elizabeth Merkooloff, School District of the Township of Washington*, 1980 *S.L.D.* 1370, 1371, the Commissioner stated:

> The Commissioner believes that these young pupils in their formative years surely deserve the best education possible with as complete continuity as can be accorded them.

In *In re Tenure Hearing of Joseph A. Maratea, Township of Riverside*, 1966 *S.L.D.* 77, 106, the Commissioner said:

> The Commissioner is assiduous to protect school personnel in their employment when they are subjected to unfair or improper attacks or when they are unable to perform effectively because of

> conditions not of their own making or beyond their control. An employee is not entitled to the protection of tenure, however, when, by his own acts or failures, he creates conditions under which the proper operation of the schools is adversely affected. When the responsibility for the conditions unfavorable to the effective operation of the schools rests with the employee then, the Commissioner holds, the protection of tenure is forfeit.

In *In re Tenure Hearing of Jacque L. Sammons, School District of Black Horse Pike Regional*, 1972 *S.L.D.* 302, 321, the Commissioner said that

> teachers of this State . . . are professional employees to whom the people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will result in the maximum educational growth and development of each individual child. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment. As one of the most dominant and influential forces in the lives of the children, who are compelled to attend the public schools, the teacher is an enormous force for improving the public weal. Those who teach do so by choice, and in this respect the teaching profession is more than a simple job; it is a calling.

It was also stated in *In re Tenure Hearing of Herman B. Nash, School District of the Township of Teaneck*, 1971 *S.L.D.* 284, 296:

> A teacher, as any citizen, who decides to take any form of action or inaction does so at his own risk. No matter what the ultimate objective sought, the individual must accept the responsibility for his actions . . . and must accept the consequences of his actions.
>
> . . . .
>
> The Commissioner's basic and fundamental concern must be in the welfare of the students in the Teaneck School System and, therefore, in the proper administration of that School System.

With respect to respondent's prior disciplinary record, it was stipulated that on August 30, 1999, the Board withheld respondent's 1999-2000 increment for the following reasons: sleeping in class during instructional time; absent 29 days, with respondent reporting her absence

too late to procure a substitute on 22 of those days; tardy 70 days; refusing to sign in – 12 days; and refusing to sign out – 25 days. Ms. Puri also testified that respondent was reprimanded by her on November 22, 1999, for among other infractions, failure to notify the school of her absence in a timely manner, unauthorized late arrival after time required for one-half day, frequent absences and tardiness, and failure to meet with the principal to discuss monthly attendance notice.

With respect to Charge Three, involving inattention to her duties in class resulting in the students being unsupervised, and Charge Four, involving repeated tardiness and failure to comply with call-out procedures, respondent's medical condition following surgery, if described accurately by respondent, may be a sufficient basis upon which to impose a remedy other than removal. However, the conduct and actions resulting in Charge One and Charge Two are so egregious as to justify her removal as a teacher. Respondent admitted that she allowed drug dealers to use her residence for the purpose of storing and selling cocaine. She admitted that she personally observed drug dealers cook powdered cocaine into crack cocaine in her residence approximately fifty times. She admitted that she observed a 90-gram cocaine sale in her residence. She also admitted allowing another drug dealer to use her residence for the purpose of selling drugs, in exchange for which she would receive money and cocaine, which she then sold. Notwithstanding her assertions that she was threatened with physical harm and death, respondent should have chosen some course of action other than acquiescence. I **FIND** that respondent's conduct is clearly conduct that adversely affects the morale or efficiency of the school district of which the teacher is a member, and has the tendency to destroy public respect for teachers and confidence in the operation of the school district. In addition, I **FIND** that respondent's conduct clearly violates not only an implicit, but also an explicit, standard of good behavior.

It is clear to me that it is not in the best interest of the students of the Trenton School District that respondent remain a teacher. The appropriate penalty for her unbecoming conduct is removal from her position. Therefore, I **CONCLUDE** that respondent should be removed as a teacher in the School District of the City of Trenton.

DECISION AND ORDER

Based upon the foregoing, I **FIND** respondent guilty of the charges of unbecoming conduct as stated above, and I **ORDER** her removal as a teaching staff member of the School District of the City of Trenton.

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

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

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

June 20, 2003
DATE

JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

Jun 23, 2003
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JUN 27 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

mph

APPENDIX

Witnesses

For petitioner:

Robert Cowan

Nancy Puri

Robert Cochran

For respondent:

Brenda D. Mapp

Exhibits

For Petitioner:

P-1 June 7, 2001, State of New Jersey vs. Brenda Mapp, Complaint W249237

P-2 June 7, 2001, State of New Jersey vs. Brenda Mapp, Complaint W249238

P-3 June 7, 2001, Affidavit of Probable Cause, Detective Robert Cowan

P-4 June 12, 2001, Mercer County Prosecutor's Office, Supplementary Investigation Report, Case No. S-01-55, Detective Robert Cowan

P-5 June 7, 2001, Statement of Brenda Mapp, Mercer County Prosecutor's Office

P-6 October 5, 1999, Patton J. Hill School Memorandum from Nancy Puri to Brenda Mapp

P-7 November 3, 1999, Patton J. Hill School Memorandum from Nancy Puri to Brenda Mapp

P-8 November 22, 1999, Patton J. Hill School Memorandum from Nancy Puri to Brenda Mapp

P-9 November 24, 1999, Patton J. Hill School Memorandum from Nancy Puri to Brenda Mapp

P-10 November 29, 1999, Patton J. Hill School Memorandum from Nancy Puri to

Brenda Mapp

P-11 December 23, 1999, Patton J. Hill School Memorandum from Nancy Puri to Brenda Mapp

P-12 January 10, 2000, Patton J. Hill School Memorandum from Nancy Puri to Brenda Mapp

P-13 January 13, 2000, Patton J. Hill School Memorandum from Nancy Puri, to Brenda Mapp

P-14 December 14, 1999, Patton J. Hill School Memorandum from Nancy Puri to Brenda Mapp

P-15 January 19, 2000, e-mail from Carlene Moore to Nancy Puri

P-16 July 10, 2000, State of New Jersey vs. Brenda Mapp, Complaint S-2000-005948-1111, Lieutenant Robert K. Cochran

P-17 November 16, 2000, State of New Jersey vs. Brenda Mapp, Indictment 00-11-1252I

P-18 July 10, 2000, City of Trenton Police Investigation Report

P-19 July 10, 2000, City of Trenton Police Arrest Docket of Brenda Mapp

P-20 July 10, 2000, City of Trenton Police Vehicle Report

P-21 July 10, 2000, City of Trenton Municipal Court Complaint vs. Brenda Mapp, Driver's License Revoked

P-22 April 10, 2002, Superior Court of New Jersey, Mercer Probation Division, Letter by Glenn Buzzi, SPO

For respondent:

R-1 Motion and Order for Dismissal of Complaint dated June 20, 2002

R-3 Brenda Mapp Class Schedule

OAL DKT. NO. EDU 8333-02
AGENCY DKT. NO. 352-11/02

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

The record and Initial Decision issued by the Office of Administrative Law have been reviewed. Respondent's exceptions and the Board's reply thereto were filed in accordance with *N.J.A.C.* 1:1-18.4.

Respondent's exceptions charge that the Initial Decision failed to properly consider and weigh the criminal justice system outcome of the criminal charges forming the basis of Charges 1 and 2 of the tenure charges herein. She points out that, after a full investigation and consideration of all surrounding circumstances, the Prosecutor's Office dismissed the first charge and disposed of the second by downgrading it to a noncriminal disorderly persons offense. As such

> [e]ither because the charges themselves, when fully considered, were not determined to be serious enough to warrant a full prosecution or because the respondent, herself, demonstrated a sufficient understanding of the issue and took the appropriate steps to curb her behavior, the conduct should not form a sufficient basis for unbecoming conduct.
> (Respondent's Exceptions at 1, 2)

Although respondent acknowledges that the justice system result does not "automatically" preclude a finding of unbecoming conduct, she argues that such an outcome provides "persuasive evidence" that such charges are insufficient to warrant termination from her position. (*Id.* At 1)

With respect to Charges 3 and 4, *i.e.*, alleged inattention to her classroom duties resulting in students being unsupervised; failure to comply with call-out procedures and repeated tardiness, respondent refers to page 26 of the Initial Decision where the Administrative Law Judge (ALJ) recognized that her testimony as to complications she experienced from medical surgery could provide a sufficient basis for the imposition of a penalty less than dismissal. Consequently, respondent argues, since Charges 3 and 4 are insufficient to require removal from her position, interests of justice and fair play dictate that "the addition to those charges of a single non-criminal offense should not tip the scales in favor of removal." (*Id.* at 2)

In reply, the Board submits a copy of its post-hearing brief advanced below and urges that, for the reasons set forth in this brief and the Initial Decision, the Commissioner adopt the recommended decision terminating respondent's tenured employment.

Upon careful and independent review of the record in this matter, which it is noted does not include transcripts of the hearing below, the Commissioner agrees with the findings and conclusions of the ALJ that respondent is guilty of conduct unbecoming a teaching staff member with respect to each of the four charges against her (Initial Decision at 23-24) warranting her removal from her tenured position with the Trenton Board of Education.

In so concluding, the Commissioner rejects as meritless respondent's advancement that, as a result of the criminal court outcome of the charges underlying Counts 1 and 2 of the tenure charges here, the behavior involved should somehow be viewed as *de minimis*, therefore, incapable of rising to the level of unbecoming conduct. It is by now well-established that diversion or dismissal of criminal charges has no bearing on a finding of unbecoming conduct in a tenure matter as to the incident(s) underlying those charges or the imposition of an appropriate penalty. *In the Matter of the Tenure Hearing of Arlene Dusel*,

School District of the Borough of Sayreville, 1978 *S.L.D.* 526, supplemental decision 1979 *S.L.D.* 153, *aff'd* State Board of Education, 1979 *S.L.D.* 155; *In the Matter of the Tenure Hearing of Jeffrey Wolfe, School District of the Township of Randolph*, 1980 *S.L.D.* 721, *aff'd* State Board, *1980* S.L.D. *728, aff'd* App. Div., 1981 *S.L.D.* 1537; *In the Matter of the Tenure Hearing of R. Scott McIntyre, Hunterdon-Voorhees Regional School District*, 96 *N.J.A.R.* 2d (EDU) 718, *aff'd* State Board, 96 *N.J.A.R.* 2d (EDU) 726, *aff'd* App. Div., 96 *N.J.A.R.* 2d (EDU) 726. Such holdings are reflective of a recognition of the fundamental differences in the purpose and scope of these adjudicating forums. First, the quantum of proof necessary to sustain criminal charges is significantly enhanced from that necessary in an administrative matter, *i.e.*, beyond a reasonable doubt as opposed to a preponderance of the credible evidence. More importantly, however, the interests implicated in a tenure proceeding are intrinsically different from those in a criminal matter. As found by the Commissioner in *Dusel, supra*:

> The "interests" to be protected herein are not those associated with a possible indictment or conviction in a criminal matter, but those concerned with fitness to hold a position as an instructor of school pupils. The right of these pupils to be taught by teachers who are free from the taint of patently illegal or flagrantly unbecoming acts is also at issue. (at 531)

Simply put, the focus of the inquiry in this matter is solely concerned with respondent's ability and fitness to teach public school children. Therefore, the analysis to be made is whether any of the charges herein, individually or collectively, amount to "unbecoming conduct."

The Commissioner finds and concludes that it is uncontestable that respondent's behavior and actions which formed the basis of Counts 1 and 2 of the tenure charges herein constitute conduct unbecoming a teaching staff member. He further concurs with the ALJ that the nature of the incidents is so egregious, in and of itself, as to justify respondent's removal from her tenured position. The Commissioner recognizes that "teachers carry a heavy

responsibility by their actions and comments in setting examples for the pupils with whom they have contact." *In the Matter of the Tenure Hearing of Blasko, School District of the Township of Cherry Hill*, 1980 *S.L.D.* 987 at 1003. As such, some actions are "so foreign to the expectations of the deeds and actions of a professionally certificated classroom teacher as to raise manifest doubts as to the continued performance of that person in the profession." (*Ibid.*) Taken in conjunction with the unbecoming conduct evidenced in Charges 3 and 4, respondent's unfitness as an educator is beyond question.

Accordingly, the Initial Decision of the ALJ is adopted for the reasons well expressed therein. Respondent is hereby dismissed from her tenured teaching position in the Trenton School District as of the date of this decision. This matter is being referred to the State Board of Examiners for action as that body deems appropriate.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 8|05|03

Date of Mailing: 8|11|03

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

435-03

435-03

IN THE MATTER OF THE TENURE HEARING OF MICHAEL BERKLEY, SCHOOL DISTRICT OF PEMBERTON TOWNSHIP, BURLINGTON COUNTY.

And

MICHAEL BERKLEY,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF PEMBERTON, BURLINGTON COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

August 8, 2003

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NOS. EDU 8172-02 and

EDU 661-03 (Consolidated)

AGENCY REF. NOS. 322-10/02 and

408-12/02

IN THE MATTER OF THE
TENURE HEARING OF
MICHAEL BERKLEY,
SCHOOL DISTRICT OF
PEMBERTON, BURLINGTON
COUNTY,

AND

MICHAEL BERKLEY,

Petitioner,

v.

BOARD OF EDUCATION OF
THE BOROUGH OF PEMBERTON,
BURLINGTON COUNTY,

Respondent.

Robert A. Muccilli, Esq., for Pemberton Borough Board of Education (Capehart & Scatchard, P.A., attorneys)

Jason E. Sokolowski, Esq., for Michael Berkley (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, P.C., attorneys)

Record Closed: June 17, 2003 Decided: June 18, 2003

BEFORE **ISRAEL D. DUBIN**, ALJ:

This consolidated matter was transmitted to the Office of Administrative Law on November 14, 2002 and February 27, 2003, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

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

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

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

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

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

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

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

6/18/03
DATE

ISRAEL D. DUBIN, ALJ

Receipt Acknowledged:

6/24/03
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 27 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

/lam

CAPEHART & SCATCHARD, P.A.
A Professional Corporation
Laurel Corporate Center, Suite 300
8000 Midlantic Drive
Mount Laurel, N.J. 08054
(856) 234-6800
Attorneys for Board of Education of the Public Schools of Pemberton Township

IN THE MATTER OF THE TENURE HEARING OF MICHAEL BERKLEY, SCHOOL DISTRICT OF PEMBERTON, BURLINGTON COUNTY,	:	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NOS. EDU 8172-02 and EDU 661-03 AGENCY REF. NOS. 322-10/02 and 408-12/02
AND	:	
MICHAEL BERKLEY,	:	
Petitioner,	:	**SETTLEMENT AGREEMENT**
vs.	:	
BOARD OF EDUCATION OF THE BOROUGH OF PEMBERTON, BURLINGTON COUNTY,	:	
Respondent.	:	

Procedural History

THIS MATTER consists of two related docket numbers that were consolidated for hearing by Order dated March 6, 2003 and is now captioned In The Matter of the Tenure Hearing of Michael Berkley, School District of Pemberton, Burlington County, And Michael Berkley v. Board of Education of the Borough of Pemberton, Burlington County (OAL DKT. NOS. EDU 8172-02 and EDU 661-03) (AGENCY DKT. NOS. 322-10/02 and 408-12/02). In the caption the Pemberton Township Board of Education is incorrectly referred to as "School District of Pemberton, Burlington County" and "Borough of Pemberton, Burlington County." The consolidated matter was presented to the Office of Administrative Law ("OAL") for a hearing on

April 1, 2003 at which time the Pemberton Township Board of Education and Michael Berkley ("referred to together as "the Parties") met through their representatives with the administrative law judge and individually to review their positions and reached an Agreement to resolve the matter subject to the approval of the Commissioner of Education ("the Commissioner");

Background

WHEREAS, Michael Berkley has been an employee of the Board since July 1, 1985 and holds tenure pursuant to N.J.S.A. 18A:17-3, and at times pertinent to the current tenure charges was a night custodian at the Pemberton Township High School.

Commissioner's Disposition of Prior Tenure Charges

WHEREAS, by Decision dated October 18, 2000 the Commissioner approved a Settlement Agreement and Initial Decision issued by the OAL on September 16, 2000 pursuant to which Mr. Berkley was suspended from employment for 9 ½ months.

Board's Position As To The Current Tenure Charges

WHEREAS, the Board states its position with respect to the current tenure charges as follows. On April 11, 2002, a special education teacher reported that a 13 inch combination television/VCR set ("the set") was missing from a closet in her classroom. The teacher last saw the set when she left her classroom at the end of the school day on April 10, 2002. The Board alleges that Mr. Berkley, who was assigned to clean the teacher's classroom on the 3:00-11:00 P.M. shift on April 10, 2002, stole the set. The Board maintains that, shortly before Mr. Berkley left for mealtime on April 10, 2002, a video surveillance camera captured him rolling a custodial cart down a hallway moving away from the direction of the teacher's classroom with a rectangular object inside a charcoal colored plastic bag balanced on top of the cart.

Mr. Berkley was informed of the missing set on April 11, 2002 when he reported to work for the 3:00-11:00 P.M. shift. The Board alleges that Mr. Berkley returned the missing set once he learned that it was reported missing. The Board maintains that video surveillance cameras captured Mr. Berkley on April 11, 2002 returning in his car from mealtime, rolling a garbage can out to his car, reentering the building and making his way up to the vicinity of the audio visual room located within the area in which he had volunteered to work. Mr. Berkley reported to the night custodian supervisor that he had located two television sets, one of which was determined to be the missing set. Mr. Berkley stated that he located the two television sets in the audio visual room, however, the Board maintains that the audio visual room had been searched earlier on April 11 and that the set was not in the room. The Board seeks Mr. Berkley's dismissal from employment.

Michael Berkley's Position As To The Current Charges

WHEREAS, Mr. Berkley states his position with respect to the current charges as follows. Mr. Berkley denies each of the two tenure charges, and maintains that he has repeatedly denied throughout these proceedings the allegation that he stole the television set. Mr. Berkley further denies that he had anything to do with the missing set. Mr. Berkley maintains that he did not volunteer to work in the area of the audio visual room on April 11, 2002. Mr. Berkley maintains that even if the Commissioner were to find that the facts set forth in support of charges 1 and 2 by the Board of Education of the Township of Pemberton were true and would support the imposition of some form of disciplinary action, removal from his employment with the Board would not be the appropriate sanction.

Weighing of Considerations And Public Benefit of Settlement

WHEREAS, the Parties, are aware of the public's interest in the proper handling of tenure charges to insure that unqualified persons do not continue to be employed when diligence at this stage might prevent difficulties in the future. However, in considering the total circumstances, the Parties believe that it is in the best interest of the Board, Mr. Berkley and the public to resolve this matter by settlement. An evaluation of these circumstances include consideration of the details of the positions as stated by the parties herein, the time and expense in maintaining the tenure charges, questions concerning the clarity and scope of coverage of the video surveillance cameras with respect to the events of April 10 and 11, 2002, the lack of direct witnesses to the removal and return of the set, the uncertainty of the ultimate result which might be obtained and the lack of any allegation that Michael Berkley presents any threat to the children of New Jersey. The Parties believe that the settlement of this matter is appropriate and that the settlement comports with the standards for review of settlements in tenure matters in accordance with In re Cardonick, 1990 S.L.D. 842, 846, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983.

NOW, THEREFORE, IT IS agreed by and between the Parties, subject to the approval of the Commissioner:

1. Mr. Berkley will resign his employment with the Board, said resignation to be effective on the date of the Commissioner's decision approving of the Settlement Agreement and Initial Decision (should the Commissioner so approve), by signing and returning to the Board the resignation letter contained in attachment "A" within seven (7) days of the date the Commissioner mails his decision. Mr. Berkley agrees that by resigning his position, he is relinquishing all present and future rights to employment and re-employment with the Board as of the effective date of his resignation. Further, Mr. Berkley acknowledges that subsequent to the effective date of his resignation, the Board will not have any obligation to provide him with any future payments, benefits or considerations other than the payment recited in paragraph 2 below.

2. In consideration of the mutual execution of this Agreement which provides for a release given by Mr. Berkley and his resignation, the Board will within fourteen (14) days of the

effective date of Mr. Berkley's resignation pay to him $57,682.00 less the gross amount of any salary payments made to him between April 1, 2003 and the effective date of his resignation.

3. Mr. Berkley agrees that any inquiries regarding him will be directed to the Board Secretary/Business Administrator who will, upon request, provide Mr. Berkley and any other individual inquiring about him with a letter reflecting Mr. Berkley's date of hire and date of resignation. This paragraph is not intended to and should not be construed as a restriction on the Board's obligation to comply with N.J.S.A. 47:1A-1 et seq. (and in particular N.J.S.A. 47:1A-10) and/or Executive Order 11 (1974).

4. Mr. Berkley, for and in consideration of the undertakings of the Board set forth in paragraph 2 herein, and intending to be legally bound, does hereby remise, release and forever discharge the Board and its officers, members, employees and agents, and their respective successors and assigns, heirs, executors and administrators, of and from any and all manner of actions and causes of actions, suits, debts, claims and demands whatsoever in law or in equity, which he ever had, now has, or hereafter may have, or which his heirs, executors or administrators hereafter may have by reason of his employment relationship and/or the termination of his employment relationship and /or affiliation with the Board and/or the claims asserted by him in In The Matter of the Tenure Hearing of Michael Berkley, School District of Pemberton, Burlington County, And Michael Berkley v. Board of Education of the Borough of Pemberton, Burlington County (OAL DKT. NOS. EDU 8172-02 and EDU 661-03) (AGENCY DKT. NOS. 322-10/02 and 408-12/02). Excepted from this release are: claims arising under the Workers' Compensation Act, N.J.S.A. 34:15-1 et seq., the Public Employees Retirement System, N.J.S.A. 43:15A-1 et seq., and claims arising from breach of this Agreement. Mr. Berkley represents that he is unaware of any claims arising under these exceptions as of the date he executes this Agreement.

5. The Parties agree that this Agreement shall not be construed in any way as an admission of wrongdoing by either Party. The Parties further agree that this Agreement shall not be admissible in a hearing in this matter should the Commissioner not approve the Agreement.

6. Both Parties have read the terms of this Agreement and acknowledge that they have had an opportunity to discuss it with counsel. The Parties further acknowledge that they are executing this Agreement of their own volition, with full understanding of its terms and effects, and without any coercion.

7. **The Parties understand that this Agreement is subject to the approval of the Commissioner. This Agreement is reached based upon an evaluation of the individual considerations with respect to the Parties and issues in this matter. This Agreement is not precedent setting or binding respect to any other matter.**

Michael Berkley (Date)

James Hager
Business Administrator/Board Secretary
Pemberton Township Board of Education
P.O. Box 228
One Egbert St.
Pemberton, NJ 08068-0228

Re: Letter of Resignation

Dear Board Members:

Please be advised that effective on the date the Commissioner of Education's Decision Approving the Settlement Agreement and Initial Decision, I resigned my custodial position with the Public Schools of Pemberton Township.

_____
Michael Berkley

ATTACHMENT "A"

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BOARD OF EDUCATION OF
PEMBERTON TOWNSHIP PUBLIC SCHOOLS

By: _____ 5/13/03
James Hager, Business (Date)
Administrator/Board Secretary

ZAZZALI, FAGELLA, NOWAK,
KLEINBAUM & FRIEDMAN
Attorneys for Michael Berkley

By: _____ 6/13/03
Jason E. Sokolowski (Date)

CAPEHART & SCATCHARD, P.A.
A Professional Corporation
Attorneys for Board of Education of the
Public Schools of Pemberton Township

By: _____ 6/11/03
Robert A. Muccilli (Date)

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OAL DKT. NOS. EDU 8172-02 AND EDU 661-03 (CONSOLIDATED)
AGENCY DKT. NOS. 322-10/02 AND 408-12/02

IN THE MATTER OF THE TENURE HEARING OF MICHAEL BERKLEY, SCHOOL DISTRICT OF PEMBERTON TOWNSHIP, BURLINGTON COUNTY.	:	
And	:	COMMISSIONER OF EDUCATION
MICHAEL BERKLEY, PETITIONER,	:	DECISION
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF PEMBERTON, BURLINGTON COUNTY, RESPONDENT.	:	

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

Upon review, the Commissioner approves the settlement terms of this consolidated matter involving a tenured custodian since they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *See In re Cardonick*, 1990 *S.L.D.* 842, 846, decided by the

[1] As noted in the Settlement Agreement, these consolidated cases were incorrectly captioned. The Pemberton Township Board of Education is incorrectly referred to as "School District of Pemberton, Burlington County," and "Borough of Pemberton, Burlington County." The case caption on this decision reflects changes to correct these errors.

Commissioner of Education April 7, 1982, *aff'd* State Board April 6, 1983; and *N.J.A.C.* 6A:3-5.6(a). The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 8|08|03

Date of Mailing: 8|11|03

[2] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*

436-03

436-03

PAUL S. NATANSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PEQUANNOCK, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner, resident of Bernards Township (Basking Ridge) in Somerset, County, sought an order requiring the Pequannock Board in Morris County (Board) to make candidates for school employment pay the cost of conducting criminal background checks. He contended that the Board's practice of paying the fee itself violated state statutes.

The ALJ found that petitioner was not a resident of either Pequannock Township or Morris County; he paid no taxes to Pequannock Township; he never worked for the Board or applied to the Board for employment. Moreover, petitioner offered no actual facts to support his theory that he was being harmed indirectly "through the state tax system." The ALJ concluded that the petition should be dismissed for lack of standing.

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

August 8, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1848-03
AGENCY DKT. NO. 19-1/03

PAUL S. NATANSON,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF PEQUANNOCK,
Respondent.

Paul S. Natanson, *pro se*

Greg K. Vitali, , Esq., for respondent
(Lindabury, McCormick & Estabrook, attorneys)

Record Closed: May 16, 2003 Decided: July 1, 2003

BEFORE **KEN R. SPRINGER**, ALJ:

Statement of the Case

Petitioner Paul S. Natanson ("Natanson") seeks an order requiring the Pequannock Board of Education ("Board") to make candidates for school employment pay the cost of conducting criminal background checks. Specifically, Natanson alleges that the Board follows the practice of paying the fee itself. He asserts that this practice violates state statutes, which he interprets as requiring the job applicant to bear the cost

of the criminal background check. Presently, the matter comes before the Office of Administrative Law ("OAL") on the Board's motion to dismiss the petition for lack of standing.

Procedural History

On January 13, 2003, Natanson filed a verified petition with the Commissioner of Education ("Commissioner"). Respondent Board filed an answer on February 3, 2003, raising various affirmative defenses including lack of standing. Subsequently on March 4, 2003, the Commissioner transmitted the case to the OAL for hearing as a contested case.

Prior to hearing, the Board filed a motion to dismiss, together with supporting certification and letter brief, on April 11, 2003. Natanson filed opposing papers on April 30, 3003. The matter was submitted on May 16, 2003 for ruling on the papers.

Findings of Fact

All of the facts needed for disposition of the motion are undisputed. I **FIND:**

The Board is the governing body of a local school district situated in the Township of Pequannock in the County of Morris, New Jersey. Paul S. Natanson resides in the Township of Bernards (Basking Ridge) in the County of Somerset, New Jersey. Natanson is not a resident of either Pequannock Township or Morris County. He pays no taxes to the Township of Pequannock. Insofar as the record reflects, Natanson has never worked for the Board or applied to the Board for employment.

Several state statutes require that applicants for employment in public school jobs must undergo a criminal background check for disqualifying offenses. Each of these statutes contains language that "the applicant shall bear the cost for the criminal history record check, including all costs of administering and processing the check."[1]

[1] *N.J.S.A.* 18A:6-4.14, *N.J.S.A.* 18A:6-7.2 and *N.J.S.A.* 18A:39-19.1

In his pleadings, Natanson accuses the Board of "paying and/or reimbursing some of these fees rather than compelling all applicants . . . to pay the fees themselves as the law requires." While Natanson does not allege that he ever sought employment in the Pequannock school district, he has applied for jobs in another unnamed school district that does require payment of such fees. Rather than seeking to change the policy in this other district, Natanson complains that, "Pequannock's conduct has blocked me from changing the law that requires me to pay for my own criminal background investigation." Strict enforcement of the law, he believes, will help him "convince our legislators to change the law so that schools can have the option of paying these fees, legally[.]"

Natanson also contends that the Board's policy gives it an unfair competitive advantage in attracting better workers. Consequently, Natanson theorizes that the pool of available job candidates in his hometown might be reduced and taxpayers in Basking Ridge might be forced "to support higher wages and higher advertising costs to attract job candidates to the school system." However, Natanson offers no actual facts to support his speculation. Other than that, the only other way in which Natanson claims he is harmed by the Board's actions is indirectly "through the state tax system." Again, he offers no underlying facts to show the amount of state aid that the Board may be receiving and whether any state money is being used to pay for background checks.

Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that the petition should be dismissed for lack of standing.

"Standing" refers to the petitioner's ability or entitlement to maintain an action before a court or administrative agency. *Stubaus v. Whitman*, 339 *N.J. Super.* 38, 47 (App. Div. 2001), *certif. den.* 171 *N.J.* 442 (2002). To possess standing, a party "must present a sufficient stake in the outcome of the litigation, a real adverseness with respect to the subject matter, and a substantial likelihood that the party will suffer harm

in the event of an unfavorable decision." *In re Camden Cty.*, 170 *N.J.* 439, 449 (2002). New Jersey courts have adopted a generous approach toward recognition of standing in order that aggrieved parties will not be denied easy access to the legal system. *See Crescent Park Tenants Ass'n v. Realty Equities Corp.*, 58 *N.J.* 98 (1971). S. Lefelt, *Administrative Law & Practice, 37 N.J. Practice Series* §7.4 (2d ed. 2003).

Nonetheless, there are accepted limits as to who may seek to vindicate rights belonging to others. Courts will not render advisory opinions or function in the abstract or entertain proceedings by parties "who are mere intermeddlers" or are "merely interlopers or strangers to the dispute." *Crescent Park, at 107.* Despite a broad standing policy, our courts require some real and direct interest be present before granting third party standing to seek judicial review of agency action. *Camden County*, at 447. Generally, two prerequisites must exist to establish standing: First, petitioner must demonstrate a sufficient stake in the outcome of the proceedings; and, second, his position must be truly adverse to the opposing party. *Home Builders League of So. Jersey, Inc. v. Berlin Twp*, 81 *N.J.* 127, 132 (1979). Sometimes the first requirement is described in terms of the "substantial likelihood of harm" to the complainant if the requested relief is not granted. *Home Builders*, at 134. Where a case is of great public interest, however, "any slight additional private interest" will be sufficient to afford standing. *Salorio v. Glaser*, 82 *N.J.* 482, 491 (1980). But courts still continue to look for some measurable amount of detrimental impact on the complaining party's personal rights.

Similar restrictions are imposed on those who would initiate administrative proceedings before the Commissioner. While *N.J.S.A.* 18A:6-9 confers upon the Commissioner jurisdiction to hear and determine "all controversies and disputes arising under the school laws," the Commissioner had adopted regulations clarifying exactly who may be considered interested persons for the purpose of such hearings. *N.J.A.C.* 6A:3-1.2 defines "interested person(s)" as someone "who will be substantially, specifically and directly affected by the outcome of a controversy before the Commissioner." Such language is consistent with the Administrative Procedure Act, which limits the definition of a contested case to proceedings where the "legal rights,

duties, obligations, privileges, benefits or other legal relations of specific parties are required by constitutional right or by statute to be determined." *N.J.S.A.* 52:14B-2(b).

Thus, the Commissioner has consistently declined to hear cases brought by petitioners who would not be affected by the outcome in a direct and meaningful way. *See, e.g., U.K. & G.K. o/b/o D.K. v. Clifton Bd. of Educ.*, 93 *N.J.A.R.*2d (EDU) 73 (Nov. 20, 1992) (parents objecting to discipline of someone else's child); *Kenwood v. Montclair Bd. of Educ.*, OAL Dkt. No. EDU 8858-81 (April 23, 1982), *adopted*, Comm'r (June 14, 1982), *aff'd* St. Bd. (Sept. 8, 1982) (concerned citizen seeking to rewrite school attendance policy); *Lobis v. Maple Shade Bd. of Educ.*, OAL Dkt. EDU 3630-79 (June 11, 1980), *adopted,* Comm'r (Aug. 11, 1980), *aff'd,* St. Bd. (Nov. 5, 1980) (parent whose child no longer attended school complaining about quality of education received by remaining students); *Delaney v. Woodbridge Bd. of Educ.*, OAL Dkt. EDU 382-78 (Dec. 12, 1979), *adopted*, Comm'r (June 11, 1980) (taxpayer questioning propriety of filling job vacancies); *Ricardelli v. Newark Bd. of Educ.*, OAL Dkt. EDU 1894-79 (Sept. 26, 1979), *adopted*, Comm'r (Nov. 16, 1979) (taxpayer challenging legality of school board's decision to transfer personnel); *G.G. v. New Providence Bd. of Educ.,* 1975 *S.L.D.* 502 (parent of high school graduate challenging attendance policy).

Significantly, Natanson has no identifiable connection with Pequannock or its school system. Moreover, the harm that he alleges is attenuated and hypothetical. Regardless of whether the Board pays the cost of background checks for its school personnel, Natanson retains the right to petition the Legislature for redress of his grievances. Resolution of Natanson's complaint is unlikely to influence the Legislature or have an appreciable effect on the ability of his local school board to recruit competent school staff. In short, Natanson has no real stake in the outcome of these proceedings and has not demonstrated a substantial likelihood of suffering genuine harm.

Order

It is **ORDERED** that the Board's motion to dismiss the petition is granted.

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

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

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

July 1, 2003
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

7-1-03
DATE

M. Kathleen Dunscombe/ch
mailed to Parties:
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JUL 8 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

al

APPENDIX

List of Exhibits

No.	Description
P-1	Petition of Paul S. Natanson, filed on January 14, 2003
P-2	Petitioner's Reply to Answer, filed on February 6, 2003
P-3	Petitioner's Reply to Motion for Dismissal, filed on April 30, 2003
R-1	Answer and Affirmative Defenses of Pequannock Board of Education, filed on February 4, 2003
R-2	Notice of Motion to Dismiss for Lack of Standing, filed on April 11, 2003
R-3	Letter Brief of Pequannock Board of Education, filed on April 11, 2003
R-4	Certification of William Albert, filed on April 11, 2003

OAL DKT. NO. EDU 1848-03
AGENCY DKT. NO. 19-1/03

PAUL S. NATANSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PEQUANNOCK, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Upon his full and independent review, the Commissioner concurs with the findings and conclusion of the Administrative Law Judge that petitioner's appeal in this matter must be dismissed for lack of standing.

Accordingly, the Initial Decision of the OAL is adopted for the reasons clearly stated therein. The instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 8|08|03

Date of Mailing: 8|11|03

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

437-03

437-03

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

SYNOPSIS

Petitioning Charter School sought payment of bus transportation costs incurred during the 2001-02 academic year from respondent local School District pursuant to *N.J.S.A.* 18A:36A-13. The District contended it met its legal obligation by offering bus tickets on public buses when it was not arranging private bus routes for petitioner's charter school students. The Charter School then entered into its own contract with a bus company due to the issue of safety. The District reversed its policy and arranged transportation for other charter schools except for petitioner because petitioner had a preexisting contract.

The ALJ found that when the District voluntarily provided all other charter schools located in Jersey City with bus routes, the District automatically triggered the statutory requirement to treat all in-district students alike. The ALJ ordered the District to pay the Hudson County Transport, Inc., the sum of $24,592 for services rendered to the Charter School from September 5 to December 5, 2001.

The Commissioner concurred with the findings and conclusions of the ALJ and ordered the District to pay the amount owed.

August 8, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5218-02
AGENCY DKT. NO. 128-4/02

JERSEY CITY COMMUNITY CHARTER SCHOOL,
Petitioner,
v.
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY,
Respondent.

Marvin L. Comick, Esq., for petitioner
(Love & Randall, attorneys)

Charlotte Kitler, General Counsel, for respondent

Record Closed: March 28, 2003 Decided: June 24, 2003

BEFORE **KEN R. SPRINGER**, ALJ:

Statement of the Case

This is a suit by a charter school seeking payment of bus transportation costs incurred during the 2001-2002 academic year. *N.J.S.A.* 18A:36A-13 requires local school districts to furnish transportation to resident charter school students "on the same terms and conditions" as its own students. In January 2001, the State-Operated School District of the City of Jersey City ("District") notified Jersey City Community

Charter School ("Charter School") that it was ending its past practice of arranging private bus routes for charter school students. Instead, the District offered to provide bus tickets on public buses. Unwilling to allow its young students to ride unattended on public buses, the Charter School entered into its own contract with a bus company to provide private bus routes. Shortly before the start of classes in September 2001, the District informed the Charter School that it was reversing itself and reinstating private bus routes. Nevertheless, the District refused to assume financial responsibility for the existing routes arranged by the Charter School because of substantial differences in the bidding specifications.

Ultimately, the District went through its own bidding process and began providing bus routes to Charter School students in early December 2001. Petitioner seeks payment of transportation expenses totaling $24,592 incurred during the first three months until the District began providing bus service. The District defends on the grounds that it met its legal obligation by offering bus tickets and that there is no statutory authority permitting it to make payment to or contract with "an intermediary" such as a charter school.

Procedural History

On April 29, 2002, the Charter School filed a verified petition with the Commissioner of Education ("Commissioner"). Respondent District filed its answer with the Commissioner on May 20, 2002. Subsequently, on May 31, 2002, the Commissioner transmitted the matter to the Office of Administrative Law ("OAL") for hearing as a contested case. The OAL held a hearing on February 28, 2003. Witnesses and exhibits are listed in the appendix. Upon receipt of post-hearing briefs, the record closed on March 28, 2003.

Findings of Fact

Uncontested Facts

Most of the relevant facts are undisputed. Chartered in 1997, the Charter School has a student population of 275 students, drawn from Jersey City and surrounding communities. During 2001-2002, it served children in Kindergarten through grade four. Approximately one hundred in-district students attending the Charter School in 2001-2002 lived more than two miles away and thus were entitled to transportation.[1] In prior years, the District had always arranged private bus routes for remote in-district students attending charter schools located in Jersey City.

On or about January 9, 2001, the District gave written notice that "effective September 2001 the Jersey City Public Schools will be providing the same transportation services for Charter School students as it provides for students enrolled in the Jersey City Public Schools, that is, bus tickets[.]" Further, the District requested that the Charter School, "Kindly notify parents in order that they might have sufficient time to arrange for and adjust to these changes[.]"

Immediately upon receipt of this communication, Carletta Martin-Martin-Goldston, the head of the Charter School, conferred with her board of trustees and consulted with the parent-teacher organization. An experienced educator with a master's degree in elementary education, Martin-Goldston regarded it as "unsafe" for her students, all of whom were below the age of ten, to ride city buses without adult supervision. Stanley Wojik, acting transportation coordinator for the District, agreed that it is "probably not appropriate," although the District itself issues bus tickets to its own remote students of similar age. Moreover, Martin-Goldston feared that the

[1] Local school districts must provide transportation to resident elementary school students who live "more than two miles from their public school of attendance." *N.J.S.A.* 18A:39-1.

unavailability of busing might reduce enrollment and threaten the financial stability of the Charter School, since its funding "depends on the number of students."

In accordance with instructions from her board, Martin-Goldston explored the possibility of declining the District's offer of bus tickets and "securing transportation on our own." Thereafter, on July 31, 2001, the Charter School accepted a bid from the Hudson County Transport, Inc. to supply two bus routes, including a driver and aide, at the cost of $212 per day for each route. Hudson County Transport began providing bus service to the Charter School on September 5, 2001.

On August 20, 2001, just two weeks before commencement of the 2001-2002 academic year, the District sent a letter to the Charter School advising that it had "reconsidered" its policy and would "revert back" to its original arrangement of providing bus routes to charter schools. Significantly, the letter failed to specify the anticipated date when such bus transportation might start. Instead, the letter merely stated that the District's transportation coordinator had been told "to solicit bids for the Charter School routes that were in effect during the 2000-2001 school year" and that, "[o]nce he has secured these routes he will notify you directly." As discussed in the next section, the parties presented conflicting versions of when the District notified the Charter School that busing was actually available.

Ostensibly, the reason for the District's change of heart was that many parents of charter school students had not been notified of the bus ticket arrangement "until the last day of school" and had insufficient time "to make plans to have their children transported in a manner acceptable to them." Of course, that rationale did not apply to the Charter School, which had acted promptly to make its own plans to secure suitable transportation for its students. As soon as she received the District's latest letter, Martin-Goldston wrote back on August 24, 2001, informing the District of the Charter School's contract for bus transportation and requesting that "the cost of our contract with Hudson County Transport be assumed by the Jersey City Public Schools." She also obtained assurance from Hudson County Transport that the bus company had no

objection to the District assuming financial responsibility under the contract. According to Martin-Goldston, the Charter School did not try to cancel its contract with Hudson County Transport at that time because school was about to begin and she did not know when the District would be ready to provide busing.

Not having received any response to her letter of August 24th, Martin-Goldston wrote a second letter on September 28, 2001, enclosing a draft of an agreement for the District to assume the costs of its existing transportation contract with Hudson County Transport. Her letter asked that the District sign the proposed agreement and return it "no later than October 5, 2001." However, the District waited until October 12, 2001 before responding to the second letter. On that date, the District's general counsel, Charlotte Kitler, Esq., sent a letter advising that the District could not properly assume the contract because the Charter School's bid specifications were "so significantly different from our specifications and requirements, particularly in the conditions affecting performance and enforcement[.]" While Kitler's letter reiterated the District's willingness "to arrange to provide transportation services for your students," it did not mention that the District was ready and able to provide such busing immediately. Information furnished separately by the District indicated that bids for various bus routes, including transportation for Charter School students, "are due on October 23rd."

Meanwhile, however, the District had awarded an "emergency contract" to the same bus company, Hudson County Transport, to provide busing to Charter School students along the same two routes, starting on September 5, 2001. Ironically, the cost of each route under the District's emergency contract would have been $243 per day or $31 more than the daily rate under the Charter School's contract. After receipt of the October 12th letter from the District's general counsel, Martin-Goldston called the respondent's transportation coordinator, Stanley Wojik, to accept the District's offer to provide future bus routes. Hudson County Transport continued providing bus service under the Charter School's contract through December 5, 2001 and is now looking for

payment in the amount of $24,592.[2] Neither party contends that Hudson County Transport's services were unsatisfactory or that the charges are unreasonable.[3]

(2) Disputed Facts

It is unfortunate that two public officials have such different recollections of whether the District notified the Charter School of the provisions for busing under the emergency contract. Martin-Goldston testified unequivocally that, after writing her letter of August 24, 2001, she had no communication with anyone from the District until she received the response from the District's general counsel in October 2001. She never saw a copy of Wojcik's letter awarding the emergency contract to Hudson County Transport until the District produced it at the administrative hearing. Wojcik's letter corroborates Martin-Goldston's testimony, since it shows that a copy was sent to the District's school bus administrator, but not to any representative of the Charter School. Admitting that he never sent a copy of the letter to Martin-Goldston, Wojcik offered the lame excuse that the arrangements had to be made quickly so everything was "done verbally."

Convincingly, Martin-Goldston asserts that, had she known of the District's emergency contract with Hudson County Transport, she would have tried to cancel the Charter School's independent arrangements with Hudson County Transport. Certainly it is unlikely that Hudson County Transport would have refused to substitute the District's emergency contract, which contained a higher price for the same two bus routes.

Wojcik claims that he personally telephoned Martin-Goldston on one or more unspecified dates and informed her that the District would have no problem furnishing

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[2] Since December 5, 2001, the District has undertaken to provide busing routes to the Charter School under a contract with a new vendor, Laidlaw.

[3] The Office of the Hudson County Superintendent of Schools has informed the Charter School that it cannot divert programmatic funds to pay for transportation costs. Martin-Goldston said that if the school's suit is unsuccessful, it will have to raise the extra money through candy and bake sales.

bus transportation starting on September 5, 2001. But he failed to produce any substantiating documentation, such as telephone records reflecting the alleged contacts or contemporaneous notes of his conversations. While Wojcik apparently conferred with another District administrator, Ellen Zadroga, the District never called Zadroga to verify that someone had notified the Charter School about the emergency arrangements. Wojcik's discussions with Zadroga appear to have focused on whether the District could assume the Charter School's existing contract.[4]

I **FIND** that Martin-Goldston was unaware emergency busing would be available for Charter School students when school opened in September. Proofs demonstrate that the Charter School management regarded safety as the highest priority and declined the District's offer of bus tickets for its young students. Leadership of the Charter School felt so strongly about the safety issue that it acted to avoid discontinuance of the private bus routes. If the Charter School administration had been informed that the District was ready to provide free busing for remote students, there is no good reason why the Charter School would not have taken advantage of the opportunity and cancelled its substitute arrangements.

Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that the District must compensate Hudson County Transport for the cost of providing bus service to the Charter School.

A charter school is a public school operated pursuant to a charter approved by the Commissioner of Education, which is independent of a local board of education and is managed by a board of trustees. *N.J.S.A.* 18A:36A-3. *In re Grant of the Charter Sch. Application of Englewood on the Palisades Charter Sch.*, 164 *N.J.* 316, 319-320

[4] For reasons that are not entirely clear, Wojcik wrote to Hudson County Transport on September 4, 2001 canceling the District's contract to provide transportation services to the Charter School. Again, Wojcik failed to inform the Charter School of this important development.

is managed by a board of trustees. *N.J.S.A.* 18A:36A-3. *In re Grant of the Charter Sch. Application of Englewood on the Palisades Charter Sch.*, 164 *N.J.* 316, 319-320 (2000). It is the public policy of the State "to encourage and facilitate the development of charter schools." *N.J.S.A.* 18A:36A-2. Charter schools have more autonomy than other public schools in staffing, curriculum and spending choices. *Englewood on the Palisades*, at 320. Despite its independent governance, however, most of the funding for a charter school derives from the local school district of residence of the charter school. *N.J.S.A.* 18A:36A-12. *Englewood on the Palisades*, at 323. *N.J.S.A.* 18A:36-13 mandates that students who reside in the school district in which the charter school is located "shall be provided transportation to the charter school on the same terms and conditions as transportation is provided to students attending the schools of the district." *N.J.S.A.* 18A:36A-13. *See also, N.J.A.C.* 6A:27-3.1(d).

First, the District argues that it satisfied its legal obligation by offering the same type of transportation provided to its own remote students, namely bus tickets. If the District's involvement had ended at that point, it might well have been absolved of further financial obligation. But that is not the factual pattern presented in this case. Here the District went beyond minimum statutory requirements and voluntarily provided all other charter schools located in Jersey City with bus routes. By doing so, the District automatically triggered the statutory requirement to treat all in-district students alike.

Second, the District contends that assuming the contractual arrangements of a charter school would exceed its statutory authority. Citing *Remedial Educ. & Diagnostic Servs. Inc. v. Essex Cty. Eduational Servs. Comm'n*, 191 *N.J. Super.* 524, 529 (App. Div. 1983), *certif. den.* 97 *N.J.* 601 (1984), the District maintains that "a power or duty delegated by statute to an administrative agency cannot be subdelegated in the absence of any indication that the Legislature so intends." In *Remedial Educ.,* the Appellate Division held that an educational services commission could not legally subcontract with a private entity to perform services that the Commission itself was obligated to supply. Local school districts, on the other hand, are fully empowered to provide bus transportation either by using their own buses or by entering into contracts with bus service providers. *N.J.S.A.* 18A:39-2. *Coaches of Eight, Inc. v. Lakehurst Bd.*

Of Educ., 1978 *S.L.D.* 416 (Comm'r 1978). In fact, the District arranged such transportation services for other charter schools and would also have done so for the Charter School, were it not for the Charter School's preexisting contract.

Legislation must be construed to avoid absurd results. *In re Expungement Application of P.A.F.*, 176 *N.J.* 218, 222 (2003). Courts presume that the Legislature intended to achieve a reasonable result. *Simpkins v. Saiani*, 356 *N.J. Super.* 26, 36 (App. Div. 2002). Fundamentally, the Legislature envisioned that local districts would pay the transportation costs of remote resident students attending charter schools. The problem here was caused by the District's last-minute change in transportation policy. When the District denied its original request for busing, the Charter School was forced to make its own alternative arrangements to bus its students. It would be absurd for the one charter school that felt strongly about the safety issue to be deprived of payment of busing costs, while the other charter schools have their busing paid for by the District. Similarly, it makes no sense for the District to take advantage of its own inefficiencies to avoid its statutory obligation, even though the District would have paid more for the same service if it had acted with appropriate dispatch. Contrary to the District's contention, the Charter School is not asking for payment to be made to an intermediary. Rather, the Charter School is merely seeking to enforce the District's statutory duty to provide bus service on the same basis as other charter schools located in Jersey City.

Order

It is **ORDERED** that the District promptly pay the sum of $24,592 to Hudson County Transport, Inc. in full payment for services rendered to the Charter School from September 5 to December 5, 2001.

APPENDIX

List of Witnesses

1. Carletta Martin-Martin-Goldston, head of school, Jersey City Community Charter School

2. Stanley Wojcik, acting transportation coordinator, State-Operated School District of Jersey City

List of Exhibits

No.	Description
P-1	Copy of memorandum to charter school administrators from Dr. Charles T. Epps, Jr., dated January 9, 2001
P-2	Copy of letter to Jersey City Charter School directors from Dr. Charles T. Epps, Jr., dated August 20, 2001
P-3	Copy of letter to Dr. Charles T. Epps, Jr. from Carletta Martin-Martin-Goldston, dated August 24, 2001
P-4	Copy of letter to Hudson Company Transport from Carletta Martin-Martin-Goldston, dated July31, 2001
P-5	Copy of letter to Dr. Charles Epps from Carlotta Martin-Martin-Goldston, dated September 28, 2001
P-6	Copy of letter to Carletta Martin-Martin-Goldston from Charlotte Kitler, Esq., dated October 12, 2001
P-7	Copy of letter to Carletta Martin-Martin-Goldston from Anthony M. Tozzi Jr., Esq., dated December 20, 2001

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

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

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

June 24, 2003
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

June 27, 2003
DATE

M. Kathleen Duncan
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 30 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

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R-1 Copy of letter to Alan Manzo from Stanley W. Wojcik, dated August 29, 2001

R-2 Copy of letter to Alan Manzo from Stanley W. Wojcik, dated September 4, 2001

R-3 Copy of Jersey City Community Charter School bidding documents, dated July 30, 2001

R-4 Copy of State-Operated School District of Jersey City bidding documents, dated October 18, 2001

OAL DKT. NO. EDU 5218-02
AGENCY DKT. NO. 128-4/02

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

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions of the State-operated School District and reply thereto of the Charter School were timely filed pursuant to *N.J.A.C.* 1:1-18.4 and fully considered by the Commissioner in his determination herein.

The District's exceptions essentially recast and reiterate its arguments advanced below which the Commissioner finds were fully and fairly addressed by the Administrative Law Judge (ALJ) in his Initial Decision and, therefore, do not require further elaboration here. To the extent the District additionally challenges the ALJ's credibility determinations with respect to the testimony of the Charter School's Director (Carletta Martin-Goldston) vis-à-vis that of the District's Acting Transportation Coordinator (Stanley Wojcik), the Commissioner is satisfied, based on the record before him, that the ALJ appropriately measured the plausibility of the testimony content in making his credibility assessments and reaching his factual findings and conclusions. It is also noted that credibility determinations of the finder of fact, who observed

the witnesses first-hand, are to be accorded great weight in the absence of any meaningful basis on which to challenge them. This is especially true where, as here, transcripts of the proceedings were not provided to the Commissioner. *See In re Morrison*, 216 *N.J. Super.* 143, 157-158 (App Div. 1987) and *N.J.S.A.* 51:14B-10(c).

Upon his full and independent review of the record, the Commissioner concurs with the findings and conclusions of the ALJ for the reasons clearly set forth in his decision.

Accordingly, the Initial Decision of the OAL is adopted. The District is hereby ordered to pay Hudson County Transport, Inc., $24,592 for transportation services provided to Jersey City Community Charter School for the period September 5, 2001 to December 5, 2001.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 8|08|03

Date of Mailing: 8|12|03

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

438-03

438-03

SUNLIGHT ELECTRIC COMPANY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BERGENFIELD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

August 8, 2003

OAL DKT. NO. EDU 1218-03
AGENCY DKT. NO. 5-1/03

SUNLIGHT ELECTRIC COMPANY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BERGENFIELD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The within matter concerns a challenge by petitioner Sunlight Electric Company, the lowest responsive bidder in two consecutive public bids for the project of electrical/technology renovations for the Bergenfield School District, to the Board's refusal to award Sunlight Electric Company the contract for the project.

This matter was originally brought as an Order to Show Cause before the Law Division of Superior Court, Bergen County. By Order of December 13, 2002, the Court denied petitioner's request for a stay of the bid award and forwarded the matter to the Commissioner pursuant to the doctrine of primary jurisdiction. On January 15, 2003, the Commissioner transmitted this matter to the Office of Administrative Law for hearing on petitioner's application for emergent relief.

On January 28, 2003, the Administrative Law Judge (ALJ) heard oral argument on the emergent relief application and issued an Order[1] on February 2, 2003 temporarily enjoining the Board from awarding and/or entering into any contract regarding the project until after conclusion of hearing on the merits of petitioner's claim. Hearings were subsequently held on March 4 and March 20, 2003, and the record closed on May 15, 2003. The ALJ issued an Initial Decision on June 25, 2003.

[1] It is noted that the ALJ did not transmit this Emergent Relief Order for the Commissioner's review as set forth at *N.J.A.C.* 1:1-12.6(i).

Prior to the Commissioner's consideration of this matter, the parties entered into the within Settlement Agreement. Upon review of the record and the terms of the settlement, the Commissioner finds that the parties have voluntarily agreed to the settlement and that the settlement fully disposes of all issues in controversy and is consistent with law.[2]

Accordingly, the Commissioner approves the Settlement Agreement as the final decision in this matter and the matter is dismissed, subject to compliance with the terms of the settlement. In light of this determination, the Commissioner does not reach to the conclusions in the Initial Decision. However, the Commissioner strongly cautions the Bergenfield Board and all boards of education where specific projects have been funded through the Educational Facilities Construction and Financing Act, *N.J.S.A.* 18A, Chapter 7G, such as the project herein, and where the voters have approved additional tax dollars for a specified purpose and the Department has approved said project based on the board's representation that the funds will be utilized solely to fund that project, that the approved funds may not be utilized by a board of education for a new project which departs from that approved by the taxpayers and the Department.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of decision: 8|08|03

Date of mailing: 8|12|03

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[2] The Commissioner points outs that the within Settlement Agreement is signed by Sun Kim, President of Sunlight Electric Company, on behalf of petitioner, and Board President Steve Stavrou, on behalf of the Board. On August 7, 2003, Mr. Kim certified that he is a principal in Sun Electric Company, a close corporation, and, thus, authorized to sign the settlement on behalf of petitioner Sunlight Electric Company. By resolution of July 16, 2003, the Board authorized the Board President, Steve Stavrou, to execute the Settlement Agreement in this matter on behalf of the Board.

[3] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

SCHENCK, PRICE, SMITH & KING, LLP
10 Washington Street
P.O. Box 905
Morristown, New Jersey 07963-0905
(973) 539-1000
Attorneys for Respondent
Bergenfield Board of Education

SUNLIGHT ELECTRIC COMPANY,	STATE OF NEW JERSEY COMMISSIONER OF EDUCATION
Petitioner,	
v.	OAL Docket No. EDU-1218-03 Agency Ref. No. 5-1/03
BOARD OF EDUCATION OF THE BOROUGH OF BERGENFIELD OF BERGEN COUNTY,	**SETTLEMENT AGREEMENT**
Respondent.	

The respondent, Bergenfield Board of Education (hereinafter, the "Board"), with its administrative offices located at 100 Prospect Avenue, Bergenfield, New Jersey, and the petitioner, Sunlight Electric Company, Inc. (hereinafter, "Sunlight"), with its principal place of business located at 41 Ray Avenue, Leonia, New Jersey, hereby set forth their full and complete agreement, as follows:

WHEREAS, Sunlight filed a petition challenging the Board's rejection of its bid for the electrical upgrades at the Roy W. Brown Middle School, the Jefferson Elementary School and the Hoover Elementary School; and

WHEREAS, a hearing on the matter proceeded before the Office of Administrative Law resulting in an Initial Decision adverse to the Board; and

WHEREAS, the Board disagrees with the Initial Decision; and

WHEREAS, the matter is pending before the Commissioner of Education for review; and

WHEREAS, the parties wish to resolve the above captioned matter amicably, without the further litigation expense of review and appeal;

WHEREFORE, the parties agree to the following terms and conditions in full resolution of all matters and issues raised in the above captioned matter:

(1) The Board agrees to award contracts to Sunlight for the completion of the electrical upgrades work at Roy W. Brown Middle School, Jefferson Elementary School, and Hoover Elementary School.

(2) Sunlight agrees to withdraw and/or voluntarily dismiss its petition pending before the Commissioner of Education.

(3) Sunlight hereby releases, waives and gives up any and all claims, rights and damages, which it may have against the Board, its members, its employees, and agents, including those claims which Sunlight may not be aware, arising out of or otherwise related to the above captioned petition, which were included in the petition and/or settlement discussions or resulting from anything which has happened up to now or which failed to occur, including all claims which could not have been brought in the current forum due to jurisdictional reasons.

(4) This Agreement shall not constitute, be interpreted, construed or used as evidence of any admission, fact, law, responsibility, wrongdoing or liability on behalf of the parties.

(5) The parties acknowledge and expressly agree that the Agreement shall be subject to plain language interpretation and that no provision shall be interpreted in favor of one party over the other party.

(6) This Agreement constitutes the full and complete agreement of the parties hereto and supercedes any prior or contemporaneous representations, whether oral or written. This Agreement may not be modified or amended except by written instrument signed by all parties hereto.

(7) If any of the terms of this Agreement are found to be found illegal or void under State and Federal law, then the remainder of the Agreement not affected will remain in full effect.

(8) The Agreement is subject to the approval by the Commissioner of Education and the Bergenfield Board of Education.

SUNLIGHT ELECTRIC CO.

SUN KIM, PRESIDENT

Dated: 7/21/03

WITNESS:

Dated:

BERGENFIELD BOARD OF EDUCATION

STEVE STAVROU, BOARD PRESIDENT

Dated:

455-03

#455-03

J.K., on behalf of minor child, L.K.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE HUNTERDON CENTRAL REGIONAL SCHOOL DISTRICT, HUNTERDON COUNTY,	:	
RESPONDENT.	:	

August 11, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8010-99

AGENCY DKT. NO. 265-9/99

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

Petitioner,

v.

BOARD OF EDUCATION OF THE HUNTERDON CENTRAL REGIONAL SCHOOL DISTRICT, HUNTERDON COUNTY,

Respondent.

Stephen Latimer, Esq., for petitioner (Laughlin & Latimer, attorneys)

Gregory J. Giordano, Esq., for respondent (Lenox, Socey, Wilgus, Formidoni & Casey, attorneys)

Record Closed: June 30, 2003 Decided: July 2, 2003

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

This matter was submitted to the Office of Administrative Law on September 7, 1999 pursuant to a petition for emergent relief seeking a ruling in respect to the imposition by the respondent board of five Saturday detentions with varying additional burdens. On September 31, 1999, my office issued a ruling and order granting the request for emergent relief. That opinion was upheld by the Commissioner of Education on October 4, 1999.

Following the resolution of the emergent relief issue, I have never heard from the parties again. Accordingly, it is **ORDERED** that the appeal in the foregoing matter be and is hereby **DISMISSED** for failure of the petitioner to responsibly, vigorously and reasonably pursue the appeal.

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

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

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

7/02/03
DATE

STEVEN C. REBACK, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

7/2/03
DATE

Mailed to Parties:

JUL 9 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cmo

OAL DKT. NO. EDU 8010-99
AGENCY DKT. NO. 265-9/99

J.K., on behalf of minor child, L.K.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE HUNTERDON CENTRAL REGIONAL SCHOOL DISTRICT, HUNTERDON COUNTY,	:	
RESPONDENT.	:	

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

Upon review, the Commissioner concurs that dismissal of this matter is warranted by petitioner's failure to pursue her claim subsequent to the Commissioner's October 4, 1999 ruling on her application for emergent relief.

Accordingly, for the reasons expressed therein, the Initial Decision is adopted as the final decision in this matter.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Issue: August 11, 2003

Date of Mailing: August 13, 2003

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Commissioner decisions are deemed filed three days after the date of mailing to the parties.

456-03

#456-03

ELLEN M. STILLITANO, DENISE SMITH, VINCENT P. HAMMOND AND ROSE COPELAND,

PETITIONERS,

V.

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

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

August 11, 2003

457-03

F.M., on behalf of minor child, R.K.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning uncle challenged the Board's residency determination that his nephew, R.K., was not entitled to a free public education in the District. R.K.'s Palestian parents live in a refugee camp in Syria.

In light of the record and the testimony of witnesses, the ALJ concluded that petitioner satisfied the requirements of *N.J.S.A.* 18A:38-1(b) in that petitioner was domiciled within the District; that he was supporting R.K. *gratis*; that the parents were incapable of supporting R.K. in their own country due to economic hardship; and that the minor child was not residing with petitioner solely for the purposes of receiving a free public education in the District. Therefore, the ALJ concluded that R.K. met the requirements of an affidavit student and was entitled to a free public education in the District.

The Commissioner adopted the Initial Decision as his own.

August 11, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8109-01
AGENCY DKT. NO. 375-9/01

F.M., ON BEHALF OF MINOR CHILD, R.K.,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,
Respondent.

Richard A. Shackil, Esq., for petitioner

Anthony V. D'Elia, Esq., for respondent (Chasan, Leyner, Bariso & Lamparello, attorneys)

Record closed: June 11, 2003 Decided: July 2, 2003

BEFORE **ROBERT J. GIORDANO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, F.M., appealed the determination by respondent, Board of Education of the City of Clifton (Board/District), that his minor nephew, R.K., was not entitled to a free public education in the District. Petitioner claimed that the minor child was entitled to a free public education pursuant to *N.J.S.A.* 18A:38-1(b). Respondent answered that

the application had not shown family or economic hardship or otherwise satisfied the requirements of *N.J.S.A.* 18A:38-1b(1). On September 5, 20001, the Board denied petitioner's application to have his nephew, R.K., admitted to school in the District. On September 25, 2001, the petitioner filed a petition pursuant to *N.J.S.A.* 18A:38-1 concerning this residency dispute. R.K. was permitted to attend school in the District during the pendency of the appeal, commencing September 26, 2001. On November 7, 2001, the Board filed an answer denying the allegations in the petition, with a counterclaim for tuition.

On November 16, 2001, the Department of Education transmitted the matter to the Office of Administrative Law for a hearing as a contested case. A hearing was scheduled for August 8, 2002. At the hearing, petitioner advised he would be seeking legal guardianship of the minor child, R.K. The matter was adjourned to October 17, 2002. Petitioner requested an adjournment. Another scheduled hearing for December 10, 2002 was also adjourned to February 27, 2003. Petitioner requested another adjournment so that he could follow up on the guardianship application. Thereafter, petitioner retained the services of an attorney and the matter was set down for hearing on May 30, 2003. The record remained open for the submission of posthearing briefs and additional documentation.[1] On June 5, 2003, the District submitted the affidavit of tuition charges. Posthearing submissions were received by June 11, 2003 and the record was closed.

STIPULATED FACTS

The parties agreed to the following stipulated facts:

1. The student is R.K.

2. R.K. was born on January 1, 1985 in Damascus, Syria.

[1] Respondent submitted the affidavit of Karen Perkins, Business Administrator, on June 5, 2003. The affidavit is marked as Exhibit R-1.

3. Since September 2001, R.K. has lived in the United States with his maternal uncle, F.M., in Clifton, New Jersey.

4. F.M. filed an application by a Clifton resident for R.K.'s admission to the Clifton Public Schools (J-1) on September 4, 2001.

5. The Board advised F.M. of its decision to deny the application for R.K.'s admission to the Clifton Public Schools by letter dated September 5, 2001 (J-2).

6. F.M. filed an appeal of the denial on September 25, 2001.

FACTUAL DISCUSSION

Testimony

F.M.

F.M. testified first. He was born in Damascus, Syria. He came to the United States when he was twenty-one years old on January 28, 1978. He became a United States citizen fourteen years ago. He resides in a home owned by him in the City of Clifton. He lives there with his three daughters, ages six, eight and thirteen. They all attend the Clifton Public Schools. Also living with him is his nephew, R.K., age eighteen.

The witness testified that he has been back to Damascus nine or ten times since moving here. He was last there in July 2002. He visits his sister, the mother of R.K. She and her husband live there with three other children, two daughters, ages 22 and 17, and a son, age 8. F.M. has known his brother-in-law since they were children in Syria. He testified that the family is considered by the government to be Palestinian.

F.M. identified a document as a transcript from the Civil Status Record (P-1), translated from Syrian to English, as R.K.'s birth certificate. He obtained this document from his sister. The document identifies R.K. as a Palestinian citizen residing in the Syrian Arab Republic since birth.

The witness testified that Palestinians living in Syria reside in refugee camps. There are few jobs and poor housing. His sister and brother-in-law live with their family in a refugee camp. The brother-in-law is a plumber. There is little or no work for him because he is Palestinian. Being a Christian also makes things difficult for them. F.M. explained that his sister's family lives on the equivalent of $100 per month. They have no car.

R.K.'s family live in a one-room apartment in Syria. There is one bathroom shared by three families. His brother-in-law cannot support the family. He sent R.K. to live with the witness. F.M. testified that he provides all the support for R.K. He feeds him and clothes him. F.M. explained that R.K. came on a visitor's visa. He has no legal status in the United States.

The witness testified that he tried to obtain legal guardianship of R.K. He was unable to explain the steps he took to do so, but he indicated that he did not or could not follow up on that matter. He never went back to finalize efforts to obtain guardianship.

R.K.

The student lives with his uncle, F.M. He came to the United States in 2001, during the summer before school started. His father could not take care of him. He told R.K. that he would ask his uncle to take care of him. The witness testified that his family of six lived together in one room. His father was a plumber helper. It is hard to earn money in Syria. The work is not steady there.

R.K. testified that the other students in Syria treated him differently, because he is Palestinian. They made fun of him. Here, in the United States, he is a good student. His grade average is about an 85 percent. He will be a senior next year at Clifton High School. His uncle is his only relative in the United States.

FINDINGS OF FACT

Based on the testimonial and documentary evidence presented, and having had the opportunity to observe the demeanor of the witnesses and to assess their credibility, I make the following **FINDINGS** of **FACT**:

1. The parents of R.K. live in a refugee camp in Damascus, Syria, with their three other children.

2. They live in a one-room apartment. Three families share the bathroom.

3. R.K.'s father, a plumber by trade, has little work, earning approximately $100 per week. He has difficulty supporting his family in Syria.

4. The family has no car.

5. R.K.'s parents cannot adequately support or provide care for R.K. due to economic hardship.

6. F.M. is a citizen of the United States and a legal resident of the City of Clifton.

7. Since living with his uncle, F.M., in September 2001, R.K. has not been back to Syria.

8. F.M. receives no remuneration for caring for R.K. and provides support and care for him *gratis.*

9. R.K. does not intend to return to Syria.

10. R.K. has attended school in the District since September 26, 2001 to the present.

11. The annual per pupil cost for the students at Clifton High School for 2001-2002 was $7,727.09. R.K. attended school in the district for 167 days in 2001-2002, for a *per diem* cost of $46.27 for the 2001-2002 school year.

12. The annual cost for the students at Clifton High School for 2002-2003 was $6,925.52. Based on 180 days for the entire school year, the *per diem* cost for the 2002-2003 school year is $41.72.

LEGAL DISCUSSION

The State of New Jersey provides that "public schools shall be free to ... any child who is domiciled within the school district." *N.J.S.A.* 18A:38-1(a). The domicile of a minor child follows that of his parents. *See V.R. on behalf of A.R. v. Bd. of Ed. of Hamburg*, 2 *N.J.A.R.* 283, 286. The applicable statute, *N.J.S.A.* 18A:38-1(b)1, reads in pertinent part:

> Any person who is kept in the home of another person domiciled within the school district and is supported by such other person gratis as if he were such other person's own child, upon filing by such other person with the secretary of the board of education of the District, if so required by the board, a sworn statement that he is domiciled in the District and is supporting the child gratis and will assume all personal obligation for the child relative to school requirements and that he intends so to keep and support the child gratuitously for a longer time than merely through the school term, and a copy of his lease if a tenant, or a sworn statement by his landlord acknowledging his tenancy if residing as a tenant without a written lease, and upon filing by the child's parents or guardian with the secretary of the board of education a sworn statement that he is not capable of supporting or providing care for the child due to a family or economical hardship and that the child is not residing with the resident of the District solely for the purposes of receiving a free public education in the District. The statement shall be accompanied by documentation to support the validity of the sworn statement, information from or about which shall be supplied only to the board and only to the extent that it directly pertains to the support or nonsupport of the child. If in the judgment of the board of education the evidence does not support the validity of the claim by the resident, the board may deny admission to the child.

Therefore, the evidence must show that: (1) petitioner is domiciled within the District; (2) petitioner is supporting R.K. *gratis*; (3) R.K.'s parents are not capable of supporting or caring for her due to family or economic hardship; and (4) R.K. is not residing with petitioner solely for the purpose of receiving a free public education in the District. Petitioner has the burden of proof to demonstrate family or economic hardship.

The position of the Board is that F.M. has not established that the parents have shown that they were incapable of supporting or providing care for their children due to a family or economic hardship. In *J.B. v Bd. of Educ. of Tp. of Ocean*, 96 *N.J.A.R. 2d* (EDU), *rev'd, Comm'r of Educ.* (March 25, 1996), *rev'd, State Bd. of Educ.* (Oct. 2, 1996), *on remand, Comm'r of Educ.* (Feb. 11, 1997), the Commissioner found that family strife had a detrimental affect on the student suggesting that the "parents, sadly, are incapable of meeting his emotional, social, and developmental needs." Having determined by prior decision that these unique and compelling circumstances constitute family hardship, the Commissioner clarified on remand that for the above reasons, J.B.'s parents were not presently capable of providing care for him due to such family hardship pursuant to *N.J.S.A.* 18A:38-1(b)(1). *Id.*

Where no hardship exists, the law requires that the resident shall be assessed tuition prorated to the time of the student's ineligible attendance in the school district. The statute, *N.J.S.A.* 18A:38-1(b)1, further reads in pertinent part:

> Tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance and shall be collected in the manner in which orders of the commissioner are enforced.

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

CONCLUSIONS

In the instant matter, the Board maintained that no family hardship was shown. The undisputed facts indicate that the situation is to the contrary. The family hardship here is that the parents were unable to provide sufficiently for R.K. to the extent that he came to a foreign country to live with an uncle so that he would have enough to eat and a decent place to live. There is no evidence that R.K. moved for the sole purpose of attending school in the District. Indeed, R.K. moved there primarily because the uncle lived there, not to avoid attending school in another district in the State. Moreover, there is no other district in the State where this child is eligible to attend school under *N.J.S.A.* 18A:38-1. I **CONCLUDE** that the compelling circumstances in this case rise to a level of family and economic hardship that meets the standard of the statute. "To hold otherwise harms a party the Legislature never meant to penalize ... and overlooks the substantial state interest in ensuring the education of all its children ... ." *Gundersen v Bd of Educ of the City of Brigantine*, 95 *N.J.A.R. 2d* (EDU) 39, 42. In finding hardship in a child's reaction to marital conflict, the Commissioner quoted his previous decision with approval. "In interpreting a statute, the Commissioner must look to the fundamental purpose for which the legislation was enacted, and where a literal reading will not accord with that purpose, the spirit of the law will control over its letter. Moreover, the meaning of a statute is to be gathered from the mischief sought to be eliminated as well as the proposed remedy."

The amendments to *N.J.S.A.* 18A:38-1

> ... were intended to ease the burden on local boards of education attempting to remove illegally enrolled students, specifically those living with a parent or guardian who claims to be, but is not, domiciled within the district, and those living with a person other than the parent or guardian in order to obtain the benefit of a free public education in a district other than that of their entitlement by parental domicile ... . The intent of the "affidavit student" law is not now, and never has been, to deny an education to a child whose living arrangements may not be as contemplated by the statutory scheme ... .
>
> [*R.H. v Ocean Co Bd of Educ.*, 96 *N.J.A.R. 2d* (EDU) 628, *citing Gundersen, supra.*]

The undisputed evidence showed that petitioner has taken his nephew into his home indefinitely to provide him with the necessities of life that the minor student's parents were not able to provide him in Syria. Hence, there was no goal of the family to move from one school district in New Jersey to another, which was a major reason for the stringent amendments to the law. *See N.J.S.A.* 18A:38-1, Legislative Statement. There was no evidence that this arrangement was entered into fraudulently for the purposes of obtaining a free public education in the District.

Based on the above I **CONCLUDE** that petitioner has satisfied the requirements of *N.J.S.A.* 18A:38-1(b) in that petitioner is domiciled within the District, is supporting his nephew *gratis*, the parents are incapable of supporting him in their own country due to economic hardship, and that the minor child is not residing with petitioner solely for the purposes of receiving a free public education in the District. Therefore, I **CONCLUDE** that R.K. meets the requirements of an affidavit student pursuant to *N.J.S.A.* 18A:38-1(b) and is therefore entitled to a free public education in the District.

ORDER

For all of the foregoing reasons, it is hereby **ORDERED** that the determination of the Board of Education of the City of Clifton is and shall be **REVERSED**. The petitioner's request to allow R.K. to attend school in the respondent District is **GRANTED**. The respondent's counterclaim for tuition is hereby **DISMISSED**.

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

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

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

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

7/2/03
DATE

ROBERT J. GIORDANO, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

7/2/03
DATE

M. Kathleen Duncan/CJ

Mailed to Parties:

JUL 10 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

md

APPENDIX

WITNESSES

For Petitioner:

F.M.

R.K.

EXHIBITS

Joint:

J-I Application by Clifton Resident, September 4, 2001

J-2 Letter, Board to F.M., September 5, 2001

For Petitioner:

P-1 Transcript from Civil Status Record, March 6, 2003

For Respondent:

R-1 Affidavit of Karen Perkins, June 2, 2003

OAL DKT. NO. EDU 8109-01
AGENCY DKT. NO. 375-9/01

F.M., on behalf of minor child, R.K.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon careful and independent review of the record in this matter, and based on the Administrative Law Judge's (ALJ) credibility assessments, *N.J.S.A.* 52:14B-10(c), the Commissioner concurs that petitioner has demonstrated that R.K. is entitled to attend school in the Board's district, free of charge, pursuant to *N.J.S.A.* 18A:38-1 *et seq.*

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

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 8/11/03

Date of Mailing: 8/14/03

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

474-03

#474-03

TOWNSHIP OF MARLBORO,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE FREEHOLD REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY, AND JAMES WASSER, SUPERINTENDENT,	:	
RESPONDENTS.	:	
R.W., on behalf of minor child, M.W.,	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION
V.	:	
BOARD OF EDUCATION OF THE FREEHOLD REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY, AND MICHAEL MADDALUNA, MONMOUTH COUNTY SUPERINTENDENT OF SCHOOLS,	:	
RESPONDENTS.	:	
AND	:	
J.D. AND J.D., on behalf of minor child, S.D.,	:	
PETITIONERS,	:	
V.	:	
BOARD OF EDUCATION OF THE FREEHOLD REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	
RESPONDENT.	:	SYNOPSIS

In consolidated matter petitioning Board and parents alleged respondents' redistricting plan was an improper exercise of the Board's discretionary authority and was arbitrary, capricious and unreasonable.

The ALJ found that petitioners did not meet their burden of proving that the Board acted improperly in its consideration of and action approving the Student Attendance Plan for school years 2003-04 through 2006-07. The ALJ ordered the consolidated petitions dismissed.

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

August 14, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 659-03

AGENCY REF. NO. 400-12/02

TOWNSHIP OF MARLBORO,

Petitioner,

v.

BOARD OF EDUCATION OF THE FREEHOLD REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY, AND JAMES WASSER, SUPERINTENDENT,

Respondent.

OAL DKT. NO EDU 660-03

AGENCY REF. NO. 402-12/02

R.W., O/B/O M.W.,

Petitioner,

v.

BOARD OF EDUCATION OF THE FREEHOLD REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY, AND MICHAEL MADDALUNA, MONMOUTH COUNTY SUPERINTENDENT OF SCHOOLS,

Respondent.

OAL DKT. NO. EDU 2933-03
AGENCY REF. NO. 147-5/03

J.D. AND J.D., O/B/O S.D.,

Petitioners,

v.

BOARD OF EDUCATION OF THE FREEHOLD REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,

Respondent.

Lance J. Kalik, Esq., for petitioner, Township of Marlboro (Riker, Danzig, Scherer, Hyland & Perretti, attorneys)

Allan Weinberg, Esq., for petitioner, R.W.

J.D. and J.D., petitioners, *pro se*

Nathanya G. Simon, Esq., for respondents, Board of Education of the Freehold Regional High School District and James Wasser, Superintendent (Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Sarah G. Crowley, Deputy Attorney General, for respondent Michael Maddaluna (Peter G. Harvey, Attorney General of New Jersey)

Record Closed: July 1, 2003 Decided: July 3, 2003

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners request the Commissioner of Education to nullify respondent's redistricting plan scheduled for implementation for the 2003-2004 school year through 2006-2007 school years. The petitions and answers were transmittal to the Office of Administrative Law on February 27 and May 29 for hearing as a contested case pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13. The cases were consolidated for all purposes by Order Consolidating

Cases entered June 9, 2003. On motion made on behalf of respondent Michael Maddaluna for summary decision, and with the consent of counsel for R.W., claims against respondent Michael Maddaluna were dismissed.

A telephone pre-hearing conference was conducted on April 25, at which time June 13, 20, 23, 24, 27, 30 and July 1, 2, and 3 were fixed as hearing dates. A subsequent in-person prehearing conference was held on June 6, at which time claims against Michael Maddaluna were dismissed. In addition, respondent, Township of Marlboro requested that R.W.'s matter be dismissed as moot because M.W. was scheduled to attend the specialized Business Administration program conducted at the Marlboro High School Learning Center. Respondent's motion was denied.

Because discovery was not completed the June 13 hearing was adjourned. Counsel for the Township of Marlboro issued subpoenas to Board of Education members, Bonnie Sue Rosenwald, Bunny Hummer and Patricia Horwath, requiring their attendance to testify on behalf of the Township of Marlboro. Counsel for respondent move to quash the subpoenas as an inquiry into the deliberative processes of the Board of Education. Counsel's motion to quash the subpoenas was granted.

The hearing commenced on June 20 and continued June 23 and 24. At the conclusion of petitioners' case on June 24, respondent requested the opportunity to furnish legal memorandum in support of a motion for involuntary dismissal. Memoranda were submitted by the parties and oral argument was received on July 1. At the conclusion of the argument, respondents' motion was granted.

Witnesses who testified and exhibits admitted into evidence are listed in the Appendix. The hearing record closed upon the issuance of the oral order of involuntary dismissal on July 1, 2003.

FACTUAL CONSIDERATIONS

For the purposes of considering a motion for involuntary dismissal all of the evidence submitted by the party opposing the motion, together with the legitimate inferences there from, must be accepted as true. Accordingly, for the purposes of this initial decision, the following is accepted as fact:

Councilman Barry Denkensohn testified that he was a member of the Township Council of the Township of Marlboro, serving in his second four-year term. Before joining the Council Denkensohn was a member of the Marlboro Township K-8 Board of Education.

In 2002 the Township Council adopted a Resolution "Re-Establishing the Advisory Committee on Education (ACE)" and appointed Denkensohn, Mayor Matthew Scannapieco, and 11 other concerned and knowledgeable residents as its members (Exhibit PM-1). Denkensohn stated Marlboro officials and residents became aware of the discussions among the Freehold Regional High School Board of Education ("Board") to redistrict the placement of pupils among the 6 high schools of the regional district.

A public forum was called in January 2002, with hundreds of parents converging at the Township Hall, to discuss the redistricting situation. ACE was a result of the public forum. One of the major areas of public outcry was the sentiment that Marlboro voters had been led in 1999 to believe that passage of the Board's December 14, 1999 Referendum and the ensuing enlargement of Marlboro High School would negate the redistricting of any Marlboro resident-student to another high school in the regional district. In particular, Denkensohn noted that the brochure published by the Board (Exhibit PM-2) explained that the project included for Marlboro High School, "add capacity by expanding the school with additional classrooms and labs to meet the growing student involvement." The referendum passed the 8-municipality vote by 26 votes; Marlboro voters approved the new construction by 391 votes. Before construction began on Marlboro High School, redistricting was again in the public discussion.

ACE met at least once a month during 2002. On May 20, 2002, ACE issued a Public Forum Report including 8 short-term recommendations and 4 long-term recommendations

(Exhibit PM-3). ACE found no immediate overcapacity in Marlboro High School. Should "attendance reassignment" occur, the reassignments should be voluntary among all of students of the regional district. The Learning Centers should be expanded throughout regional district, both in depth of curriculum and into full-time programs. Further demographic studies should be undertaken.

Denkensohn presented the confidential 1998 Redistricting Study for the Freehold Regional High School District (Exhibit PM-4). The confidential Redistricting Study was not adopted by the Board. But it discussed 5 separate redistricting options. By way of comparison, the Final Recommendation on Student Attendance Plan for school years 2003-04 through 2006-07 (Exhibit PM-5) ("Plan") contained only 1 option – mandatory redistricting. At the meeting of the Board on September 9, 2002 the demographer spoke only of population statistics based on enrollment data. The likelihood of the student entering a non-public high school was not explored. Denkensohn spoke with Carol Fox and Bonnie Rosenwald, the 2 Marlboro-resident members on the Board's Student Attendance Advisory Committee. Fox told Denkensohn that she was "disturbed" with the process used by the Committee, that the Committee did not respect Fox's ideas, disregarded those ideas, and members told Fox to rely on faith. Fox's cover letter to the Student Attendance Committee (though not admitted into evidence because of the lack of identify of person handwriting marginal notes and corrections, is transmitted for a completed record) is Exhibit PM-6.

Denkensohn received numerous phone calls from Marlboro residents objecting to the Plan. The primary complaint was the omission of voluntarily redistricting from the Board's considerations. A petition was circulated throughout Marlboro (Exhibit PM-7) citing opposition to involuntary redistricting while Marlboro High School while current capacity existed in the high school, support of changing the regional high school tax assessment formula, and support of a re-examination of the Board Vote Appointment in accordance with Census 2000 results. Two thousand five hundred signatures are affixed to the petitions.

Lastly, Denkensohn discussed the adverse impact the redistricting will have on the Marlboro community. Because Marlboro has no downtown business district the high school is the focal point of Marlboro. The Plan divides the community.

On redirect, Denkensohn pointed to an approved senior citizen housing development and a master plan designed to slow growth to question the accuracy of the suggested school population figures.

Jerome Liebers and Susan Shakked are 2 Marlboro residents who live on streets affected by the Plan. (Exhibit PM-5, addendum #17). Liebers's older children graduated from Marlboro High School. His youngest son is most upset because he cannot follow in the footsteps of his siblings. Liebers believes the Board did not consider the Plan's impact or in-coming students. Shakked's daughter cannot understand the Board's decision to affect only a small number of children. Only a "handful" of the graduating class of 727 from the Middle School are going to Colts Neck High School. Shakked's daughter is a member of a 14-girl dance team; all but 2 of the girls are going to Marlboro High School. In order to keep his family in Marlboro schools, Shakked's husband commutes to Brewster, New York for work. The Shakked family had been active in all of the activities at Marlboro High School, especially during their older daughter's years in the school. Shakked's daughter has been "miserable" realizing her friends are going to Marlboro High and she has to go to Colts Neck. Colts Neck does not abut the area affected by the Plan. At the time the Plan was considered, it was thought that 114 students would be moved; but, considering the children going to the Learning Center and private/parochial schools, Shakked believes the number of students going to Colts Neck High School will be 40.

Lauren and Scott Preiss described the portion of Marlboro being assigned to Colts Neck High School as a "sliver." They left Brooklyn after careful study to locate a beautiful place to live and an exceptional school system. Their daughter who just graduated from the Middle School is "very, very upset." They believe the Board was arbitrary in its decision; all options were not explored, Ryan Road is not the area of Marlboro nearest to Colts Neck High School, and it is unfair to send students into another school where all of the other students already know each other. Scott Preiss rejected a job transfer to Chicago in order to keep his family in Marlboro's schools. Lauren Preiss thought the Board was not listening to the comments of parents and children made at Board meetings. Preiss indicated the areas of Marlboro affected by the planned redistricting of high school freshman to Colts Neck High School on an enlarged map of northern Monmouth County (Exhibit PM-8). Scott Preiss thought the addition to Marlboro

High School approved in the referendum provided sufficient space to avoid any involuntary redistricting. The recommendations of ACE were not even mentioned in the Board's final plan. The Board would have better served the student had it provided for more students to attend Colts Neck High School. Had the graduating class of one of Marlboro's middle schools been sent to Colts Neck the result would have been more "palatable."

Mayor Matthew Scannapieco testified as a 24-year resident and 12 year Mayor of Marlboro. Marlboro High School is the focal point of the Township. Both the Township and the independent soccer program changed their official colors to the blue and gold of the high school. Scannapieco recalled that redistricting of Marlboro was first raised approximately 5 years ago. In 1998 a decision to not involuntarily redistrict was made. Redistricting discussions with the Board continued in 1999 when the Board's representatives explained proposed expansions of its high schools. Scannapieco had a "sense" that the expansions were to provide additional cafeteria space.

The Marlboro governing body supported the referendum. Allowing for a student population of 2400 was to provide enough space to avoid redistricting. In June 2001 the redistricting issue was raised by the Board. During the 2001 discussions, residents raised their concerns with the Mayor and Council. ACE was formed to meet with the residents and attend meetings of the Board. In January 2002 the Board's Student Attendance Advisory Committee reported to the Board its recommendations for student attendance at the regional district's high schools. After Marlboro received the report ACE members met with Superintendent Wasser and Board President Horvath, and continued meeting on a regular basis.

On June 10, 2002, Wasser presented a draft proposal Student Attendance Plan for school years 2003-04 through 2006-07 (Exhibit PM-10) with an accompanying message (Exhibit PM-9). The draft proposal noted that the recommendations were first made in January 2002 for implementation by September 2002, but implementation was delayed for a year upon Wasser's recommendation. Scannapieco continued to meet with Wasser and Horwath delaying the Board's final action until September 2002.

Scannapieco described ACE, its subcommittees for demographics, statistics and community involvement, and the May 2002 report to the Board (Exhibit PM-3). The "short term" recommendations of ACE were: 1) redistricting should not begin in 2003 because no immediate overcapacity was shown, the number relied upon by the Board were inaccurate and did not account for students going to non-public schools; 2) voluntary redistricting through expansion of the Learning Centers should have been considered, 1/3 of the population of the regional district's Learning Centers are Marlboro students; 3) Learning Centers programs should be lengthened into full-day programs to save on classrooms use; 4) a "sibling rule" should be applied to keep siblings in the same high school; 5) a full-time Grants Acquisition Consultant should be hired to seek funding for the regional district; 6.) Centralized Registration is questioned as to its cost effectiveness, impact upon real estate values, and legality; 7) meetings with the governing bodies of the member municipalities at least semi-annually; and 8) cost apportionment among the member municipalities should be reexamined.

Scannapieco and Denkensohn as Co-Chairpersons of ACE addressed a memorandum to the Board members (Exhibit PM-11) as a cover letter to the ACE report (Exhibit PM-3). They requested further study and evaluation of alternative proposals before putting the Plan into effect. The "far reaching tentacles" of the Board's measures are the destruction of Marlboro's sense of community and pride in identification with Marlboro High School.

The actual enrollment figures used at Addendum #15 of the Board's Final Student Attendance Plan (Exhibit PM-5) was disputed by Scannapieco. Because the effect of the sibling rule, Learning Centers, and enrollments in non-public schools, Scannepieco believed the figure for 2003-04 school year should be 50 or 60, rather than 114.

Scannepieco believed that members of the Board had "ulterior motives" for voting in favor of the Plan. The Board members from Marlboro and Colts Neck voted against the Plan. Two other members who had indicated their disfavor with the Plan changed their minds after a September 6 visit to Marlboro High School. They then had concerns about "safety" and "overcrowding" of the cafeteria. The Board members spoke publicly of "parity" but comments were made that it was now "Marlboro's turn." If Marlboro was not redistricted other communities wanted all of their resident-students returned to their high schools.

Scannepieco also noted that Dr. Harber in his June 3, 2002 letter to the Board (Exhibit PM-5, attachment #3) made no reference to overcrowding at Marlboro until 2006.

Petitioners next sought to have Dr. Carol R. Conger testify as an expert on the educational impact of changes of placement of students. I did not accept Dr. Conger as an expert on that topic. Counsel made a proffer into the record that had Conger been permitted to give an opinion that should the 86 students who are now slated to attend Colts Neck High School go to Marlboro High School there would be no impact upon Marlboro High School. Having visited both high school and spoken with the administration of each Conger would testify that sending the Marlboro students to Colts Neck would not improve or change to educational opportunities at either school. Conger did not observe an overcrowding at Marlboro High School. She believed there was a more sensible way to change the dynamic of the high school, and overcrowding was not a reasonable approach to the current situation. Conger would also question the lack of an in-depth analysis of enrollment projections. Conger's CV was admitted as Exhibit PM-12.

Ilisa Diamond, Dawn Censoplano, Sandor Epstein, Beth Goldberg Meyer, Jed Steinberg, and Janet Doro, all residents of the area of Marlboro affected by the Plan, and all parents of children whose plans to attend Marlboro High Schools were dashed by the Plan, testified to their child's disappointment. Diamond's daughter is an accomplished gymnast who expected to compete on Marlboro's outstanding gymnastic team. Colts Neck does not have a gymnastic team. Censoplano described her daughter's efforts to renew her social life after the illness and death of her father. The realization that all of her friends were going to Marlboro High School and she would not, gave her daughter an anxiety attack. Epstein's child grew up with siblings who participated in sports at Marlboro, graduated and moved on to attend quality colleges. Although Epstein's child will attend the Learning Center at Marlboro he thought the redistricting a small part of the town was segregation. Meyer described her son's reaction to being forced to attend Colts Neck as "extremely frantic." He was a Junior Mustang wrestler who fully expected to be a Marlboro Mustang wrestler. Now he feels "isolated" and punished.

Steinberg's older daughter just graduated from Marlboro High School where she played soccer, was president or vice-president of several clubs, and participated in fund raising, sporting,

and social events. His younger daughter looked forwarded to following her sister. She was a Marlboro Pop Warner cheerleader who looked forward to competing to become a Marlboro High School cheerleader. She does not know when cheerleader trials were or will be held at Colts Neck. Steinberg said his daughter will not discuss redistricting because she is no upset; "devastated" into quietude with the expectation of having to go to Colts Neck.

Dono is a petitioner in the matter of *J.D. and J.D., o/b/o S.D. v. Board of Education of the Freehold Regional High School District.* Dono is a Registered Nurse, certified to work as a Psychiatric Mental Health Nurse. Because she did not include herself as an expert witness in her response to discover she was precluded from offering an expert opinion. Nevertheless, Dono testified to her observations of her son who had attended Colts Neck High School for a special program during his junior high school years. When her son realized he had to return to Colts Neck his grades deteriorated to a point where graduation became marginal. He resents the fact that he cannot follow his sister at Marlboro; his sister graduated in June. He cannot comprehend why 2 of his neighbors on the block can go to Marlboro under the sibling rule but he cannot.

ANALYSIS AND CONCLUSION

In any case, upon the completion of the case by the party bearing the burden of proof, the opposing party "may move for dismissal of the action or of any claim on the ground that upon the facts and upon the law the plaintiff has shown no right to relief . . . . [s]uch motion shall be denied if the evidence, together with legitimate inferences there from, could sustain a judgment in [favor of the party with the burden of proof]." R.4:37-2(b). The judicial function on a motion for an involuntary dismissal "is quite a mechanical one." *Dolson v. Anastasia,* 55 *N.J.*2, 5-6 (1969). "The trial court is not concerned with the worth, nature or extent (beyond a scintilla) of the evidence, but only with its existence, viewed most favorably to the party opposing the motion. *Ibid.* The aforementioned Rule applies in this matter by operation of *N.J.A.C.* 1:1-1.3(a).

Petitioners' burden in this matter is the demonstration that the Board acted arbitrarily, capriciously and unreasonably in its consideration of and action approving the Student Attendance Plan for school years 2003-04 through 2006-07 (Exhibit PM-5). I Find as a matter of

Fact and I **CONCLUDE** as a matter of Law that petitioner have not met that burden in the hearing record.

Petitioners respond to respondents' motion for dismissal with argument that they have shown the Board did not consider alternative options to its course of conduct, relied upon faulty statistical information refusing to conduct a full demographic study, did not need to redistrict Marlboro students for 2003-04 school year, and failed to consider the dramatic impact of redistricting upon the affected students. The hearing record contains the March 2, 1998 "Confidential" Redistricting Study for the Freehold Regional High School District (Exhibit PM-4). The Report analyzed 5 redistricting options including the voluntary redistricting suggest by petitioners. The Report recognized that in 1998 voluntary redistricting would continue the *status quo* except for Colts Neck students and allows delay of reassignment until necessary new school construction is completed. I cannot infer that the Board did have access to this Report as it deliberated in 2002. As I mentioned during my oral opinion, the recitation of the 5 options in the September 9, 2002 Plan would have been tantamount to erecting "straw men" for destruction.

The hearing record does not contain the statistical data within the control of Marlboro Township, such as building permits, numbers of approved residential and non-residential housing, and voters records, to justify the Mayor's comment of "gross errors" in the housing reports relied upon by the Board. Likewise no credible evidence was presented upon which one could infer the number of students from Marlboro who will attend Marlboro High School and Colts Neck High School in September. Reviewing the enrollment projections contained in Appendix C of the 1998 Redistricting Study (Exhibit PM-4) with the figures in 2002 Plan (Exhibit PM-5) one sees that demographics is not an exact science; it is a tool for planning.

Discussing "need" for redistricting based upon a school physical capacity is an encroachment into the discretion of a board of education. I cannot infer that by not maximizing school population to the limit a board acted arbitrarily, unreasonably or capriciously. To the contrary one may more properly hold that filling the school to its maximum capacity is arbitrary, unreasonable and capricious.

Lastly, "dramatic impact" upon the redistricting student is alleged as a circumstance disregarded by the Board. No one seriously disagrees with the testimony of each parent at the hearing. Certainly each Marlboro child bused to Colts Neck has and will continue to have fears, anxieties and apprehensions over the new environment and classmates. I commented in my oral opinion that the Freehold Regional High School District administration has a lot of work in the next few months to unite all of the students at Colts Neck High School (and the other affected high schools) into community. I cannot infer that the Board ignored the problems of the adolescent nor that Superintendent Wasser will sidestep those problems. Might the expert testimony of Dr. Conger have established proffered premise that the change in the placement of a student adversely affects the education of that student? Without test results on that hypothesis the reliability of the premise is too questionable to be material. The expert's test to be accepted must be replicated, an error rate established, and the methods published in peer-reviewed journals.

"Arbitrary," "unreasonable," and capricious" are almost interchangeable terms, defined in *Black's Law Dictionary* as applying to actions which are determined to be "without fair, and substantial cause; that is without cause based on law," "irrational, foolish, unwise, absurd, senseless," and "willful, deliberate disregard of apparently trustworthy data." I may disagree with the Board's conclusion, but I cannot conclude its conclusion was erroneous.

Petitioners' counsel requested reconsideration of my Order quashing the subpoenas issued to Board members Bonnie Sue Rosewald, Bunny Hummer and Patricia Horwath. I deny the requested reconsideration. My reasons for quashing the subpoenas were respondents' imposition of the deliberative process privilege and the public access to all meetings of boards of education under the Open Public Meetings Act (*N.J.S.A.* 10:4-6 to –21).

Notwithstanding the admonition of U.S. Circuit Court of Appeals Judge J.L. Edmundson at the outset of the Elion Gonzalez hearing, "It is entirely possible that a judge may make a statement or ask a question that is the exact opposite of what he or she is thinking, because he or she may want to see how the lawyers respond," comment exchanged by members of a public body before the finalization of the resolution may be viewed as statements or questions of

absolute fact. To later question those statement is unfair to the speaker. Board members must have the ability to fully and frankly discuss all matters on the Board agenda.

Secondly, with minutes of all public meetings a requirement under the Open Public Meetings Act and the availability of those minutes to eventually public scrutiny, counsel could have obtained the official record of Board deliberations.

I emphasize that my discussion is based entirely upon the hearing record and with any input from the respondents except for petitioners' exhibits.

ORDER

Accordingly, for all of the foregoing reasons, I **ORDER** that respondents' motion for involuntary dismissal of the three consolidated matters herein by **GRANTED.** I further **ORDER** that the petitions of Township of Marlboro, R.W., o/b/o M.W., and J.D. and J.D., o/b/o S.D., are **DISMISSED.**

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

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

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

7/3/03 — Anthony T. Bruno by Miller, ALJ

DATE — **ANTHONY T. BRUNO**, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

7/3/2003

DATE

Mailed to Parties:

JUL 8 2003

DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

tmp

APPENDIX

WITNESSES

For Petitioners:

Barry D. Denkensohn

Jerome M. Liebers

Susan Shakked

Lauren Preiss

Scott J. Preiss

Matthew Scannapieco

Carol R. Conger

Ilisa Diamond

Donna Censoplano

Sandor Epstein

Beth Goldberg Meyer

Jed Steinberg

Janet Steinberg

Janet Dono

EXHIBITS

For petitioners:

PM-1 Resolution (No. 2002-81) Reestablishing the Advisory Committee on Education (ACE) and Appointing Its Members

PM-2 Mailing/brochure of Freehold Regional High School District (3/2/98)

PM-3 Action Committee on Education Public Forum Report (5/20/02)

PM-4 Confidential Redistricting Study, Freehold Regional High School District (3/2/98)

PM-5 Final Recommendation on Student Attendance Plan for School Years 2003-2004 through 2006-2007 (9/9/02)

PM-6 Letter from Carol Fox to Superintendent Wasser (4/19/02) (attached dissenting opinion not admitted because of failure of identification of author of harnd-written notes)

PM-7 Signed petitions collected by ACE

PM-8 Street map of northern Monmouth County (returned to counsel for Township of Marlboro)

PM-9 Message from the Superintendent (6/10/02)

PM-10 Draft-Proposed Student Attendance Plan for school years 2003-2003 through 2006-2007 (5/13/02)

PM-11 Memornadum from co-chairpersons of ACE to Board (5/24/02)

PM-12 Curriculum Vitae of Carol R. Conger, Ed.D.

PM-13 Letter from Superintendent Wasser to Ilisa Diamond (5/6/02)

PW-1 Affidavit of Dr. Suzanne Koegler (5/12/03)

Respondents exhibits admitted into evidence but not considered for the purpose of this Initial Decision:

R-1 Letter from Donna L. Censoplano to Dr. Patricia Emmerman (1/14/03)

R-2 Letter from Patricia Emmerman, Ed.D. to Donna Censoplano (1/15/03)

TOWNSHIP OF MARLBORO, PETITIONER, V. BOARD OF EDUCATION OF THE FREEHOLD REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY, AND JAMES WASSER, SUPERINTENDENT, RESPONDENTS. R.W., on behalf of minor child, M.W., PETITIONER, V. BOARD OF EDUCATION OF THE FREEHOLD REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY, AND MICHAEL MADDALUNA, MONMOUTH COUNTY SUPERINTENDENT OF SCHOOLS, RESPONDENTS AND J.D. AND J.D., on behalf of minor child, S.D., PETITIONERS, V. BOARD OF EDUCATION OF THE FREEHOLD REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY, RESPONDENT.	COMMISSIONER OF EDUCATION DECISION

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

Upon his full and independent review, the Commissioner concurs with the Administrative Law Judge that petitioners have failed to sustain their burden of establishing that the Board's consideration and approval of the Student Attendance Plan for school years 2003-04 through 2006-07 were arbitrary, capricious or unreasonable and, therefore, the Board's actions in this regard must be upheld.

Accordingly, the Initial Decision of the OAL is adopted and the within consolidated Petitions of Appeal are hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 8/14/03

Date of Mailing: 8/15/03

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

475-03

#475-03SEC

IN THE MATTER OF JULIA HANKERSON, :

WOODBINE BOARD OF EDUCATION, : COMMISSIONER OF EDUCATION

CAPE MAY COUNTY. : DECISION

SYNOPSIS

The School Ethics Commission determined that respondent Board member committed numerous violations of the School Ethics Act, *i.e.*, *N.J.S.A.* 18A:12-24.1(c), (d), (e), (g) and (h), many of which occurred even after her Board member training. The Commission found her behavior so egregious that it recommended respondent be removed from her position on the Board.

Upon review of the record, the Commissioner, whose decision was restricted solely to a review of the Commission's recommended penalty, concurred with the Commission's recommendation and, thus, ordered respondent removed from the Board as of the date of this decision.

August 14, 2003

IN THE MATTER	:	**BEFORE THE** 03 JUL -2 A 8:55
	:	**SCHOOL ETHICS COMMISSION**
OF	:	
	:	**Docket No.: C36-02**
JULIA HANKERSON,	:	
WOODBINE BOARD OF EDUCATION	:	**DECISION ON VIOLATION**
CAPE MAY COUNTY	:	
	:	

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The above-captioned matter arises from a complaint that was filed on September 10, 2002 by former Woodbine Superintendent Bruce Kinter. Therein, he alleged that that Woodbine Board of Education member, Julia Hankerson, violated the Code of Ethics for School Board Members in the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq. by: 1) initiating actions contrary to the report of the Fiscal and Education Intervention Team (FEIT); 2) directing employees without consulting the superintendent, but with the consultation of the Mayor of Woodbine; 3) proposing the termination of two employees without consulting the superintendent; 4) hiring new employees without the recommendation of the superintendent; 5) calling meetings regarding the budget for 2002-2003 without knowledge of the superintendent; 6) sending *Rice* notices to employees without recommendation by the superintendent; 7) restructuring staff without the consultation of the superintendent; 8) removing the superintendent from the agenda of the first day of school teacher in-service and directing him to conduct interviews; 9) advising the President of the WEA and an administrator that the contract of the superintendent would not be renewed in violation of N.J.S.A. 18A:12-24.1(g); 10) creating a position of behavior specialist without consulting the superintendent in violation of N.J.S.A. 18A:12-24.1(g); 11) ignoring the recommendation of the superintendent and recommending her own candidate to the Board to be business administrator/board secretary in violation of N.J.S.A. 18A:12-24.1(d) and (h); 12) rejecting the recommendation of the superintendent and the interview committee and recommending that the board hire a technology person in violation of N.J.S.A. 18A:12-24.1(h); 13) recommending the discharge of an employee because she was not a resident of Woodbine in violation of N.J.S.A. 18A:12-24.1(i); attending a class without signing in and interrupting the teacher which resulted in a teacher grievance in violation of N.J.S.A. 18A:12-24.1(j); and 14) directing staff members to drop everything and do as Ms. Hankerson directed.

Dr. Kinter presented evidence of other violations of N.J.S.A. 18A:12-24.1 during the hearing of this matter, including the firing of math in-service consultants, the proposed firing of a custodian and the purchase of computers, but the Commission dismissed these allegations as they were not part of his complaint.

Ms. Hankerson denied every allegation in her answer of November 4, 2002. She set forth in her answer that she discussed each matter with Complainant prior to her taking

action and that Dr. Kinter was aware of almost every action before it was taken, and if he was unaware, it was because he was not available to be informed.

The parties were invited to appear and present testimony at the Commission's meeting of December 17, 2002. Both parties appeared and both were represented by counsel. Each presented testimony and witnesses to aid in the Commission's investigation.

At its meeting of December 17, 2002, the School Ethics Commission tabled the matter. At its meeting of January 28, 2003, the Commission found probable cause to credit the allegations in the complaint that Ms. Hankerson violated the Code of Ethics of the School Ethics Act. Respondent's attorney requested that the Commission clarify the issues upon which it found probable cause because the complaint was so voluminous. On February 25, 2003, the Commission determined that probable cause was found on each allegation of the complaint. Further, because Ms. Hankerson denied each allegation, the Commission determined that the material facts were in dispute. Therefore, in light of the requirement that Code of Ethics cases be heard within 90 days, the Commission decided to hold a full hearing at a public meeting to determine whether Ms. Hankerson violated the Act.

After numerous proposed dates were recommended and rejected by the parties, their attorneys or members of the Commission, the Commission scheduled a full hearing for June 3, 2003 and so advised the parties in a letter dated March 31, 2003. By letter of May 12, 2003, Ms. Hankerson's attorney advised that Ms. Hankerson requested that he withdraw his appearance on her behalf because she did not want to incur any additional expense to the District. On May 27, 2003, the Commission received a letter from Ms. Hankerson requesting an adjournment due to a conflict that she had with the date of June 3, 2003. When Commission staff called to inform her that the adjournment could not be granted, she informed the Commission that she needed additional time to prepare her case because she was now representing herself. The Commission denied Ms. Hankerson's request. The Commission believed that it would be patently unfair to the complainant to adjourn the matter so close to the hearing date when he had prepared for the June 3, 2003 date that all parties were informed of since the Commission's letter of March 31, 2003.

On June 3, 2003, Dr. Kinter appeared with his attorney, Robert Schwartz, Esq. and his witnesses, Ronald Sahli, Esq., Sharon Popper, Lynda Blank and Stephen Hensil. Ms. Hankerson appeared with Board member Gregory Palm as a witness, but he did not testify. Ms. Hankerson began by stating that she was representing herself because she could not ask the Woodbine School District to continue to pay for her representation. Although the Commission found probable cause to credit each of the allegations in the complaint, at the hearing of June 3, 2003, the complainant did not present evidence on each allegation.

The Commission voted at its public meeting of June 3, 2003 to find that Ms. Hankerson violated N.J.S.A. 18A:12-24.1(c), (d), (e), (g) and (h), set forth in the Code of Ethics of the School Ethics Act and recommended that the Commissioner of Education

impose a penalty of removal from her position as a Board member for these violations. The Commission adopted this decision with amendments at its meeting of June 24, 2003.

FINDINGS OF FACT

Based on the pleadings, the documents submitted and the testimony presented, the Commission finds the following facts to be undisputed. Julia Hankerson was elected to the Woodbine Borough Board of Education (Board) in April 2002. Due to dissatisfaction with the budget, only three incumbent board members remained after the election. Ms. Hankerson became part of a new board majority and was elected Board President at the 2002 reorganization meeting. She attended new board member training class in June 2002. Complainant Dr. Bruce Kinter has been the Superintendent since March 2000. Prior to that time, he was Assistant Superintendent. At the time of the hearing of this matter, Dr. Kinter was still being paid pursuant to his contract but he was not working in the District.

The remaining facts were determined by Commission after having heard the testimony of the witnesses and reviewed the documents submitted. They are presented in a loose chronological order.

I. Meetings after Budget Defeat

On May 7, 2002, the Fiscal Educational Improvement Team (FEIT) issued its report on the Woodbine School District. The FEIT report listed numerous deficiencies in the District and directed at page 43, among other things, that the superintendent should be more involved in the budget process. (C-1 in evidence) The Administration put together a budget for 2002-2003 that included a $.19 tax increase. The tax increase became an issue in the Board elections, as set forth above, many incumbents were defeated in the April 2002 elections. The Board and the municipality had to discuss the tax increase. Dr. Kinter alleges that Ms. Hankerson held meetings on this subject without inviting him. He became informed when specific people told him that such meetings were taking place. He discussed this matter with Ms. Hankerson in late spring and early summer, but with no results. He alleges that he was not involved until the budget was completed. As superintendent, he is required to sign the Statement of Assurances that the budget meets the educational needs of the District, but he called the county business administrator and asked what he should do because the budget was not the one he proposed. He eventually signed it on June 20, 2002 noting, "Signed with serious reservations (ex. FEIT, special education, surplus)" (C-2 in evidence). The revised budget called for only a $.04 increase. Dr. Kinter was opposed to specific cuts in the budget and he was told, not consulted, about the cuts that were made.

Dr. Kinter admitted that he had no direct knowledge of who arranged the budget meetings or whether Ms. Hankerson attended them.

Ms. Hankerson testified that she attended one budget meeting that she thought was scheduled and arranged by Dr. Kinter. She denied making any unilateral decisions. She

said that the Board discussed the issues and made decisions. She said that she is not the Board. She denied any knowledge of how the Board reached a $.04 tax increase from the $.19 increase recommended by the superintendent.

II. Hiring of Business Administrator

Regarding the hiring of a business administrator, the District's business administrator resigned in February 2002 in the middle of the FEIT inquiry. Dr. Kinter, after conducting interviews, recommended that the Board appoint applicant J.S. Dr. Kinter sent J.S. a letter on April 30, 2002 congratulating him and stating that he will begin working on May 6, 2002 upon approval of the Board. At the May 2, 2002 Board meeting, at which the recommendation was to be discussed, Ms. Hankerson commented that the Board was going to hire people from the community and sent Dr. Kinter back to review resumes. She said that the hiring should reflect the racial makeup of the school. Applicant Judson Moore was hired by the Board and given a contract, into which the superintendent had no input. Mr. Moore is the former mayor of a town not far from Woodbine.

Board Attorney Ronald Sahli testified that he drafted a contract for Mr. Moore working with him and Dr. Kinter, the term of which was from May 20, 2002 to June 30, 2003. (Exhibit C-26). However, the contract that was placed before the Board was for three years, which would automatically give Mr. Moore tenure. The contract was also changed to give Mr. Moore three substantial pay increases of 10% each year of the contract and vacation days that could be accumulated to allow him to be out long stretches of time. Mr. Sahli testified that this would cause hardship to the District. Mr. Sahli testified that he wrote Ms. Hankerson on June 17, 2002 pointing out the problems with the revised contract and noting that the contract as prepared could not be terminated during the three-year period unless mutually agreed to by the business administrator and the Board. He never received a reply from Ms. Hankerson. The revised contract was approved by the Board. Mr. Sahli's contract was terminated at the Board's last meeting in June 2002. At the direction of Ms. Hankerson, Mr. Moore asked Mr. Sahli not to attend the June meetings.

Ms. Hankerson testified that she did not put together the contract for Mr. Moore that was ultimately approved by the Board.

III. Giving Orders to District Employees and Observing Teachers without Signing-in

L.B. testified that she was employed by the Board as confidential secretary to the School Business Administrator before Mr. Moore. She testified that Ms. Hankerson began coming to the Business Office and asking her to perform certain tasks. She said that in April 2002, she came in the office and told her to drop what she was doing and make copies of a document that she had and fax it to someone. She testified that Ms. Hankerson was frequently in the office, hallway, and cafeteria talking to students and teachers and she never signed the sign-in sheet required of anyone entering the building.

Ms. Hankerson testified that she never directly gave a staff person an order to do anything. She recommends that staff go to the administration if there is a problem.

IV. Removal of Two Employees by Reduction in Force

On the evening of June 11, 2002, Dr. Kinter was advised that the School Board President scheduled a School Board Meeting for June 13, 2002, without his knowledge and instructed the Business Administrator to give a *Rice*[1] notice to non-classroom personnel that their possible termination by reduction in force would be discussed. Dr. Kinter testified that N.J. and L.B. were recommended for a reduction in force at the meeting. He testified that he had no input into their termination and in fact, was vehemently against it because it violated the recommendations in the FEIT report. Dr. Kinter wrote a memorandum to Assistant Commissioner Albert Monillas to this effect dated June 12, 2002 (Exhibit C-19), but he did not receive a response. The Board Solicitor did not attend this meeting. The employees were terminated by the Board.

V. Hiring of Technology Specialist

In July 2002, Dr. Kinter interviewed applicants for a part-time technology position. There were ten applicants, eight of whom were scheduled for interviews. The interviews were held on July 11, 2002 before a committee consisting of Dr. Kinter, Business Administrator Mr. Moore and Supervisor of Student Services, Stephen Hensil. The interviews resulted in a ranking of the six that were actually interviewed. After two rounds, the recommendation from the committee was for applicant D.S. to receive the position. Applicant A.T. was ranked third of three in the second round by Dr. Kinter and Mr. Hensil and second by Mr. Moore. (Exhibit C-4) Despite the superintendent's recommendation based upon the committee interviews, the Board agenda had applicant A.T. as the recommended person for the job, at its July 11, 2002 meeting. (Exhibit C-5) At its August 2002 meeting, Ms. Hankerson suggested that A.T. become a full-time employee without any recommendation from the superintendent.

Ms. Hankerson testified that the Board hired A.T. She said she voted for him because she wanted the best person for the job.

VI. Hiring of Behavior Specialist

Referring back to the FEIT report, Dr. Kinter noted that the report recommended that the District maintain the position of Supervisor of Students for Discipline. (Exhibit C-1, page 34) However, against his recommendation, the Board eliminated the position. The employee holding the title was laid off pursuant to a reduction in force and the position of Behavior Specialist was created. Dr. Kinter was directed to make a job description for the new position, which he did. (Exhibit C-7) He submitted it to the county office for approval. However, the Board adopted a different job description with different

[1] "Rice" refers to the case, *Rice v. Union County Regional High School Bd. of Ed.*, 155 *N.J. Super.* 64 (App. Div. 1977), *certif. den.* 76 *N.J.* 238 (1978), which held that when a board intends to discuss the termination of an employee in closed session, it must provide the employee with reasonable notice of its intention to do so in order to allow her to exercise her statutory right to request a public hearing.

qualifications. Instead of a teaching certificate, the new job description requested a certificate of school social work or school psychologist certificate. (Exhibit C-8)

Ms. Hankerson admits that she called the county office to determine the qualifications for a school psychologist, but denies that her inquiry had to do with the Behavior Specialist. She testified that the District never hired a school psychologist, but she just wanted to know. Ms. Hankerson denied that she put together a job description. The new job description was adopted by the Board and submitted to the county office.

At the August 8, 2002 meeting of the Board, the Board hired A.W. as Behavior Specialist. (Exhibit C-10) The item is listed under personnel, but does not indicate a recommendation by the superintendent. However, Dr. Kinter admitted to being present when Ms. Hankerson interviewed A.W. A.W. was the organist in the church to which Ms. Hankerson attended. He had no teaching certificate and no school psychologist certificate. On April 24, 2002, A.W. had been issued a summons in Middle Township for lewdness. He pleaded guilty to N.J.S.A. 2C:14-4A on July 16, 2002 and was sentenced to a $500.00 fine and one-year probation. (Exhibit C-12) On September 16, 2002, Dr. Kinter met with A.W. and advised him that he had to be suspended with pay. (Exhibit C-11)

Ms. Hankerson testified that the vote to hire A.W. was unanimous because he was bilingual. She testified that she only knew "of him" and that she had just started attending the church in which he played.

VII. Hiring of Teachers

At the beginning of the 2002-2003 school year, there were still vacancies for teachers in the District. Ms. Hankerson called an emergency meeting of the Board, which was held on September 2, 2002 for the purpose of discussing these vacancies. The minutes of the meeting set forth that five teachers without tenure were not notified that they were returning for the 2002-2003 school year and as a result, two of the five were not returning. The minutes go on to note that a physical education teacher also resigned and no arrangements had been made for the start of school on Tuesday, September 3, 2002. The minutes further note:

> Ms. Hankerson discussed the hiring of one teacher with Ms. Rinck, a current teacher for special education at WSD. Ms. Hankerson called this person by telephone and learned that she was bilingual. Ms. Hankerson offered Ms. Pownall, this position at step 2 as a 3rd grade teacher. (Exhibit C-13).

Dr. Kinter testified that he never spoke to Ms. Pownall or heard of her. He said he had no involvement in hiring her or setting her salary. He was planning to interview people the day after the meeting.

The minutes go on to discuss the opening for a school nurse saying:

> Ms. Hankerson discussed the nurse opening. Ms. Hankerson said that the school district has been out of compliance and that the district is illegal with just having an LPN according to the Department of Health. Ms. Hankerson said she new [sic] a nurse from a prior experience to recommend for this position. Ms. Hankerson said we cannot be illegal when hiring a nurse and informed the superintendent and business administrator to adjust salaries of the nursing position for the proper hiring of this person. (Exhibit C-13)

Dr. Kinter testified that he never interviewed this person and had no involvement in the setting of her salary. He met her when she came in and was filling out paperwork with the secretary of the office and was introduced to her as the "new nurse."

After the initial hearing before the Commission, Ms. Hankerson's attorney advised by letter of January 3, 2003 that the minutes of September 2, 2002 had been revised. He set forth, "Dr. Kinter knew or should have known that these minutes had been subsequently revised," although he gave no date that they were revised. (Exhibit J-1) The attorney attached the revised minutes which now set forth, "Ms. Hankerson interviewed candidates with Dr. Kinter." and "Ms. Hankerson discussed this with Dr. Kinter who thought this was a good recommendation." (Exhibit C-22) However, the revised minutes were not placed on the agenda for approval until January 9, 2003. (Exhibit C-24) At the January 9, 2002 Board meeting, the motion to approve the revised minutes was tabled. Other revised minutes for October 21, 2002, November 4, 2002 and November 21, 2002 were approved at the meeting. The revised minutes sent to the Commission were never approved by the Board.

Ms. Hankerson testified that she never hired anyone; the Board did. She said she talked to Dr. Kinter about Ms. Pownall, but when it was time to hire her because classrooms were not all covered at the start of the year, she could not reach Dr. Kinter. She testified that the ethics regulations say that if the administration is not performing its duty, then the Board can perform the duty. She said she had to make arrangements for an emergency meeting. Dr. Kinter was present at that meeting and endorsed the hires. She denied any knowledge about the revisions to the September 2, 2002 minutes submitted by her attorney. She testified that she does not know who asked that they be revised, who put them on the agenda to be approved or why they were tabled.

VIII. Teacher Orientation September 3, 2002

The first day of school for teachers was scheduled for September 3, 2002. The first day for students was to be September 4, 2002. Dr. Kinter prepared an agenda for the teachers' orientation on their first day of school. He was scheduled to give opening remarks, along with Ms. Hankerson, and then give a presentation on the faculty handbook and provide general information. (Exhibit C-15) However, Custodian of Records Mr. Cheesman's secretary gave Dr. Kinter an alternate orientation agenda in which Ms. Hankerson was scheduled to give opening remarks alone and Dr. Kinter was removed from the agenda altogether. (Exhibit C-16) Mr. Cheesman told him that Ms. Hankerson

put the new agenda together. Dr. Kinter said he was told by Ms. Hankerson that he was to conduct interviews during the orientation. He attended the orientation, but only to explain that Mr. Hensil would be taking over.

IX. Removal of Superintendent

Dr. Kinter testified that in June 2002 he began to hear rumors that Ms. Hankerson wanted a new superintendent. Dr. Kinter heard it from Mr. Hensil, who said that the Board was going to act at its June 6, 2002 meeting. Dr. Kinter wrote a memorandum to Assistant Commissioner Albert Monillas to ask him to have a Department of Education representative present at that night's meeting. He said that the request was made because, among other reasons, the Board Solicitor was asked not to attend. (Exhibit C-18) At that meeting, Dr. Kinter's contract was nonrenewed and he was to cease working on June 30, 2002; however, he said that he had already received a new contract in January 2002. Dr. Kinter said that did not receive a response from Mr. Monillas. On or about September 18, 2002, Dr. Kinter was suspended from his duties, although he is still being paid and is still holding the title of Superintendent. Mr. Robert Manning was appointed to serve as Interim Superintendent on September 26, 2002.

Sharon Popper, WEA President, testified that Ms. Hankerson told her on May 15, 2002 that she had the contracts for the nontenured employees, but she would not be issuing one to Dr. Kinter. Ms. Hankerson assured Ms. Popper that all the teachers would be getting such contracts. Board member, David Zweigenbaum, was present during the conversation.

Mr. Stephen Hensil, former Supervisor of Student Services, testified that on June 13, 2002, Ms. Hankerson told her that she wanted to release a certain staff member, N.J., to make it so difficult for Dr. Kinter that he would leave. She said that she wanted Dr. Kinter out by September 2002. On July 22, 2002, Ms. Hankerson told Mr. Hensil that she was going to offer Dr. Kinter a buyout and asked whether Mr. Hensil would want to be interim superintendent. Mr. Hensil told her that he would not be eligible because he is not certified to be a chief school administrator. On July 26, 2002, Mr. Hensil confirmed with the County Educational Specialist that he would not be able to be a chief school administrator without certification. On that same day, he advised the superintendent of his conversation with Ms. Hankerson. Later that day, he related his conversation with the county office to Ms. Hankerson and she said that he was not supposed to have discussed the offer with anyone. Ms. Hankerson testified that she recalled the July 22nd conversation, but did not recall any subsequent conversations.

Mr. Hensil further testified that when he was waiting outside of the Board's executive session meeting on September 26, 2002 with others, when someone in the group asked Mr. Manning, who was also waiting, who might become the next superintendent and Mr. Manning said that he had been waiting for the job since June.

Last, Mr. Hensil testified that he appeared before the Commission on December 17, 2002 and presented testimony on behalf of Dr. Kinter. Mr. Hensil testified that he was

given *Rice* notices on March 24 and 25, 2003 that his position would be discussed. At the March 27, 2003 Board meeting, his position was part of a reduction in force and he was given notice that his position would be abolished on May 1, 2003. He was reassigned to replace a long term substitute in a sixth grade class.

Ms. Hankerson testified that she did not know Mr. Manning prior to September 2002. She said that Mr. Manning submitted a resume for whatever position was available. She gave his resume to Mr. Hensil and they discussed it briefly. Mr. Manning's title was changed from Interim Superintendent to Assistant Superintendent in October 2002.

APPLICABLE LAW AND DISCUSSION

The Commission found probable cause to credit each of the allegations in the complaint. However, at the hearing of June 3, 2003, the complainant did not present evidence as to each of the allegations. The Commission will address the allegations in the order set forth above. The Commission notes at the outset that the complainant has the burden of proving factually that a violation of the Code of Ethics has occurred. N.J.S.A. 18A:12-29(b).

I. Respondent held Meetings on the Budget to Which Complainant Was Not Invited

Complainant alleges that in May 2002, Ms. Hankerson had meetings with the Board Auditor, the School Business Administrator, the Mayor of Woodbine and other Borough official. He was not included in those meetings in violation of N.J.S.A. 18A:12-24.1(a) and (c) of the Code of Ethics. The Commission determined that there were meetings between the Board and the Borough Council that occurred without the knowledge of the superintendent as he testified, resulting in the reduction of the budget tax assessment from the $.19 increase that the superintendent proposed to the $.04 cent increase that the Board eventually approved. However, the Commission is without sufficient evidence to sustain a finding that Ms. Hankerson had a role in the scheduling of such meetings or attended such meetings with the knowledge that Dr. Kinter was not invited. Therefore, the Commission must dismiss this allegation of the complaint.

II. Hiring of Business Administrator

Complainant alleges that on or about May 2, 2002, at a public meeting of the Board, Ms. Hankerson ignored and dismissed his recommendation for the appointment of a School Business Administrator/Board Secretary in violation of N.J.S.A. 18A:12-24.1(h). Complainant had already sent a letter to an applicant congratulating him and saying that he would begin work after Board approval. Complainant alleges that at the meeting following May 2, 2002, Ms. Hankerson rejected his recommendation and said that the District should hire people from the community. Judson Moore, who is the former mayor of a town not far from Woodbine, was hired by the Board.

Board Attorney Ronald Sahli, Esq. testified that the contract that he drafted for Mr. Moore was not the contract that was placed before the Board. The contract that he

drafted was for one year; the contract before the Board was for three years, which would automatically give Mr. Moore tenure. Mr. Sahli testified that the contract was also changed to give Mr. Moore three substantial pay increases of 10% each year of the contract and vacation days that could be accumulated to allow him to be out long stretches of time, which would cause hardship to the District. Mr. Sahli testified that the letter that he wrote to Ms. Hankerson on June 17, 2002 pointing out the problems with the revised contract was not acknowledged and the revised contract was approved by the Board. Mr. Sahli's legal services contract was terminated at the Board's last meeting in June 2002. He had been asked not to attend the June meetings. Mr. Moore told him that Ms. Hankerson said that he was not to attend.

The issue is whether Ms. Hankerson violated N.J.S.A. 18A:12-24.1(h) in connection with the above conduct. This section requires a board member to "vote to appoint the best qualified personnel available after consideration of the recommendation of the Chief Administrative Officer." Ms. Hankerson testified that she did not put together the contract that was ultimately approved by the Board and that she did not want Mr. Sahli to attend the meetings due to the cost to the Board.

As set forth above, there was no recommendation from Dr. Kinter to hire Judson Moore. N.J.S.A. 18A:27-4.1 makes clear that:

> A board of education shall appoint, transfer or remove a certificated or non-certificated officer or employee only upon the recommendation of the chief school administrator and by a recorded roll call majority vote of the full membership of the board. The board shall not withhold its approval for arbitrary and capricious reasons. [N.J.S.A. 18A:27-4.1(a)]

Section (h) of the Code of Ethics allows board members to reject the recommendation of the Superintendent, but implicitly requires that the board give the Superintendent an opportunity to present another recommendation. This was not done here. Rather, Ms. Hankerson, as Board President, had Mr. Moore come up for a vote before the Board without any recommendation from the Superintendent to hire him. Ms. Hankerson bypassed the superintendent and brought the vote for Mr. Moore before the Board without a superintendent recommendation. The Commission therefore concludes that Ms. Hankerson did not vote to appoint the best qualified personnel available after consideration of the recommendation of the superintendent in violation of N.J.S.A. 18A:12-24.1(h). In so concluding, the Commission makes no determination about Mr. Moore's qualifications, but finds there was no consideration of a recommendation by the superintendent.

III. Giving Orders to District Employees and Observing Teachers without Signing in

Complainant alleges that Ms. Hankerson gave direction to employees of the District without consulting him in violation of N.J.S.A. 18A:12-24.1(c), which requires a board member to confine her board action to policy making, planning and appraisal and (d), which requires that board members carry out their responsibility not to administer the

schools, but, together with their fellow board members, see that they are well run. Lynda Blank testified that while she was confidential secretary to the School Business Administrator, Ms. Hankerson began coming to the Business Office and asking her to perform certain tasks. She said that in April 2002, Ms. Hankerson came in the office and told her to drop the work that she was doing (payroll) and immediately copy and fax documents that Ms. Hankerson handed her. She testified that Ms. Hankerson was frequently in the office, hallway and cafeteria talking to students and teachers and she never signed the sign-in sheet required of persons entering the building.

Ms. Hankerson testified that she never directly gave a staff person an order to do anything. She recommends that staff go to the administration if there is a problem.

The School Ethics Commission was given the charge of determining whether a violation of the Code of Ethics exists based on the proof submitted by the complainant. This necessarily requires that the Commission make determinations of credibility. The Commission finds the testimony of Ms. Hankerson to be less than credible. Even in the face of overwhelming evidence, her only response was denial of such conduct. The Commission finds that Ms. Hankerson spoke directly to the secretary Ms. Blank, and gave her orders without the knowledge of the complainant. The Commission also finds that she was engaged in the schools without following the protocol of signing-in upon entering the school building. The Commission finds such conduct to be in violation of N.J.S.A. 18A:12-24.1(c) and (d) as alleged.

IV. Removal of Two Employees by Reduction in Force

Complainant alleges that on June 13, 2002, Ms. Hankerson proposed the termination of two employees without consulting him in violation of N.J.S.A. 18A:12-24.1(c). Dr. Kinter testified that Ms. Hankerson scheduled a School Board Meeting for June 13, 2002 without his knowledge and instructed the Business Administrator to give a *Rice* notice to non-classroom personnel that their possible termination by reduction in force would be discussed. Noelle Jacquelyn and Lynda Blank were recommended for reduction in force at the meeting without his recommendation. Not only did Dr. Kinter have no input into their termination; he spoke against it because he believed the terminations violated the recommendations in the FEIT report.

The Commission finds that Ms. Hankerson had the positions of two employees terminated without any recommendation from the superintendent, thus greatly exceeding her authority as board president to confine her board action to policy making, planning and appraisal as required by N.J.S.A. 18A:12-24.1(c). Although Ms. Hankerson argues that the Board took the action and she did not act alone, as Board president, she is to act upon personnel matters upon the recommendation of the superintendent. In the present case, she was well aware that there was no such recommendation and even further, that the superintendent was opposed to the terminations. Therefore, the Commission concludes that Ms. Hankerson violated N.J.S.A. 18A:12-24.1(c) in connection with the above conduct.

V. Hiring of Technology Specialist

Complainant alleges that Ms. Hankerson hired a technology specialist in violation of N.J.S.A. 18A:12-24.1(h), which requires a board member to appoint the best qualified personnel available after consideration of the recommendation of the Chief Administrative Officer. Complainant alleges that on July 9, 2002, Ms. Hankerson advised a board employee that she was going to hire a specific person to the technology position in the District. Dr. Kinter and his appointed committee Business Administrator Judson Moore and Supervisor of Student Services Mr. Hensil, interviewed and rated applicants for the part-time position. The recommendation from the committee was for applicant D.S. to receive the position. However, despite the Superintendent's recommendation, the Board agenda had applicant A.T. as the appointee at its July 11, 2002 meeting. At its August 2002 meeting, Ms. Hankerson suggested that A.T. become a full-time employee, although A.T. was rated last by the interviewing committee and was not the recommendation of the superintendent.

Although Ms. Hankerson testified that the Board, rather than she alone, hired A.T. and that she voted for him because she wanted the best person for the job, the Commission finds that the procedure for the hire was flawed. It is not appropriate for the Board to simply appoint someone without taking into consideration the superintendent's recommendation. As previously set forth, the Board may reject the superintendent's recommendation and direct him to present another recommendation for board approval under N.J.S.A. 18A:12-24.1(h). Once again, this was not done. Rather, Ms. Hankerson substituted her preference without consideration of the Superintendent's recommendation and thereby did not vote to appoint the best qualified personnel available after consideration of the chief administrative officer's recommendation in violation of N.J.S.A. 18A:12-24.1(h).

VI. Hiring of Behavior Specialist

Complainant alleges that Ms. Hankerson had the position of Supervisor of Students for Discipline eliminated contrary to the recommendations in the FEIT report in violation of N.J.S.A. 18A:12-24(a), and, without consultation or recommendation from him, created the position of Behavior Specialist in violation of N.J.S.A. 18A:12-24.1(c) and (g). The FEIT report recommended that the District maintain the position of Supervisor of Students for Discipline. (Exhibit C-1, page 34) Although Dr. Kinter had no input in the termination, the employee holding the title was laid off pursuant to a reduction in force. Dr. Kinter was told to make a job description for the new position, which he did. (Exhibit C-7) He made it and submitted it to the county office for approval. However, the Board adopted a different job description with different qualifications. (Exhibit C-8) Instead of a teaching certificate, the new job description requires a certificate of school social work or school psychologist certificate. Ms. Hankerson denied drafting the new job description, but admits to calling the county office to determine the qualifications for a school psychologist, not the behavior specialist. Dr. Kinter admits to being present when Ms. Hankerson interviewed A.W. for the position.

The Commission finds Ms. Hankerson's testimony that she called the county office regarding the qualifications for a school psychologist, when there was no employment issue pending about a school psychologist, to be lacking in credibility. Once again, Ms. Hankerson denied taking the action, but never could explain how the resultant action came about, in this instance the changed job description. She denies that she put together the new job description, which was adopted by the Board and submitted to the county office, but does not dispute that the superintendent's version of the job description was substituted with the Board's own version.

The Commission finds that the job description for Behavior Specialist and the hiring of A.W. as Behavior Specialist on August 8, 2002 should have been recommended by the superintendent. Ms. Hankerson's interview of a candidate in the presence of Dr. Kinter clearly demonstrates her overstepping her role as a board member. For the foregoing reasons, the Commission concludes that Ms. Hankerson again violated her duty to confine her action to policy making, planning and appraisal in violation of N.J.S.A. 18A:12-24.1(c). Because the FEIT report was not a law, rule or regulation of the State Board of Education or a court order, the Commission cannot conclude that the elimination of the position violated N.J.S.A. 18A:12-24.1(a). Also, although A.W. was hired by the Board after he pleaded guilty to a disqualifying criminal offense, the Commission did not hear any evidence that Ms. Hankerson knew of A.W.'s disqualification status before she recommended him such that it could find that she failed to provide accurate information in violation of N.J.S.A. 18A:12-24.1(g). The Commission cannot infer such a fact solely because A.W. was Ms. Hankerson's church organist.

VII. Hiring of Teachers

Complainant also alleges that Ms. Hankerson violated N.J.S.A. 18A:12-24.1(d) by recommending the hiring of staff for the 2002-2003 school year. Complainant presented minutes of an emergency meeting of the Board that was held on September 2, 2002 for the purpose of discussing remaining vacancies. The minutes of the meeting note that there were vacancies at the start of the school year. Ms. Hankerson said that she had to act to fill those vacancies because Dr. Kinter was not acting. The minutes of the meeting are clear that Ms. Hankerson offered Ms. Pownall a teaching position and even determined the step at which she was to be placed. She also selected and recommended the hiring of an individual for the position of school nurse.

Even if it were true that Dr. Kinter had been less than diligent in filling all the vacancies for September 2002, the Commission would have to conclude that Ms. Hankerson overstepped her bounds as a Board member when she actually hired personnel. The Board minutes showed that she nominated, interviewed and recommended the hiring of candidates for employment. The submission to the Commission of unapproved revised minutes with changes that would be favorable to Ms. Hankerson further undermines Ms. Hankerson's credibility. The Commission therefore finds Dr. Kinter's statement that there was no emergency requiring Ms. Hankerson to take such actions to be more credible in this regard.

The Commission believes that Ms. Hankerson is well aware that she acted outside her authority on September 2, 2002 and that is why she submitted, through her attorney, unapproved revised minutes to replace the actual ones. Ms. Hankerson had attended new board member training in June 2002 and was aware of the standards set forth in the Code of Ethics. Based on the foregoing, the Commission concludes that Ms. Hankerson administered the schools in a clear attempt to subvert the superintendent in violation of N.J.S.A. 18A:12-24.1(d).

VIII. Teacher Orientation September 3, 2003

Complainant alleges that Ms. Hankerson violated N.J.S.A. 18A:12-24.1(e) when she removed him from the agenda that he had prepared for the teachers' orientation on their first day of school. N.J.S.A. 18A:12-24.1(e) requires a board member to recognize that authority rests with the board of education and make no personal promises nor take any private action that may compromise the board. Dr. Kinter was scheduled to give opening remarks to the teachers, along with Board President Hankerson and then give a presentation on the faculty handbook and provide general information. (Exhibit C-15) However, Ms. Hankerson directed the superintendent to conduct interviews rather than attend the orientation.

Ms. Hankerson testified that Dr. Kinter was pulled from the agenda and directed to conduct interviews because of the emergency resulting from not having all positions filled at the start of the year. She noted that she did not fill in for him on the agenda, but rather had another administrator, Mr. Hensil, substitute for Dr. Kinter at the orientation.

As set forth above, Ms. Hankerson's testimony is less than credible in this regard. The Commission recognizes a clear pattern of Ms. Hankerson to discredit the superintendent at every opportunity. Pulling Dr. Kinter from the teachers' orientation clearly undermines his authority with his staff and thereby compromises his ability to serve as chief school administrator. The Commission therefore concludes that in setting her own agenda for the teachers' orientation, Ms. Hankerson took private action that may compromise the Board in violation of N.J.S.A. 18A:12-24.1(e).

IX. Removal of Superintendent

Complainant last alleges that Ms. Hankerson violated N.J.S.A. 18A:12-24.1(g) by discussing with District employees her intent to remove him as superintendent before giving him any official notice. Prior to the June 6, 2002 meeting at which Dr. Kinter had his contract non-renewed, Ms. Hankerson informed the President of the WEA, Ms. Popper and Mr. Hensil that Dr. Kinter's contract would not be renewed. She made the unsolicited comment to Ms. Popper in May 2002 and to Mr. Hensil just prior to the meeting. Although Dr. Kinter's contract was nonrenewed at the June 6, 2002 meeting and he was to cease working on June 30, 2002, Dr. Kinter said that he had already received an extended contract in January 2002. This is the subject of litigation to which the Commission does not offer any opinion. However, it is undisputed that on or about September 18, 2002,

Dr. Kinter was suspended from his duties, although he was still being paid and was still holding the title of Superintendent. Mr. Manning was appointed to serve as Interim Superintendent on September 26, 2002.

The sole issue before the Commission concerning Dr. Kinter's removal is whether Ms. Hankerson "failed to hold confidential matters pertaining to the schools which, if disclosed, would needlessly injure individuals or the schools" in violation of N.J.S.A. 18A:12-24.1(g). The Commission finds it reprehensible that Ms. Hankerson would discuss her intent to get rid of Dr. Kinter with his subordinates in the District. Personnel matters are confidential and fall within an exception to the Open Public Meetings Act, N.J.S.A. 10:4-12(b)(8), yet Ms. Hankerson casually discussed Dr. Kinter's contract with members of the staff. The Commission finds that her unsolicited comments clearly constitute a failure to hold confidential matters pertaining to the schools, which would needlessly injure Dr. Kinter and the schools.

CONCLUSIONS OF LAW

For the foregoing reasons, the School Ethics Commission hereby **CONCLUDES** that Julia Hankerson violated the Code of Ethics for School Board Members in the following ways: 1) Ms. Hankerson ignored the recommendation of the superintendent and allowed a business administrator to be hired without any recommendation in violation N.J.S.A. 18A:12-24.1(h); 2) Ms. Hankerson gave orders to a District employee to perform tasks for her in violation of N.J.S.A. 18A:12-24.1(c); 3) Ms. Hankerson had *Rice* notices sent to employees proposing the termination of two employees without consulting the superintendent in violation of N.J.S.A. 18A:12-24.1(c); 4) Ms. Hankerson hired a technology specialist contrary to the superintendent's recommendation in violation of N.J.S.A. 18A:12-24.1(h); 5) Ms. Hankerson created the position of Behavior Specialist and had a candidate appointed to the position without recommendation from the superintendent in violation of N.J.S.A. 18A:12-24.1(c); 6) Ms. Hankerson interviewed and hired a teacher and a nurse for the 2002-03 school year without the superintendent's recommendation in violation of N.J.S.A. 18A:12-24.1(d); 7) Ms. Hankerson removed the superintendent from the agenda of the teacher in-service orientation and directed him to conduct interviews in violation of N.J.S.A. 18A:12-24.1(e); and 8) Ms. Hankerson advised the President of the WEA and an administrator that the contract of the superintendent would not be renewed in violation of N.J.S.A. 18A:12-24.1(g).

The Commission further **CONCLUDES** that there is insufficient evidence that she scheduled budget meetings in violation of the N.J.S.A. 18A:12-24.1(a) and (c). Moreover, although Ms. Hankerson acted contrary to the report of the Fiscal and Education Intervention Team (FEIT) when she terminated the position of Supervisor of Students for Discipline and created the position of Behavior Specialist, the Commission **CONCLUDES** that her action did not violate the alleged provisions N.J.S.A. 18A:12-24.1(a) because no law, rule or regulation of the State Board or court order was violated or (g) since there was no evidence that she provided inaccurate information.

ORDER

ORDER

For the foregoing reasons, the Commission concludes that respondent Julia Hankerson violated N.J.S.A. 18A:12-24.1(c), (d), (e), (g) and (h), set forth in the Code of Ethics for School Board Members of the School Ethics Act and recommends that the Commissioner of Education impose a penalty of removal from her position as a Board member for these violations. The Commission finds that Ms. Hankerson continued to act in blatant disregard of the Code of Ethics even after she had been trained as to its provisions. Ms. Hankerson's submission of false revised minutes in order to defend herself in this action undermined her credibility. Further, the Commission heard testimony that the positions of employees who testified against her in the first hearing of this matter were terminated subsequent to the December hearing. Such retaliatory conduct makes the argument for removal even more compelling. Because the Commission finds Ms. Hankerson's conduct to be so egregious, if the Commission had the authority to do so, it would further recommend that Ms. Hankerson be barred from holding a position on a school board in the future.

This decision, having been adopted by the Commission, shall now be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction only, pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, the respondent may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Paul C. Garbarini

Paul C. Garbarini, Chairperson

Resolution Adopting Decision – C36-02

Whereas, the School Ethics Commission has considered the pleadings filed by the parties and the documents submitted in support thereof and the testimony of the parties; and

Whereas, the Commission found probable cause to credit the allegations that Ms. Hankerson violated N.J.S.A. 18A:12-24.1(a), (c), (d), (e), (f), (g), (h), (i) and (j) of the Code of Ethics for School Board Members; and

Whereas, the Commission held a full hearing to determine whether Ms. Hankerson violated the Code of Ethics for School Board Members as alleged in the complaint; and

Whereas, the Commission now finds that respondent violated N.J.S.A. 18A:12-24.1(c), (d), (e), (g) and (h) of the Code of Ethics and concludes that removal would be the appropriate penalty for the reasons set forth;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter finding Julia Hankerson in violation of the Act and recommending that the Commissioner of Education impose a penalty of removal.

Paul C. Garbarini, Chairperson

I hereby certify that the School
Ethics Commission adopted this decision
at its public meeting on June 24, 2003.

Lisa James-Beavers
Executive Director

AGENCY DKT. NO. 231-7/03

IN THE MATTER OF JULIA HANKERSON,	:	
WOODBINE BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
CAPE MAY COUNTY.	:	DECISION

The record of this matter and the decision of the School Ethics Commission ("Commission"), finding that Julia Hankerson, member of the Woodbine Board of Education, violated *N.J.S.A.* 18A:12-24.1(c), (d), (e), (g) and (h), set forth in the Code of Ethics for School Board Members of the School Ethics Act, and recommending a penalty of removal from her position as a Board member have been reviewed. Upon issuance of the decision of the Commission, respondent was provided 13 days from the mailing date of the decision to file written comments on the recommended penalty for the Commissioner's consideration.

Respondent's comments set forth her disagreement with and defenses to the Commission's findings on each of the ethics violation charges addressed in its decision. She maintains that such findings were not founded on valid evidence but, to the contrary, were "based on misinformation, unsubstantiated and blatantly erroneous statements, unreported information and an assumption that a denial is not an appropriate response to an untrue statement or situation, and most horrifying; THAT A SUPERINTENDENT HAS MORE CREDIBILITY THAN A BOARD MEMBER." (Respondent's Comments at 7) She, additionally, argues that some of the allegations here arose during her first four months as a new Board member, with two of those months having been prior to her receiving Board Member Training. She proposes that "[i]t is unreasonable to believe that a new Board Member and President of a troubled school would have a working knowledge of all School Board processes and procedures immediately."

(*Id.* at 2) Respondent, therefore, urges that if any "penalty" is to be imposed, removal is entirely too harsh.

Initially, it must be emphasized that, pursuant to *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6A:3-9.1, the determination of the Commission as to violation of the School Ethics Act **is not reviewable by the Commissioner** herein. Only the Commission may determine whether a violation of the School Ethics Act occurred. The Commissioner's jurisdiction is limited to reviewing the sanction to be imposed based upon a finding of a violation by the Commission. Therefore, this decision is restricted solely to a review of the Commission's recommended penalty.

Upon a thorough review of the record and full consideration of respondent's comments, the Commissioner concurs with the Commission that respondent's blatant disregard of the Code of Ethics evidenced herein warrants no less a penalty than removal from her position as a Board member. The Commissioner is unpersuaded by respondent's attribution of her offenses here to her newness as a Board member. Rather, he concurs with the Commission, respondent repeatedly acted outside her authority and "in blatant disregard of the Code of Ethics even after she had been trained as to its provisions." (Commission's Decision at 16)

Accordingly, IT IS HEREBY ORDERED that Julia Hankerson is removed from the Board of Education of Woodbine as of the date of this decision.*

COMMISSIONER OF EDUCATION

Date of Decision: 8/14/03

Date of Mailing: 8/15/03

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

476-03

#476-03

K.R.C. AND N.L.C., on behalf of minor child, L.M.U.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE SALEM COUNTY VOCATIONAL-TECHNICAL SCHOOL DISTRICT, WILLIAM ADAMS AND JOHN CLIFFORD,	:	
RESPONDENTS.	:	

August 14, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INIITAL DECISION

OAL DKT. NO. EDU 4202-03

AGENCY DKT. NO. 213-6/03

K.R.C. & L.L.C. o/b/o L.M.U.,

Petitioners,

v.

BOARD OF EDUCATION OF THE SALEM COUNTY VOCATIONAL TECHNICAL SCHOOLS, WILLIAM ADAMS, AND JOHN CLIFFORD,

Respondents.

K.R.R. & L.M.C., parents of **L.M.U.**, for petitioners pro se

Robert A. Muccilli, Esq., for respondents (Capehart & Scatchard, attorneys)

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

Record Closed: July 9, 2003 Decided: July 9, 2003

STATEMENT OF THE CASE

Respondent Board of Education of the Salem County Vocational Technical Schools (BOE) operates two high schools: the Salem County Career and Technical High School and the Salem County Arts, Science and Technology High School, in which there are 5 academies,

including the Academy of Biological and Environmental Sciences (ABES). Petitioners K.R.C. and L.M.C. and petitioner L.M.U., their daughter, who recently graduated from the ABES program, claim that respondents should have named L.M.U. a "distinguished student speaker" for the ABES graduation. Respondents submit that L.M.U. did not meet all of the criteria for that distinction, particularly because she was not a student in the ABES program for all 4 of her high school years. Respondents also submit that, because L.M.U. has now graduated, petitioners' claim should be dismissed as moot.

PROCEDURAL HISTORY

On June 12, 2003, the petition was filed with the Department of Education. N.J.S.A. 18A:6-9. The Department transmitted the contested to the Office of Administrative Law (OAL), where it was filed on June 13, 2003 and scheduled for a hearing on June 16, 2003. N.J.S.A. 52:14B-2(b). (The petition names as respondents only William Adams, Ed.D., Superintendent of the BOE's school system and John Clifford, Ed.D., principal of the BOE's Career and Technical High School. However, the case's caption, as transmitted by the Department, showed the BOE as a respondent.) On June 16, 2003, respondents' answer and exhibits were filed in the OAL, testimony was taken, the request for emergent relief was argued on a taped record, and I issued an order denying the request. The letter transmitting the order notified the parties that the case was scheduled for a plenary hearing on July 9, 2003 and respondents' attorney represented that, on July 8, 2003, by way of a telephone message, he reminded petitioners of the hearing. By 9:30 am on July 9, 2003, petitioners had not appeared, the OAL had no message from them, and respondents' attorney moved for dismissal.

FINDINGS OF FACT

The BOE operates two high schools: the Salem County Career and Technical High School and the Salem County Arts, Science and Technology High School.

The Salem County Career and Technical High School primarily prepares students to directly enter specific fields of vocational or employment. The Salem County Arts, Science and

Technology High School (on campuses other than its own) operates 5 educationally rigorous academies, including the ABES.

On December 17, 1996, the BOE approved establishment of a Law Enforcement and Public Safety Program at the "Career Center" and provided that it "may become full-time and an academy program." R-C. On July 15, 1997, the Law Enforcement and Public Safety Program's "Vo Tech Career Center Curriculum" was presented and the BOE approved implementation of that program during the 1997-98 school year. R-C. On August 26, 1998, the BOE again approved the Law Enforcement and Public Safety Program as part of the "Career Center." R-G.

On August 3, 1999, the BOE approved courses for the 1999-2000 school year for the ABES program and the Law Enforcement and Public Safety Program. The ABES program's courses, e.g., "Algebra I," "Honors English I" and "Honors History II," were more rigorous than the Law Enforcement and Public Safety Program's courses, e.g., "Pre Algebra," "Algebra," "English 9" and "US History II – 20th Century America." R-E.

Substantial differences among the BOE's schools and programs make it difficult if not impossible to reconcile the weights and values of grades in the various courses. Therefore, the BOE has not recognized a valedictorian or salutatorian. Instead, Dr. Adams, the Superintendent of the BOE's school system, has determined an academy's "distinguished student speaker" on the following criteria: (1) at the time of graduation, the academy must have been in operation for a minimum of 4 years, (2) to be eligible a student must have participated in the same academy's program for a minimum of 4 years, (3) the student must have the highest grade point average (GPA) of eligible students, and (4) the student must be of good character. R-1, R-A

In past years, Dr. Adams determined who would be the "distinguished student speaker" and reported the student's name to the BOE. The criteria were not written or formally adopted by the BOE in a policy, etc.

During the 1999-2000 school year, L.M.U. was a freshman in the BOE's school system's Law Enforcement and Public Safety Program, so that she took Law Enforcement and Public Safety Program courses and not the more rigorous ABES program courses. R-F.

During the 2000-01 school year, L.M.U. was a sophomore in the BOE's school system's Law Enforcement and Public Safety Program, so that she again took Law Enforcement and Public Safety Program courses and not the more rigorous ABES program courses. R-F.

During the 2001-02 school year, L.M.U. was a junior in the BOE's school system, she transferred from the Law Enforcement and Public Safety Program to the ABES program and took that program's courses. R-D.

On July 23, 2002, the BOE approved "Career and Technical Programs", including the Law Enforcement and Public Safety Program as a full-time program option. R-C. The BOE thereby reiterated that the Law Enforcement and Public Safety Program is not an academy program.

During the 2002-03 school year, L.M.U. was a senior in the ABES program.

Dr. Adams, a credible witness, applied the above-described criteria and determined that I.R. would be the ABES program class of 2003 graduation "distinguished student speaker."

Petitioners contended that L.M.U. had attained the highest average in her class, so that she should be named the "distinguished student speaker." However, since L.M.U. had not been a student in the more rigorous ABES program for all 4 of her high school years, Dr. Adams, determined that she was not eligible for that distinction.

On June 18, 2003, the Salem County Arts, Science and Technology High School graduation ceremony was held.

L.M.U. will be entering college for the 2003-04 school year.

CONCLUSIONS OF LAW

Generally, in administrative adjudication, the claimant bears the burden of persuasion (proof), by the preponderance (greater weight) of the competent and credible evidence of facts essential to his or her claim. See N.J.S.A. 52:14B-10(c); see also N.J.S.A. 2A:84A-1 et seq.; N.J.R.E. 101(b)(1); Atkinson v. Parsekian, 37 N.J. 143, 149 (1962); Snyder v. I. Jay Realty Co., 53 N.J. Super. 336, 347 (App. Div. 1958), rev'd in part on other grounds, 30 N.J. 303 (1959); Collins Realty Co. v. Sale, 104 N.J. Eq. 138, 142 (E. & A. 1929).

The above-described criteria for determination of what graduate will be the "distinguished student speaker" appear reasonable. More particularly, given the difference of educational rigor between the ABES program and the Law Enforcement and Public Safety Program, the second criterion for eligibility, requiring that a student must have participated in the same program for a minimum of 4 years, appears to subject all students to equal standards. Further, although it would be preferable for the BOE to adopt written criteria, from the past years, the BOE appears well aware of and essentially ratified the criteria. (Petitioners have cited no law requiring the BOE to, e.g., adopt a written policy setting forth criteria.)

For all four high school years, I.R. took the more rigorous ABES program courses However, for her first two high school years, L.M.U. took the less rigorous Law Enforcement and Public Safety Program's courses. As applied, the criteria subject L.M.U. to no inequity. That is to say, petitioners have not shown that respondents should be ordered to designate L.M.U. as a "distinguished student speaker" for the graduation.

In support of respondents' motion for dismissal, they also cite Oxfeld v. New Jersey State Board of Education, 68 N.J. 301 (1975), wherein since petitioners had graduated and were no longer students in a school, their constitutional challenge to a school regulation were dismissed as moot. Respondents also distinguish this case from the circumstances noted in Justice Clifford's Oxfeld dissent wherein he points out that the Oxfeld petitioners brought a constitutional challenge to a school regulation governing distribution of pamphlets and leaflets on school grounds.

Respondents submit that they have acted reasonably; but they also point out the following: since L.M.U. has graduated and is no longer a BOE student, the claim that she should be a "distinguished student speaker" cannot be granted; petitioners have not claimed that respondents should be ordered to amend the BOE's records to show that she was "distinguished;" and petitioners have not brought a constitutional claim. Consequently, this case could also be dismissed as moot and I agree with this.

To reiterate, the petitioners have failed to prove that the respondents wrongfully refused to name L.M.U. a distinguished student speaker" and their case is moot.

ORDER

I **ORDER** the petition **DISMISSED WITH PREJUDICE**.

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

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

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

July 9, 2003
DATE

JOHN R. TASSINI, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

July 10, 2003
DATE

Mailed to Parties:

JUL 16 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

EXHIBITS

For Petitioners:

P-1 Board resolution: Approval of New Career Center and Salem County Arts, Science and Technology High School Curricula and Curriculum Modifications for the 2000-01 School Year

For Respondents:

R-1 Affidavit of Dr. Adams

R-A Memorandum (relative to honors distinction) from Superintendent William H. Adams, Ed.D., May 17, 2001

R-B Letter (relative to selection of students for distinguished speaker status) from Superintendent Adams to petitioners, June 11, 2003

R-C Board Minutes: Approval to Establish a Law Enforcement and Public Safety Program for the 1997-98 School Year, December 17, 1996; Board Minutes: Approval of Career Curriculum Changes for the 1997-98 School Year, July 15, 1997; Board Minutes: Board Review and Approval of the 2002-03 District Educational Curriculum, July 23, 2002

R-D Transfer Information, School: Salem County Arts, Science and Technology High School, 2002-03 School Year, Term: Marking Period 3, L.M.U.

R-E Board Minutes: Request and Recommendation for Board of Education Approval of the Career Center and the Salem County Arts, Science and Technology High School Curriculum and Curriculum Modifications for the 1999-2000 School Year, August 3, 1999

R-F Official Transcript, Salem County Vocational Technical Schools, L.M.U.

R-G Board Minutes: Request and Recommendation for Board of Education Approval of the Career Center Curriculum for the 1998-99 School Year, August 26, 1998

WITNESSES

For Petitioners:

K.R.R.

L.L.C.

For Respondents:

Dr. Adams

OAL DKT. NO. EDU 4202-03
AGENCY DKT. NO. 213-6/03

K.R.C. AND N.L.C., on behalf of minor child, L.M.U.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE SALEM COUNTY VOCATIONAL-TECHNICAL SCHOOL DISTRICT, WILLIAM ADAMS AND JOHN CLIFFORD,	:	
RESPONDENTS.	:	

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

Upon review, the Commissioner concurs with the Administrative Law Judge (ALJ) that petitioners have failed to meet their burden of demonstrating that respondents' actions in not selecting L.M.U. as a "distinguished student speaker" at graduation were arbitrary, capricious or contrary to law. Further, like the ALJ, the Commissioner finds the matter moot given the relief sought by petitioners and the previous denial of their motion for emergent relief.

Accordingly, for the reasons expressed therein, the Initial Decision of the Office of Administrative Law dismissing the Petition of Appeal is adopted as the final decision in this matter.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 8/14/03

Date of Mailing: 8/15/03

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

#477-03

477-03

H.A. DeHART & SONS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST DEPTFORD, GLOUCESTER COUNTY, AND HOLCOMB BUS SERVICES, INC.,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioner, unsuccessful bidder, sought emergent relief enjoining respondent Board from taking further action upon the awarding of a contract for pupil transportation services to respondent bus company, setting aside the award of contract and directing the award to petitioner. Petitioner contended respondent company made changes to its original bid violating the bidding laws.

The ALJ concluded that petitioner should be granted the relief it requested insofar as enjoining the Board from proceeding on the award of the transportation contract to respondent since the legal right for disqualification was settled and the harm to petitioner would be irreparable. The ALJ, however, concluded that awarding the contract to petitioner without an immediate rebidding opportunity for the Board would place an economic burden upon the taxpayers, which may be mitigated through a rebidding for the contract; rebidding eliminates the need to review the contentions of the Third Count of the petition (petitioner did not know that the Board no longer required the successful bidder to bear the cost of a bus route coordinator). The ALJ ordered the bids received on July 17, 2003 rejected and ordered the Board to solicit the receipt of new bids for the 2003-04 school year. The ALJ ordered the remaining issues contained in the petition dismissed as moot.

The Commissioner concurred with the ALJ that, under all of the circumstances, the appropriate resolution of this matter is a prompt rebid, which also serves to moot any remaining matters in dispute.

August 14, 2003

State of New Jersey

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

JAMES E. MCGREEVEY
Governor

WILLIAM L. LIBRERA
Commissioner

August 15, 2003

Thomas H. Ward, Esq.
Albertson Ward
36 Euclid Street
P.O. Box 685
Woodbury, NJ 08096

Robert A. Muccilli, Esq.
Capehart & Scatchard, P.A.
Laurel Corporate Center, Suite 300
8000 Midlantic Drive - C.S. 5016
Mount Laurel, New Jersey 08054

Thomas Cosma, Esq.
Connell Foley LLP
85 Livingston Avenue
Roseland, NJ 07068

Dear Parties:

H.A. DeHART & SONS V. BOARD OF EDUCATION OF THE TOWNSHIP OF WEST DEPTFORD, GLOUCESTER COUNTY, AND HOLCOMB BUS SERVICES, INC., AGENCY DKT. NO. 267-7/03, OAL DKT. NO. EDU 4918-03

We are enclosing a copy of the decision of the Commissioner of Education dated August 14, 2003, in the above-captioned matter. Appeals of Commissioner decisions, other than State Department of Education employee contractual determinations and matters involving the New Jersey State Interscholastic Athletic Association, may be filed with the State Board of Education pursuant to *N.J.A.C. 6A:4-1.1* et seq.

Please note that this office is no longer providing courtesy copies of Commissioner decisions directly to represented parties or to the Board Secretary or County Superintendent of Schools.

Additionally, please note that, pursuant to *N.J.A.C.* 6A:4-1.4(a), the Commissioner's decision is mailed to the parties three days prior to the date it is deemed officially filed. This provides counsel and *pro se* litigants with the decision before it is made public by the Department. Parties and counsel are requested to refrain from making Commissioner decisions public prior to the filing date. Your cooperation is appreciated.

Very truly yours,

M. Kathleen Duncan

M. Kathleen Duncan, Director
Bureau of Controversies and Disputes

MKD/cc:o/dec ltr/HADeHartSons.doc
Enclosure

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
ON MOTION FOR
EMERGENT RELIEF
OAL DOCKET NO. EDU 4918-03
AGENCY REFERENCE NO. 267-7/03

H.A. DeHART & SONS,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST DEPTFORD, GLOUCESTER COUNTY, AND HOLCOMB BUS SERVICES, INC.,

Respondent.

Thomas H. Ward, Esq., appeared for petitioner (Albertson Ward, attorneys)

Robert A. Muccilli, Esq., appeared for respondent, Board of Education of the Township of West Deptford (Capehart & Scatchard, attorneys)

Thomas S. Cosma, Esq., appeared for respondent, Holcomb Bus Services, Inc. (Connell Foley, attorneys)

Record Closed: August 6, 2003 Decided: August 6, 2003

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner ("DeHart") seeks emergent relief enjoining respondent, Board of Education of the Township of West Deptford ("West Deptford") from taking further action upon the awarding of a contract for Pupil Transportation Services ("Contract") to respondent, Holcomb Bus Service, Inc. ("Holcomb"), setting aside the award of said Contract to Holcomb, directing the award of the Contract to DeHart, and for costs of suit and other just and equitable relief.

DeHart's verified petition for emergent relief was filed with the Department of Education, Bureau of Controversies and Disputes, on July 30, 2003 and then transmitted to the Office of Administrative Law on August 1, 2003 for hearing as a contested case pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13. West Deptford's Answer, Affidavit of William H. Thompson, and Brief were filed August 5, 2003. Oral argument was presented on August 6, 2003 at the Office of Administrative Law. Upon conclusion of testimony of the parties a verbal opinion in accordance with the terms of the Initial Decision was given. The hearing record closed August 6, 2003.

STATEMENT OF FACTS

The Petition and Answer address three counts. This decision addresses only the First Count because the allegations of the Second Count and Third Count are rendered moot by the Order contained herein. Further, a plenary hearing would be required because the material facts of the latter Counts are in dispute.

The material facts relative to the First Count of the Petition are not in dispute. On or about July 7, 2003, West Deptford issued Bid Specifications for Pupil Transportation Services for the 2003-2004 School Year (Exhibit A of the Petition, a/k/a Exhibit P-1). Among the documents contained in the Bid Specifications was a multi-page Bid Sheet. The first page of the Bid Sheet contained the following statements:

$ Bids which do not include an adjustment amount will not be accepted.

$ The following routes and aide/attendant (if applicable) are to be bid on a PER DIEM basis.

$ Routes which require an aide are so indicated by an asterisk(*).

Seven columns followed the introduction:

Tier Number	Route Number	Route Cost (without aide)	Tier Cost	Increase/Decrease Adjustment Cost	Per Diem Aide/Attendant Cost (if applicable)	Tier cost Including Aide (if applicable)

Because the dispute in this matter arises from Holcomb's responses to Route 308 and 310, a copy of the Route Description provided in the Bid Specifications for those routes were submitted as Exhibit D to the Petition (Exhibit P-2). The Route Descriptions list as "Special Instructions" for Route Nos. 308 and 310 "Aide."

Bids were returned on July 17, 2003 by DeHart and Holcomb. DeHart's proposal totaled $1,401,416.28 and Holcomb's bid was $1,287,276.00. Holcomb's Bid Sheet for both Route Nos. 308 and 310 were Route Cost $57.00, Increase/Decrease Adjustment Cost $1.00, and Per Diem Aide/Attendant Cost (if applicable) $ N/A. (See Exhibit A attached to Answer, a/k/a R-1). DeHart's Bid Sheet (Exhibit D attached to Answer, a/k/a R-2) shows DeHart's figures were $45.00, $1.25, and $20.00 for Route Cost, Increase/Decrease Adjustment Cost, and Per Diem Aide/Attendant Cost (if applicable) for Route No. 308. The Route Cost for Route No. 310 was $66.00 with the other 2 items being $1.25 and $20.00, respectively.

Upon the opening of the bids DeHart protested Holcomb's bid. West Deptford alleges Holcomb promptly verbally advised West Deptford that Holcomb was not charging for the cost of an aide for Route Nos. 308 and 310. Five days later Holcomb addressed a letter to West Deptford (Exhibit B attached to the Petition, a/k/a R-3) stating, "Holcomb Bus Service, Inc. will not be charging for the aides on these routes [308 and 310]."

ANALYSIS AND CONCLUSION

DeHart contends that the award by West Deptford of its Public Transportation Services Contract to Holcomb violated the public bidding laws of New Jersey and the terms of the Department of Education Regulations for transportation services. The bid sheet which is one of the "documents and forms" required "to be made part of the bid specifications and of the contract" "shall include a separate per diem cost for each aide to be assigned to the route." *N.J.A.C.* 6A:27-9.3(e)1ii. DeHart further suggests that *N.J.A.C.* 6A:27-9.8(c) was violated by West Deptford's consideration of Holcomb's verbal response during the bid opening and its July 22 letter; both of which should be considered as changes to the original bid.

Counsel for West Deptford argued that Holcomb's "N/A" was "understood" by the Board to mean that because no per diem cost was to be charged; the requirement to specify "$0" was neither necessary nor appropriate. To respond "not applicable" was reasonable under the circumstances. Counsel for Holcomb emphasized that Holcomb's bid was not defective because Holcomb did not leave the space empty as was the case in *L. Pucillo & Sons, Inc. v. Mayor of New Milford,* 73 *N.J.* 349 (1977), and *Hall Construction Co., Inc. v. New Jersey Sports & Exposition Authority,* 295 *N.J. Super.* 629 (App. Div. 1996).

"Where authorized by law and where irreparable harm will result without an expedited decision . . . emergency relief pending a final decision on the whole case may be ordered upon the application of a party." *N.J.A.C.* 1:1-12.6(a). Described in *Crowe v. DeGioia,* 90 *N.J.* 126, 132-134 (1982), as "principles, rules or tests" to guide a court in "the most sensitive exercise of judicial discretion," four findings must be made: "a preliminary injunction should not issue except when necessary to prevent irreparable harm, . . . the legal right underlying [petitioner's] claim is [settled], . . . all material facts are uncontroverted, and . . . [weighing] the relative hardship to the parties [who suffer more] . . .". These "fundamental principles" are better stated in *Ispahani v. Allied Domecq Retailing USA, et al.*, 320 *N.J. Super.* 494, 498, (App. Div. 1999), "To obtain a preliminary injunction, the applicant must establish that he will suffer irreparable injury if the relief is denied, that his claim is based on a settled legal right, that the material facts are substantially undisputed, and that the harm to him if the injunction is denied will be greater than the harm to the opposing party if the injunction is granted."

I **CONCLUDE** that DeHart should be granted the injunctive relief it requested insofar as enjoining West Deptford from proceeding on the awarding of the Pupil Transportation Services Contract to Holcomb. However, I **CONCLUDE** that awarding the Contract to DeHart without an immediate re-bidding opportunity for West Deptford will place an economic burden upon the taxpayers of West Deptford, which may be mitigated through a re-bidding for the Contract. Counsel for West Deptford represents that it will be able to re-publish its request for bids, receive and open those bids, and award the Contract in time to meet the September 4, 2003 start date. That the re-bidding process also disposes of DeHart's objection that it did not know that West Deptford no longer required the successful bidder to bear the cost of a bus route coordinator (Third Count) and should result in a lower bid from DeHart should not be overlooked. Re-bidding disposes of the entire controversy without the need for a plenary hearing.

In arriving at the aforesaid conclusion I first **CONCLUDE** that Holcomb's bid must be set aside, the legal right for disqualification being settled.

"Bidding statues are for the benefit of the taxpayers and are to be construed as nearly as possible with sole reference to the public good. Their objects are to guard against favoritism, improvidence, extravagance and corruption, their aim is to secure for the public the benefits of unfettered competition. To achieve these purposes all bidding practices which are capable of being used to further corrupt ends or which are likely to affect adversely the bidding process are prohibited, and all awards made or contracts entered into where any such practice may have played a part, will be set aside." *Terminal Construction Corporation v. Atlantic County Sewerage Authority,* 67 *N.J.* 403, 409-410 (1975). "The long standing judicial policy in construing cases governed by the Local Public Contracts Law, *N.J.S.A.* 40A:11-1 *et seq.* and its predecessors, has been to curtail the discretion of local authorities by demanding strict compliance with public bidding guidelines." *L. Pucillo v. Mayor and Council of Borough of New Milford, supra,* 73 *N.J.* at 356. Allowing West Deptford the discretion of what it understood "N/A" to mean frustrates judicial policy.

Respondents emphasize that Holcomb did not leave the space blank or empty, but in fact, responded to indicate that no charge would be made. However, the title of the column "Per Diem

Aide/Attendant Cost" also included the parenthetical "if applicable." The specifications defined aide/attendant cost to be applicable; it is neither unreasonable nor undebateable that Holcomb could use the ambiguous – and contrary to specifications – N/A to withdraw its bid on the grounds of obvious error or oversight. "A deviation is material if: (1) waiver of such defect deprives the purchase of its assurance that the contract will be entered into, performed, and guaranteed according to the specified requirements and (2) it adversely affects the competitive bidding process by placing a bidder in a position of advantage over other bidders or by otherwise undermining the necessary common standard of competition." *Hall Construction Co., Inc. New Jersey Sports & Exposition Authority, supra,* 295 *N.J. Super.* At 637. "Material conditions contained in the bidding specifications cannot be waived by the contracting authority." *Ibid.* ". . . [A]dvertised conditions whose waiver is . . . capable of affecting the ability of the contracting unit to make bid comparisons, are the kind of conditions which may not under any circumstances be waived." *Terminal Construction Corporation v. Atlantic County Sewerage Authority, supra.,* 67 *N.J.* at 412.

I **CONCLUDE** that the harm to DeHart should emergent relief not be granted is irreparable; "it cannot be redressed adequately by monetary damages." *Crowe v. DeGioia, supra.* 90 *N.J.* at 133. The final test is relative hardship. West Deptford indicates that it can meet its obligation to transport it students by immediately re-instituting the bidding process. As alluded to at the outset of this decision, re-bidding eliminates the need to review the contentions of the Third Count of DeHart's Petition. The aura of favoritism and unfairness alleged to have resulted from West Deptford's removal of the bus coordinator from the obligations of the successful bidder will be removed with all parties being aware of all of the circumstances for performing the Contract.

Note is made of the request of counsel for Holcomb for a stay of the implementation of this decision. I denied the request because it should be addressed in the Final Decision of the Commissioner.

ORDER

Accordingly, it is **ORDERED** that the Board of Education of the Township of West Deptford is permanently enjoined from taking further action upon a Contract for Public Transportation Services based upon the bids received on July 17, 2003. It is further **ORDERED** that the bid's received on July 17, 2003 are deemed rejected. It is further **ORDERED** that the Board of Education of the Township of West Deptford forthwith solicit the receipt of new bids for Public Transportation Services for the 2003-2004 School Year. It is finally **ORDERED** that upon the implementation of this Order, the remaining issues contained in the Petition are moot and are **DISMISSED.**

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

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

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

August 6, 2003
DATE

ANTHONY T. BRUNO, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

DATE

Mailed to Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

/tmp

OAL DKT. NO. EDU 4918-03
AGENCY DKT. NO. 267-7/03

H.A. DeHART & SONS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST DEPTFORD, GLOUCESTER COUNTY, AND HOLCOMB BUS SERVICES, INC.,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the Initial Decision on Motion for Emergent Relief of the Office of Administrative Law have been reviewed. Although applicable rules make no provision for the filing of exceptions to Administrative Law Judge (ALJ) Orders on motion for emergent relief, *N.J.A.C.* 1:1-12.6, Respondent Holcomb's submission of August 12, 2003[1] has been considered by the Commissioner in rendering his decision herein, as has the Board's submission of August 13, 2003, since the ALJ's decision also serves as the OAL's recommended Initial Decision on the merits pursuant to *N.J.A.C.* 1:1-18.3.

Upon review and consideration, the Commissioner concurs with the ALJ that, regardless of what Respondent Holcomb's intent may have been, its bid as actually

[1] Respondent Holcomb's submission seeks a "stay" of the ALJ's Order to reject all bids and rebid the contract at issue. However, since the ALJ's ruling serves as a recommendation to the Commissioner and is, in itself, of no force and effect, respondent's submission is considered as exceptions to the Initial Decision, to be considered by the Commissioner pursuant to *N.J.A.C.* 1:1-18.4 before rendering a final decision. The Board objects to Holcomb's request for "stay" and urges the Commissioner to decide the matter without delay, but excepts to the ALJ's recommended order on grounds that any "defect" in Holcomb's bid, which the Board does not concede, was not material.

submitted is not properly responsive to published specifications governing aides for the designated bus routes.[2] The Commissioner further concurs that, under all of the circumstances, the appropriate resolution of this matter is a prompt rebid, which also serves to moot any remaining matters in dispute.

Accordingly, for the reasons expressed therein, the Initial Decision of the Office of Administrative Law, directing timely rebid of the contract in dispute and dismissing the remainder of the Petition of Appeal as consequently moot, is adopted as the final decision in this matter.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 8/14/03

Date of Mailing: 8/15/03

[2] In this regard, the Commissioner notes that Holcomb's entries in the "Per Diem Aide/Attendant Cost (If Applicable)" column for routes 308 and 310 ("$ N/A") are identical to its entries on routes where the Board did *not* require an aide or attendant.

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

478-03

#478-03

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

August 14, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 1598-02
AGENCY DKT. NO. 487-12/01

N.A. on behalf of minor child, J.A.,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF CLIFTON,
Respondent.

N.A., *pro se,* petitioner

Anthony V. D'Elia, Esq., for respondent
(Chasan, Leyner, Bariso & Lamparello, P.C., attorneys)

Record Closed: July 8, 2003 Decided: July 9, 2003

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

On or about December 3, 2001, petitioner, N.A., filed a petition of appeal with the Commissioner of Education, challenging respondent's residency determination in regard to his nephew, J.A. On January 16, 2002, respondent filed its answer seeking dismissal of the petition and counterclaiming for tuition for the period of ineligible attendance. On February 5, 2002, the Department of Education, Bureau of Controversies and Disputes, transmitted this matter to the Office of Administrative Law (OAL) as a contested case for a hearing, pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13.

The matter was assigned to the undersigned judge on February 22, 2002, and a telephone prehearing conference scheduled for April 29, 2002. A telephone conference was held on April 30, 2002 and, based upon a possible resolution of this matter, the prehearing conference was adjourned. The prehearing conference was rescheduled and held on July 29, 2002, during which the issues were isolated and a hearing scheduled for January 27and 28, 2003 at the OAL. On January 27, 2003, the parties appeared and settlement discussions were held. Due to a probable settlement of this matter, the hearing was adjourned. Since the settlement agreement was not forthcoming, the matter was rescheduled for hearing on July 8, 2003 at the OAL. As the result of settlement conferences held between the parties on that date, a settlement was reached and the hearing was not held.

The parties have agreed to settle this matter and have prepared the attached Stipulation of Settlement and Board Resolution, indicating the terms of settlement.

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

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

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

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

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

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

July 9, 2003
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

7-11-03
DATE

M. Kathleen Duncan/CS

Mailed to Parties:

JUL 14 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

al

CHASAN, LEYNER, BARISO & LAMPARELLO, P.C.
300 HARMON MEADOW BOULEVARD
SECAUCUS, NEW JERSEY 07094-3621
201-348-6000
ATTORNEYS FOR Respondent, Clifton Board of Education
08550-0001

NA o/b/o JA

Plaintiff(s).

vs.

BOARD OF EDUCATION
CITY OF CLIFTON

Respondent(s).

BEFORE THE COMMISSIONER
OF EDUCATION
DOCKET NO.: 01598-02N

AGENCY REFERENCE NO.: 487-12/01

Civil Action

STIPULATION OF SETTLEMENT

The matter and things in controversy having been discussed by and between the parties, and the parties having agreed as follows:

It is on this 8 day of July, 2003, stipulated by and between the parties as follows:

1. Petitioner agrees to pay the sum of $4,000.00, which sum Respondent agrees to accept in full settlement of its counterclaim herein.

2. The sum aforesaid shall be paid for by Respondent to Karen Perkins, Business Administrator, Clifton Board of Education, 745 Clifton Avenue, Clifton, N.J. 07111 in the following manner:

(a) 30 equal monthly payments beginning with the month of ~~March~~ August, 2003;

(b) All payments to be due on the first of each month;

NA

(c) In the event Petitioner fails to pay in accordance with the terms set forth in this Stipulation then, and in that event, Respondent shall be entitled to obtain the entry of a judgment against Petitioner, Neil Angelino, ex parte in the sum of $4,000.00 (giving ~~Respondent~~ Petitioner and credit for any sum actually paid pursuant to the terms of this Stipulation) along with interest at the maximum rate allowable by law, retroactive to ~~March~~ August 1, 2003 on any unpaid amount plus reasonable attorney fees and costs of suit incurred in obtaining this Stipulation and executing any judgment which may be obtained in accordance with this sub-paragraph;

3. In the event of default of the aforesaid, Respondent shall be entitled to obtain the entry of judgment upon ex parte application with supporting Certification and with notice to the Petitioner, Neil Angelino, only in the form of the application addressed to Neil Angelino, ~~127 East 6th Street~~ 14 Vasser Rd. Newfoundland NJ 07435, ~~Clifton~~, ~~N.J. 07011~~, by First Class Mail, postage prepaid.

4. All claims / counterclaims are hereby withdrawn and dismissed.

We hereby understand the terms of this Agreement and consent and agree to the terms as described herein.

Neil Angelino
Dated: 7/8/03

Marie L. Hakim
Marie Hakim, President
Clifton Board of Education
Dated: 2/12/03

Anthony V. DeLa
Attorney for Clifton Board of Education
2h 7/8/03

BOARD OF EDUCATION
CLIFTON, NEW JERSEY 07013
RESOLUTION #2/12/03 - C

APPROVAL TO SETTLE PENDING APPEAL
"NA ON BEHALF OF JA VS. THE CLIFTON BOARD OF EDUCATION"

WHEREAS, the Clifton Board of Education has determined that it is in their best interest to settle the pending appeal "NA on Behalf of JA vs. the Clifton Board of Education";

NOW, THEREFORE, BE IT RESOLVED, that the Board of Education agrees to the terms of settlement as follows:

1.) Petitioner agrees to pay the sum of four thousand dollars ($4,000.00), which sum the respondent agrees to accept in full settlement of its counter-claim.

2.) The aforesaid sum shall be paid by respondent to our Business Administrator in thirty (30) equal monthly payments beginning with the month of March, 2003. All payments are due on the first of each month. In the event that the petitioner fails to pay in accordance with this agreement then the respondent (Board) shall be entitled to obtain the entry of a judgement in the Superior Court of New Jersey against the petitioner in the sum of four thousand dollars ($4,000.00), giving the petitioner credit for any sum actually paid along with interest at the maximum rate allowable by law, retroactive to March 1, 2003 on any unpaid amount, plus all reasonable attorney's fees in the course of the suit incurred in obtaining this settlement agreement and executing any civil judgement which may be obtained.

Introduced by John M. Traier

Second by James A. Leeshock

DATE: February 12, 2003

VOTE: YES: Bernstein,Demikoff,Hakim,Kolakowsky,Kolodziej,Leeshock,Smith & Traier
ABSENT: Kurnath

ATTEST:

Karen L. Pinkus
Secretary/Business Administrator

PRESIDENT Marie L. Hakim

OAL DKT. NO. EDU 1598-02
AGENCY DKT. NO. 487-12/01

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 8/14/03

Date of Mailing: 8/15/03

479-03

#479-03

MARK STEINBRICK,

PETITIONER,

V.

BOARD OF EDUCATION OF THE SHORE REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

August 15, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL FOR FAILURE TO PROSECUTE
OAL DKT. NO. EDU 4773-01
AGENCY DKT. NO. 315-8/01

MARK STEINBRICK,

Petitioners,

v.

BOARD OF EDUCATION OF SHORE REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,

Respondent.

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

Gregory W. Vella, Esq., for respondent (Tucci and Collins, attorneys)

Record Closed: July 10, 2003 Decided: July 10, 2003

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

This is an appeal by the petitioner from the allegation that the respondent school district's decision not to renew his employment for the 2001 school year was based upon arbitrary, capricious and unreasonable grounds. The matter was transmitted to the Office of Administrative Law as a contested case, pursuant to *N.J.S.A.* 52: 14B-1 to -15 and *N.J.S.A.* 52:14F-1 to –13, on August 15, 2001. The case was scheduled before me for a telephone prehearing conference to be conducted on November 16, 2001. The matter was adjourned in advance at the request of counsel. My chambers was advised by counsel for Mr. Steinbrick that he had spoken to counsel for the district and a settlement of the parties' issues was arrived at and

would be submitted to my office for review and for an issuance of a decision approving it. In the alternative, it was my understanding that Mr. Hunter suggested his desire might be to withdraw the appeal. To date, I have never heard from either party again nor have I received any documents in regard to this case.

Accordingly, it is **ORDERED** that the above-entitled appeal be and is hereby **DISMISSED** with prejudice for failure to prosecute.

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

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

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

7/10/03
DATE

STEVEN C. REBACK, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

7/11/03
DATE

Mailed to Parties:

JUL 16 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cmo

OAL DKT. NO. EDU 4773-01
AGENCY DKT. NO. 315-8/01

MARK STEINBRICK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SHORE REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Upon careful and independent review of the record in this matter, the Commissioner concurs that this matter is properly dismissed for failure to prosecute. Accordingly, the Initial Decision of the Administrative Law Judge is adopted for the reasons expressed therein.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 8/15/03

Date of Mailing: 8/18/03

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

480-03

#480-03

BOARD OF EDUCATION OF THE TOWNSHIP OF SPRINGFIELD, UNION COUNTY,

PETITIONER,

V.

NEW JERSEY STATE DEPARTMENT OF EDUCATION, BOARD OF EDUCATION OF THE BOROUGH OF POINT PLEASANT BEACH, OCEAN COUNTY AND THE BOARD OF EDUCATION OF THE CITY OF SUMMIT, UNION COUNTY,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

August 15, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
PARTIAL SETTLEMENT
OAL DKT. No. EDU 5987-02
AGENCY DKT. NO. 184-6/02

BOARD OF EDUCATION OF THE TOWNSHIP OF SPRINGFIELD, UNION COUNTY,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION, BOARD OF EDUCATION OF THE BOROUGH OF POINT PLEASANT BEACH, OCEAN COUNTY AND THE BOARD OF EDUCATION OF THE CITY OF SUMMIT, UNION COUNTY,

Respondent.

Thomas O. Johnston, Esq., for petitioner
(Porzio, Bromberg & Newman, attorneys)

Kathleen Asher, Deputy Attorney General, for New Jersey State Department of Education, respondent
(Peter C. Harvey, Attorney General of New Jersey, attorney)

Kevin B. Riordan, Esq., for Point Pleasant Beach Board of Education, respondent (Berry, Sahradnik, Kotzas, Riordan & Benson, attorneys)

Arla Cahill, Esq., for Summit Board of Education, respondent
(Schenck, Price, Smith & King, attorneys)

Record Closed: June 28, 2003 Decided: July 7, 2003

BEFORE **STEPHEN G. WEISS,** ALJ:

This matter was transmitted to the Office of Administrative Law by the New Jersey Department of Education on July 26, 2002 as a contested case and concerns the issue of which Board of Education (petitioner Springfield Board or respondents Point Pleasant Beach Board and/or Summit Board) is responsible for the payment of tuition for two children who petitioner claimed were not domiciled in Springfield during the 1999-2000 school year but, instead, were the responsibility of either Point Pleasant Beach or Summit. Following the filing of the petition, answers and crossclaims were filed by the respondents and the matter was scheduled for hearing in April 2003. Those scheduled dates were adjourned when a motion was filed by the Springfield Board for summary decision.

Shortly thereafter, a Stipulation of Dismissal was entered into between the Springfield Board and the Summit Board whereby it was agreed any claims between those two parties would be dismissed but without prejudice to the claims asserted by the petitioner against the remaining respondents, the Department of Education and the Point Pleasant Beach Board.

Accordingly, having reviewed the Stipulation of Settlement which is attached hereto I **FIND** as follows:

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

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

Therefore, I **ORDER** that the Springfield Board and the Summit Board comply with the terms of the settlement and that the proceedings between those two parties be and are hereby **CONCLUDED**. However, the issuance of this partial initial decision settlement shall not interfere with the continued processing of the claims between the remaining parties.

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

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

July 7, 2003
DATE

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

7-10-03
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 11 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

\mvh

PORZIO, BROMBERG & NEWMAN, P.C.
100 Southgate Parkway
P.O. Box 1997
Morristown, NJ 07962-1997
Attorneys for Petitioner Springfield Board of Education

SPRINGFIELD BOARD OF EDUCATION, Petitioner, v. NEW JERSEY DEPARTMENT OF EDUCATION, POINT PLEASANT BEACH BOARD OF EDUCATION and SUMMIT BOARD OF EDUCATION, Respondents.	BEFORE THE COMMISSIONER OF EDUCATION OFFICE OF ADMINISTRATIVE LAW Agency Dkt. No. 184-6/02 OAL Dkt No. EDU 5987-02 **STIPULATION OF DISMISSAL WITHOUT PREJUDICE BETWEEN PETITIONER SPRINGFIELD BOARD OF EDUCATION AND RESPONDENT SUMMIT BOARD OF EDUCATION**

It is hereby stipulated and agreed by and between petitioner, Springfield Board of Education, and respondent, Summit Board of Education, that all claims asserted herein between and against the Springfield Board of Education and Summit Board of Education, be and hereby are dismissed without prejudice as against any claims between these respective parties and without costs in favor of or against these respective parties, and that the within Stipulation of Dismissal shall have no affect on the claims asserted herein by the Springfield Board of

Education against respondents New Jersey Department of Education and Point Pleasant Beach Board of Education.

SCHENCK, PRICE, SMITH & KING, LLP
Attorneys for Respondent
Summit Board of Education

By: _____
Arla Cahill
An Attorney of the Firm

Dated: 4/30/03

PORZIO, BROMBERG & NEWMAN, P.C.
Attorneys for Petitioner
Springfield Board of Education

By _____
Thomas O. Johnston
An Attorney of the Firm

Dated: 5.1.03

OAL DKT. NO. EDU 5987-02
AGENCY DKT. NO. 184-6/02

BOARD OF EDUCATION OF THE TOWNSHIP OF SPRINGFIELD, UNION COUNTY,	:	
PETITIONER,	:	
V.		COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, BOARD OF EDUCATION OF THE BOROUGH OF POINT PLEASANT BEACH, OCEAN COUNTY AND THE BOARD OF EDUCATION OF THE CITY OF SUMMIT, UNION COUNTY,	:	DECISION
RESPONDENTS.	:	

The record and notice of dismissal, as to respondent Summit Board of Education, transmitted by the Office of Administrative Law (OAL) have been reviewed. It is noted that this matter was characterized as a partial Settlement, pursuant to *N.J.A.C.* 1:1-19.1, by the Administrative Law Judge in his Initial Decision. The Commissioner determines that because no settlement terms were brought to the record and the document appended to the decision is an advisement of dismissal, this matter is more appropriately categorized as a withdrawal as to this respondent under *N.J.A.C.* 1:1-19.2. The Commissioner approves the withdrawal and, consequently the Summit Board of Education is no longer deemed a party in this case.

This matter shall proceed at the OAL with respect to the remaining parties.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 8/15/03
Date of Mailing: 8/18/03

481-03

#481-03

BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION (IN THE MATTER OF THE DISTRICT'S SUPPLEMENTAL AID APPLICATION)	:	DECISION
RESPONDENT.	:	

August 18, 2003

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

7/14/03
DATE

STEVEN C. REBACK, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

7/14/03
DATE

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JUL 17 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

cmo

OAL DKT. NO. EDU 6197-00
AGENCY DKT. NO. 241-6/00

BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION (IN THE MATTER OF THE DISTRICT'S SUPPLEMENTAL AID APPLICATION)	:	DECISION
RESPONDENT.	:	

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

Upon careful and independent review of the record in this matter, the Commissioner concurs that this matter is properly dismissed for failure to prosecute.[1]

Accordingly, the Initial Decision of the Administrative Law Judge is adopted for the reasons expressed therein.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 8/18/03

Date of Mailing: 8/18/03

[1] Because this agency is a party to the present matter, had a settlement been effectuated pursuant to *N.J.A.C.* 1:1-19.1(c), it would have been deemed the final decision in this matter. *N.J.A.C.* 1:1-19.1(d).

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

482-05

#482-03

HOPE SANKER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF ENGLEWOOD CLIFFS, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

August 18, 2003

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 7572-01

Agency Dkt. No. 307-7/01

HOPE SANKER,

Petitioner,

v.

BOARD OF EDUCATION OF ENGLEWOOD CLIFFS, BERGEN COUNTY,

Respondent.

Alfred F. Maurice, Esq., for petitioner
(Springstead & Maurice, attorneys)

Rodney T. Hara, Esq., for respondent
(Fogarty and Hara, attorneys)

Record Closed: May 29, 2003 Decided: July 11, 2003

BEFORE **MUMTAZ BARI-BROWN**, ALJ:

STATEMENT OF THE CASE

This case was transmitted to the Office of Administrative Law ("OAL") on August 31, 2001 for a hearing pursuant to *N.J.S.A.* 52:14B-1 to 15 and *N.J.S.A.* 52:14F-1 to 13.

The parties entered into an agreement and have prepared a settlement letter, which is attached and fully incorporated herein.

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

1. The parties have voluntarily agreed to a settlement of this matter.

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

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1(d) and should be approved. I approve the stipulation of settlement and therefore **ORDER** that the parties comply with the agreement.

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

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

July 11, 2003
DATE

MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged:

July 16, 2003
DATE

M. Kathleen Duncan (Ca)
DEPARTMENT OF EDUCATION

Mailed to Parties:
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JUL 17 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

cb

Springstead & Maurice

Attorneys at Law

JUN 4 2 23 AM '03

Practice Limited to Labor Relations
39 Hudson Street, Hackensack, NJ 07601
(201) 487-1414 OR (201) 343-0003
Telecopier (201) 487-0212

6/20/03
6/23/03

ALFRED F. MAURICE
N.J. & Fl. Bars

HAROLD N. SPRINGSTEAD, L.L.M.
(certified criminal trial attorney)

LAUREN E. MCGOVERN

May 29, 2003

Honorable Mumtaz Bari-Brown, ALJ
Office of Administrative Law
33 Washington Street
Newark, New Jersey 07102

Re: Hope Sanker v. Englewood Cliffs Board of Education
Agency Ref. No. 307-7/01, OAL Docket No. EDUOR 07572-01N

Dear Judge Bari-Brown:

The above-referenced matter has been amicably resolved by the parties. Would you please consider the matter settled and withdrawn by the petitioner.

Thank you for your attention in this regard.

Respectfully,

Alfred F. Maurice

Cc: Fogarty & Hara, Esqs. (201) 791-3432
Ms. Hope Sanker

OAL DKT. NO EDU. 7572-01
AGENCY DKT. NO. 307-7/01

HOPE SANKER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF ENGLEWOOD CLIFFS, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of dismissal transmitted to the Commissioner by the Office of Administrative Law have been reviewed. It is noted that this matter was characterized as a Settlement, pursuant to *N.J.A.C.* 1:1-19.1, by the Administrative Law Judge in her Initial Decision. The Commissioner determines that because no settlement terms were brought to the record and the document appended to the decision is an advisement of withdrawal, this matter is more appropriately categorized as a withdrawal under *N.J.A.C.* 1:1-19.2. The Commissioner approves the withdrawal and, consequently, this matter is no longer deemed to be a contested matter before him and is, accordingly, dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 8/18/03

Date of Mailing: 8/18/03

483-03

#483-03

D.B., on behalf of minor child, J.S., :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY, :

RESPONDENT. :

COMMISSIONER OF EDUCATION

DECISION

August 18, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 11227-02
Agency Dkt. No. 312-10/02

D.B. o/b/o minor child, J.S.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,
Respondent.

Keith O.D. Moses, Esq., for petitioner

Stephen J. Christiano, Esq., for respondent

Record Closed: July 1, 2003 Decided: July 11, 2003

BEFORE **EDITH KLINGER**, ALJ:

STATEMENT OF THE CASE

This case was transmitted to the Office of Administrative Law ("OAL") on December 31, 2002 for a hearing pursuant to *N.J.S.A.* 52:14B-1 to 15 and *N.J.S.A.* 52:14F-1 to 13.

The parties entered into an agreement and have prepared a Stipulation of Settlement, which is attached and fully incorporated herein.

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

1. The parties have voluntarily agreed to a settlement of this matter.

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

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1(d) and should be approved. I approve the stipulation of settlement and therefore **ORDER** that the parties comply with the agreement.

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

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

July 11, 2003
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

July 16, 2003
DATE

M. Kathleen Duncan (Ex)
DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JUL 17 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

cb

Stephen J. Christiano
Attorney for Respondent
49 Mt. Pleasant Avenue
West Orange, NJ 07052
(973) 736-1636

BEFORE THE COMMISSIONER OF
EDUCATION OF NEW JERSEY
OAL DOCKET NO. EDU-11227-02

D.B., ON BEHALF OF MINOR CHILD, J.S.,

Petitioner,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,

Respondent.

STIPULATION OF SETTLEMENT

The parties having amicably adjusted the differences between them, it is hereby stipulated as follows:

(1) Petitioner withdraws his petition of appeal.

(2) Respondent withdraws its counterclaim for tuition charges.

(3) J.S. shall be permitted to attend West Orange High School so long as all school residency requirements continue to be met.

(4) Petitioner shall provide respondent with a copy of the custody order for J.S. as soon as possible.

(5) Petitioner agrees to pay respondent the sum of $1,500 in full settlement of all tuition charges. Payment shall be made in five (5) monthly installments of $300. The first installment is due June 15, 2003, and the succeeding installments will be due

on the fifteenth day of each month thereafter. If petitioner defaults on any of the payments ("default" meaning failure to make a payment within 10 days of its due date), respondent shall be entitled to the entire amount of tuition for the period of J.S.'s school attendance in West Orange during the 2002-2003 year, less any payments made.

(6) This settlement is subject to approval by the Commissioner of Education. If the Commissioner rejects this settlement, any tuition payments heretofore made by petitioner shall be refunded by respondent.

(7) The parties, upon completion of the terms of this settlement, do mutually release the other party, including agents, employees, heirs, executors, personal representatives and assigns, from all claims, demands, damages, causes of action or suits which could have been made, have been made or might have been made with respect to the events giving rise to this action.

(8) This stipulation of settlement constitutes the entire agreement of and understanding between the parties.

Dated:

Derrick Bishop, Petitioner

Dated:

Keith O.D. Moses,
Attorney for Petitioner

BOARD OF EDUCATION OF THE
TOWNSHIP OF WEST ORANGE

By: Debbie Haus 6/26/03
President

ATTEST:

Mark A. Young 6/26/03
Secretary

OAL DKT. NO. EDU 11227-02
AGENCY DKT. NO. 312-10/02

D.B., on behalf of minor child, J.S.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

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

Upon review, the Commissioner approves the settlement terms and adopts the Settlement Agreement as the final decision in this matter. In so holding, however, the Commissioner observes that the settlement included with the Initial Decision sets forth terms that were to be effectuated prior to approval of the settlement terms by the Commissioner pursuant to *N.J.A.C.* 1:1-19.1. The ALJ and the parties are cautioned against effectuating terms of a settlement agreement presented to the Commissioner for his review prior to receiving approval from the Commissioner.

The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 8/18/03

Date of Mailing: 8/19/03

484-03

484 -03

STUDENTS – NONRESIDENT TUITION

SUMMARY OF COMMISSIONER'S DECISION

A.K., on behalf of minor child, R.K. v. Robert E. Smith, Superintendent of Schools and the Board of Education of the Rumson-Fair Haven School District, Monmouth County

Petitioning parent challenged the Board's refusal to accept his daughter as a nonresident tuition student.

The matter was dismissed as moot.

August 19, 2003

A.K., on behalf of minor child, R.K.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
ROBERT E. SMITH, SUPERINTENDENT OF SCHOOLS AND THE BOARD OF EDUCATION OF THE RUMSON-FAIR HAVEN SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 107-03
AGENCY DKT. NO. 348-11/02

A.K. obo R.K.,

Petitioners,

v.

ROBERT E. SMITH, SUPERINTENDENT OF SCHOOLS, & THE RUMSON-FAIR HAVEN REGIONAL BOARD OF EDUCATION,

Respondents.

A.K., Esq., father of **R.K.**, for petitioners pro se

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

Record closed: July 9, 2003 Decided: July 17, 2003

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

STATEMENT OF THE CASE

Petitioner R.K. resides in the district served by the Red Bank Regional (RBR) High School, from which she has now graduated. While a senior in RBR High School during the 2002-03 school year, R.K. applied for admission as a nonresident tuition-paying student to

Rumson-Fair Haven Regional (R-FHR) High School and respondent Robert E. Smith, Ed.D., the R-FHR superintendent of schools, denied the application. Petitioners alleged that the denial of the application violated the R-FHR Board of Education's (BOE's) criteria for admission of such applicants and they demanded orders reversing the denial and requiring respondents to provide a written, detailed decision on the application. By March 2003 R.K. had completed requirements for graduation from RBR High School and she entered a college. In responses to discovery demands, respondents described the policy on applications for admission by nonresident students and explained the decision on R.K.'s application. Given R.K.'s graduation, respondents (who deny any wrongful conduct) move for an order dismissing the petition and its claims as moot. Petitioners move for an order allowing an amended petition and for an order allowing additional discovery.

PROCEDURAL HISTORY
AND
FINDINGS OF FACT

The facts and procedural history are interrelated and are set forth together.

Petitioners reside in Little Silver, which is in the district served by RBR High School.

During the 2001-02 school year R.K. was a junior in RBR High School. Two of R.K.'s eight courses were honors courses: in Pre-Calculus Honors she received a final grade of "79" and in Spanish 4 Honors she received a final grade of "86." In A.K.'s four non-honors courses, she received grades in the "80s"; in Family Life II she received a "92"; and in Band Percussion she received a "99." P-2.

Petitioners allege that, during the 2002-03 school year when R.K. was a senior in RBR High School, she had "conflicts of a personal nature" in her school that distracted her from her academic work and "threatened to cause a motivational decline in [her] studies and academic goals." P-1.

R-FHR High School considers applications from nonresidents to be tuition-paying

students and the R-FHR BOE's policy states that in considering such an application, the school administrator should consider factors including the student's "potential" and the school's "capacity" so as "not to incur any additional expense." P-2.

In October 2002, A.K. (who is an attorney) spoke with Dr. Smith about R.K. applying for admission as a nonresident tuition-paying student. A.K. alleges that Dr. Smith stated that, when space is available and a non-resident tuition-paying student appears likely to be successful in R-FHR High School, subject to the discretion of the R-FHR BOE, an applicant for admission to the high school may be accepted. A.K. represented that R.K. was an "honors student" at RBR High School. A.K. alleges that Dr. Smith stated that R-FHR High School staff would communicate with RBR High School staff relative to R.K. and that he "expressed confidence that the [R-FHR] guidance department would be able to structure a program for R.K. that would accomplish her goal of high school graduation." P-1. A.K. alleges that Dr. Smith stated that he had authority to accept R.K. (before the BOE could act on the application) and that R.K. could begin classes at R-FHR High School as early as Wednesday, November 6, 2002. P-1.

On October 22, 2002, R.K. submitted her application and on October 31, 2002, Dr. Smith interviewed R.K. Dr. Smith then notified A.K. that A.K.'s RBR High School program was "light" and there may be difficulties in preparing a program at R-FHR High School that meshed with A.K.'s RBR High School program. P-2. Dr. Smith discussed the application with Deborah Connolly, R-FHR High School's supervisor of guidance, who held the opinion that R.K.'s RBR High School courses "could not be duplicated" by R-FHR High School. P-2. Having obtained more information about R.K.'s academic history, Dr. Smith was concerned about several factors: R.K. would need extra service from the R-FHR High School staff to overcome her academic deficit; there would be difficulty meshing A.K.'s RBR High School program with a program at R-FHR High School; and A.K.'s application was made when she was already well into her senior year.

On November 1, 2002, Dr. Smith telephoned A.K. and notified him that he may have been "overly enthusiastic" in first discussing the matter with him and that, given the above-described circumstances, he had denied the application. P-2. A.K. has alleged that, during the November 1, 2002, telephone conversation, Dr. Smith also stated that "extra help" would be

needed for R.K. to "catch up" with the R-FHR High School program, which would place an "unreasonable burden" on R-FHR High School. P-1. A.K. requested that Dr. Smith reconsider, but Dr. Smith stated that his decision was final.

On November 6, 2002, the petition was filed with the Department of Education. N.J.S.A. 18A:6-9. (The petition incorrectly identified Dr. Smith as William E. Smith.) Petitioners contended that respondents' denial was arbitrary, capricious and unreasonable, and that it violated R.K.'s right to a thorough and efficient education. P-1. R.K. is Asian-American and petitioners also wrote that the denial of the application "raises the question of whether there may be some hidden racial discrimination at work." P-1. Petitioners demanded an order requiring that respondents reconsider the application, writing:

> such reconsideration [should] include a rational, detailed, and written decision based on a sufficiently thorough analysis of R.K.'s educational, academic, intellectual and personal qualifications, and adequate pedagogical consultation with [RBR High School] for the purpose of determining whether R.K. is capable of succeeding in a transfer to [R-FHR High School] and accomplishing her goal of high school graduation this year.
>
> [P-1.]

On November 7, 2002, respondents' answer and defenses were filed with the Department.

On November 14, 2002, the Commissioner issued a letter denying petitioners' motion for emergent relief.

The Department transmitted the contested case to the Office of Administrative Law, where it was filed on January 15, 2003. N.J.S.A. 52:14B-2(b). On February 24, 2003, I issued a letter scheduling discovery, etc.

By February or March 2003 R.K. had completed the requirements for her high school degree from RBR High School and entered college. However, petitioners did not disclose these circumstances until months later (as detailed below).

In response to discovery demands, respondents provided petitioners with a description of the factors on which respondents rely in acting on applications for nonresident tuition-paying students, as well as copies of records related to R.K.'s application and the denial. P-2.

On June 2, 2003, petitioners filed a motion for orders relative to discovery and a proposed amended petition. Petitioners submitted copies of their discovery demands and the respondents' responses, including answers to interrogatories and copies of documents. Petitioners seek an order allowing additional discovery, e.g., respondents' "prior record of adjudicating applications of non-resident applicants, comparative degree of burdensomeness on the teaching staff of accepting students after the start of the school year, and regarding the school district's non-discrimination policy" and "all Stringed Instrument Ensemble courses" offered at R-FHR High School. P-2.

In the proposed amended petition, petitioners allege that respondents willfully disregarded their policies relative to applications for admission by non-resident students; they contend that the denial of the application was arbitrary, capricious and discriminatory; and they allege that the denial of the application harmed R.K.'s educational career and record, harmed her ability to gain admission into the school of her choice, harmed her self-esteem, and constituted violation of her due process and constitutional rights. P-3. The proposed amended petition demands compensatory damages of $50,000 and punitive damages of $150,000. P-3. (Petitioners did not file a motion for an order allowing the proposed amended petition, but I am treating their submission as such a motion. See N.J.A.C. 1:1-1.3; R. 4:9-1.)

On June 11, 2003, I conferred with A.K. and respondents' attorney. A.K. stated that by February or March 2003 R.K. had completed her requirements for a high school degree from RBR High School and that she had entered a college. Upon learning of R.K.'s circumstances, respondents' attorney represented that he would file a motion for summary decision, dismissing petitioners' claims as moot. I stated that I would defer any decision on petitioners' motion relative to discovery, etc., until I had decided respondents' anticipated motion.

On June 24, 2003, respondents filed their papers in support of their motion to dismiss and in opposition to petitioners' motion for an order allowing the amended petition.

On July 9, 2003, petitioners submitted a letter memorandum in opposition to respondents' motion.

Summary of Facts

R.K. resides in the district served by RBR High School, from which she has now graduated. During the 2001-02 school year, when R.K. was a junior in RBR High School, two of her eight courses were honors courses. In the honors courses she received a "79" and an "86," and in most of her other courses her grades were acceptable, but not very high. Well into the 2002-03 school year, when R.K. was a senior, she applied for admission to R-FHR High School. The R-FHR policy on applications for admission of nonresident tuition-paying students provides that the chief school administrator should consider factors including the student's "potential" and the school's "capacity" so as "not to incur any additional expense." P-2. A.K. represented to the R-FHR superintendent that R.K. was an "honors" student and the R-FHR superintendent was optimistic about R.K.'s chances for admission. However, after obtaining more information about R.K.'s academic history, the R-FHR superintendent was concerned about several factors: R.K. would need extra service from the R-FHR High School staff to overcome her academic deficit; there would be difficulty meshing A.K.'s RBR High School program with a program at R-FHR High School; and A.K.'s application was made when she was already well into her senior year. Consequently, the R-FHR superintendent notified petitioners that he had denied the application. In this litigation, respondents have provided to petitioners information and copies of documents detailing the relevant factors and process of decision-making on R.K.'s application and reasons for the denial. R.K. has received her high school degree from RBR High School and has entered college.

CONCLUSIONS OF LAW

New Jersey's constitution requires that the Legislature provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the

children in this state between the ages of five an eighteen years. N.J. Const. art. VIII, § 4, ¶ 1. The Legislature complies with this requirement by providing for school districts, including regional school districts operated by boards of education, to provide instruction to school-age children residing within their districts. See N.J.S.A. 18A:13-1 to -81.

R.K. resides within the RBR High School district and, consistent with the above-cited laws, RBR High School has provided her with instruction. Petitioners have cited no authority requiring the R-FHR's BOE to provide instruction to R.K., who is not a resident of its district. However, when a public school system accepts applications from school-age children to enter its school as nonresident tuition-paying students, in making a decision on the application fundamental fairness requires that it use reasonable factors and that it notify the applicant of the reasons for a denial of an application. J.A. v. Board of Educ. for S. Orange, 318 N.J. Super. 512, 525-26 (App. Div. 1999).

The BOE's factors for decisions on applications relate reasonably to both the potential for success of the applicant and to the potential burden on the school system. The factors are realistic and equitable. Following A.K.'s representations about R.K.'s academic achievement, when Dr. Smith had more complete information about her academic history, he determined that she would need "extra help" to "catch up" with the R-FHR High School program, which would place an "unreasonable burden" on R-FHR High School. P-1; P-2. Petitioners have not shown that respondents' denial of R.K.'s application was arbitrary, capricious or unreasonable or that it resulted from invidious discrimination. Dr. Smith spoke with A.K. about the denial and, by way of the discovery process in this case, respondents provided additional information and copies of relevant documents. Respondents thereby provided a reasonably detailed explanation of the factors and process involved in the decision on R.K.'s application. Petitioners have submitted no evidence creating an issue necessitating a trial-type hearing.

R.K. has graduated from her high school and entered college, so petitioners' claims, which are based on her application for admission to the respondents' high school, are also dismissible as moot. Oxfeld v. New Jersey State Bd. of Educ., 68 N.J. 301, 303-04 (1975). A.K. has provided no reasonable basis for his speculation that the denial "raises the question of whether there may be some hidden racial discrimination at work." P-1. That is, petitioners have

submitted no evidence showing, e.g., some matter of compelling public importance capable of repetition such that this case should be decided despite its mootness. See In re J.I.S. Landfill, 110 N.J. 101, 104-05 (1988) (citing Matter of Conroy, 98 N.J. 321, 342 (1985); Guttenberg Sav. & Loan Ass'n v. Rivera, 85 N.J. 617, 622-23 (1981); Dunellen Bd. of Educ. v. Dunellen Educ. Ass'n, 64 N.J. 17, 22 (1973)).

Relative to petitioners' motion for an order compelling additional responses to discovery demands, etc., respondents have already reasonably complied with petitioners' initial discovery demands. Petitioners' proposed discovery requests information relating to, e.g., respondents' "prior record of adjudicating applications of non-resident applicants, comparative degree of burdensomeness on the teaching staff of accepting students after the start of the school year, and regarding the school district's non-discrimination policy" and relating to "all Stringed Instrument Ensemble courses" offered at R-FHR High School, etc. P-2. An order compelling respondents to expend time and effort complying with such discovery requests would waste public funds.

Relative to petitioners' proposed amended petition, the proposed claims for alleged damages cannot be granted in this administrative education case. N.J.S.A. 18A:6-9; see J.A. v. Board of Educ. for S. Orange, supra, 318 N.J. Super. at 526.

The motion for summary decision is an efficient means of resolving a contested case, available where there is no genuine issue of material fact that necessitates a trial-type hearing. The movant bears the burden of persuasion that there is no such genuine issue of material fact and, in making such a determination, reasonable inferences are drawn in favor of the objector. N.J.A.C. 1:1-12.5; R. 4:46-1; Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 528-40 (1995); Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 73-75 (1954). Even where a statute calls for a hearing, where the objector submits no evidence to demonstrate such a genuine issue of material fact, the motion procedure constitutes the hearing and no trial-type hearing is necessary. South Brunswick Asphalt v. Department of Envtl. Protection, No. A-693-98T5 (App. Div. April 10, 2000) (citing Contini v. Newark Bd. of Educ., 286 N.J. Super. 106, 120-21 (App. Div. 1995), certif. denied, 145 N.J. 372 (1996)), certif. denied, 165 N.J. 487 (2000).

Petitioners have shown no basis in law or in fact for their petition and/or claims or for their proposed amended petition. There is no need for a trial-type hearing here. The BOE's motion must be granted. Petitioners' motions must be denied.

ORDERS

I **GRANT** the respondents' motion and I **ORDER** the petition **DISMISSED WITH PREJUDICE**.

I **DENY** the petitioners' motion for an order allowing amendment of the petition and for orders requiring compliance with petitioners' discovery requests.

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

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

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

July 17, 2003
DATE

John R. Tassini
JOHN R. TASSINI, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

July 17, 2003
DATE

Mailed to Parties:

JUL 23 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/lam

EXHIBITS

For Petitioners:

P-1 Petition for Emergent Relief, certified by A.K., November 5, 2002

P-2 Papers in support of A.K.'s motion to compel more specific answers to interrogatories; interrogatories and answers; answer to request for production of documents; Dr. Smith's notes regarding application for admission of R.K.; letter from Deborah Connolly; Nonresident Policy; Non-resident Student Tuition Contract (form); R.K.'s Application for Admission; R.K.'s academic records; petitioners' proposed second set of interrogatories, etc.

P-3 Proposed "First Amended Petition"

For Respondents:

None

OAL DKT. NO. EDU 107-03
AGENCY DKT. NO. 348-11/02

A.K., on behalf of minor child, R.K.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
ROBERT E. SMITH, SUPERINTENDENT OF SCHOOLS AND THE BOARD OF EDUCATION OF THE RUMSON-FAIR HAVEN SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

The record of the matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioners exceptions were filed in accordance with the provisions of *N.J.A.C.* 1:1-18.4 and have been fully considered by the Commissioner in his determination herein..

Petitioner excepts, *inter alia*, to the Administrative Law Judge's (ALJ) determination that this matter is moot. Rather, he argues, "a teenager's due process rights with respect to applying to other school districts which have chosen to accept non-resident applications, is a matter of sufficient public importance to fall under the doctrine of exceptions to mootness." (Petitioner's Exceptions at 17)

Upon his full and independent review, the Commissioner finds and determines, as did the ALJ, that inasmuch as R.K. graduated from high school in February or March 2003 and now attends college, the debate concerning her admission to Rumson-Fair Haven Regional High School as a nonresident, tuition-paying student is academic and moot. Additionally, contrary to

the advancement of petitioner, this matter presents no issue of significant public importance or other compelling reason warranting deviation from the general rule against adjudicating moot issues. There being no relief which the Commissioner can grant petitioner herein, the Board's motion for summary decision on the basis of mootness is appropriately granted.[1] This being the case, the Commissioner finds it unnecessary to reach to the discussion of the ALJ or the arguments of the parties which go to the underlying merits of this case.

Accordingly, the Initial Decision of the OAL, as modified above, is adopted. The instant Petition of Appeal is hereby dismissed as moot.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: August 19, 2003

Date of Mailing: August 19, 2003

[1] The Commissioner additionally concurs with the ALJ that petitioner's motion to amend his petition to include a claim for damages must be dismissed for lack of jurisdiction.

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

485-03

485-03S

NANCY WILTBANK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF DEAL, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

August 19, 2003

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

July 21, 2003
DATE

Ana C. Viscomi
Ana C. Viscomi, ALJ

Receipt Acknowledged:

July 23, 2003
DATE

M. Kathleen Duncan (for)
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 25 2003
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jck

EXHIBITS

Jointly Submitted

J-1 Stipulation of Dismissal and Settlement Agreement

ZAZZALI, FAGELLA, NOWAK
KLEINBAUM & FRIEDMAN
150 West State Street
Trenton, New Jersey 08608
(609) 392-8172
Attorneys for Petitioner

NANCY WILTBANK, Petitioner, v BOARD OF EDUCATION OF THE BOROUGH OF DEAL, MONMOUTH COUNTY, Respondent.	:BEFORE THE OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO.: EDUOR 06672-01S **STIPULATION OF DISMISSAL AND SETTLEMENT AGREEMENT**

This matter having come before this forum on the petition of Nancy Wiltbank, Richard A. Friedman, Esq., appearing, and a response having been submitted by the Deal Board of Education, Honora O'Brien Kilgallen, Esq., appearing, and the school nurse, Marianne Baumann having intervened in the matter, Stephen B. Hunter, Esq., appearing, and the parties having agreed to amicably resolve the issues in dispute, it is hereby stipulated and agreed as follows:

1. That the petitioner, Nancy Wiltbank, shall dismiss the claims asserted in the petition of appeal against the respondent, Deal Board of Education, in consideration of a total settlement amount of $7,500.00, which shall be paid no later than

4a

September 30, 2003; and

2. That the dismissal of the claims asserted in the petition of appeal applies only to Ms. Wiltbank's and Ms. Baumann's present assignments of health and physical education classes, and that Ms. Wiltbank reserves and retains her tenure and seniority rights, so that if additional physical education or health classes become available, or additional physical education or health classes are assigned to any other teaching staff member or to Marianne Baumann, Ms. Wiltbank reserves the right to assert tenure and seniority claims to any such classes, positions, or assignments; and

3. That the terms of this settlement shall be held in the strictest of confidence and that no party to this action shall reveal the terms of this Settlement Agreement to any third parties, except for representatives of the respondent, Deal Board of Education or of the New Jersey Education Association, either verbally or in written form, except to the extent required by law; and

4. That the fully executed original of this Stipulation of Dismissal and Settlement Agreement shall be submitted to the Office of Administrative Law and that each of the parties shall receive and obtain one fully executed copy of this document for their respective files.

KILGALLEN & KILGALLEN, LLP

By: _____
Honora O'Brien Kilgallen, Esq.
Attorney for Respondent

Dated: 6/18/03

ZAZZALI, FAGELLA, NOWAK, KLEINBAUM & FRIEDMAN

By: _____
Richard A. Friedman, Esq.
Attorney for Petitioner

Dated: 6/13/03

ZAZZALI, FAGELLA, NOWAK, KLEINBAUM & FRIEDMAN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

KLAUSNER & HUNTER

By: Stephen B. Hunter
Stephen B. Hunter, Esq.
Attorney for Mary Ann Baumann

Dated: 6/20/03

ZAZZALI,
FAGELLA, NOWAK,
KLEINBAUM
& FRIEDMAN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

OAL DKT. NO. EDU 6672-01
AGENCY DKT. NO. 384-9/01

NANCY WILTBANK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF DEAL, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: August 19, 2003

Date of Mailing: August 20, 2003

* The Commissioner is, however, compelled to comment on Term 3 of this agreement. Although the parties may agree between themselves to keep the specific terms of a settlement agreement confidential, they cannot seek to bind the Commissioner or any other individual to such confidentiality. Furthermore, in the absence of a motion to seal the record for good cause shown, Commissioner's decisions and the underlying proceedings are a matter of public record.

486-03

486-03SEC

IN THE MATTER OF JUAN SANTIAGO,	:	
PATERSON BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
PASSAIC COUNTY.	:	DECISION
	:	

SYNOPSIS

The School Ethics Commission determined that respondent Board member violated *N.J.S.A.* 18A:12-24.1(j) when dealing with personnel or confidentiality issues (writing a letter to the superintendent requesting the demotion of the assistant superintendent and copying that person's subordinates among other parties). The Commission recommended the penalty of reprimand.

Upon review of the record, the Commissioner, whose decision was restricted solely to a review of the Commission's recommended penalty, concurred with the Commission's recommendation and, thus, ordered respondent reprimanded as a school official found to have violated the School Ethics Act.

August 19,2003

IN THE MATTER	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
OF	:	
	:	**Docket No.: C01-03**
JUAN SANTIAGO	:	
PATERSON BOARD OF EDUCATION	:	
PASSAIC COUNTY	:	**DECISION**
	:	

PROCEDURAL HISTORY

The above-captioned matter arises from a complaint filed by Paterson Board of Education (Board) member Joseph Atallo against Board member Juan Santiago alleging that Mr. Santiago violated N.J.S.A. 18A:12-24.1(c), (d) and (j) of the Code of Ethics for School Board Members of the School Ethics Act when he wrote a letter to the superintendent of the Paterson school district requesting that assistant superintendent, Dr. John Sico be demoted from his position and copied Dr. Sico's subordinates.[1]

Mr. Santiago filed an answer to the complaint on February 25, 2003 admitting that he did write the above-referenced letter. Mr. Santiago denies that his actions were in violation of any provision of the Code of Ethics.

The Commission invited the parties to its March 25, 2003 meeting to present witnesses and testimony to aid in the Commission's investigation. Dr. Atallo appeared *pro se.* Mr. Santiago appeared and was represented by counsel, Gregory Johnson, Esquire. After hearing testimony, the Commission voted at its public meeting to find probable cause to credit the allegation that Mr. Santiago's conduct was in violation of the Code of Ethics section N.J.S.A. 18A:12-24.1(j). The Commission found no probable cause to credit the allegation that Mr. Santiago violated N.J.S.A. 18A12-24.1(c) and (d) of the Code of Ethics

The Commission found that the material facts were not in dispute with respect to the issue upon which it found probable cause and, therefore, the Commission advised the parties that it would decide the matter on the basis of written submissions pursuant to N.J.A.C. 6A:28-1.14(b). Mr. Santiago was invited to provide a written submission to the Commission within 30 days of the date of the probable cause decision, May 14, 2003, and set forth why the Commission should not find Mr. Santiago in violation of N.J.S.A. 18A:12-24.1(j) for the above stated action. He was also told that his written submission should include the respondent's position on an appropriate sanction should the Commission determine that the Act was violated.

[1] Although Dr. Atallo did not cite these specific sections, he quoted the language from these provisions.

The Commission did not receive a response from Mr. Santiago. It discussed this matter at its meeting of June 24, 2003 and voted to find Mr. Santiago in violation of N.J.S.A. 18A:12-24.1(j) and recommended a penalty of reprimand.

FACTS

Based on the pleadings, documents and testimony, the Commission found the following facts to be undisputed.

Mr. Santiago became a member of the Paterson Board of Education (Board) in April 2002. At all times relevant to this complaint, he was serving as Board president.

On May 1, 2002, the Panther Academy held an induction ceremony for its new students at the Passaic County Community College (PCCC).[2] The ceremony was planned and organized by Dr. Sico. Several students in the district were honored at the ceremony, including eleven students from the district's school no. 11. Board members Dr. Anthony Davis, Dr. Jonathan Hodges and Dr. Joseph Atallo were present. Mayoral candidate William Kline also attended the ceremony. The superintendent of schools, the building principals from school no. 11 and the other Board members were not officially notified of the event. After the ceremony, a reception was held in the PCCC cafeteria where "Vote for Kline" buttons were made available.

Mr. Santiago discussed the aforementioned events with those Board members who were not formally invited to the ceremony. Mr. Santiago also met with the superintendent of schools, Dr. Edwin Duroy, to advise him that Dr. Sico had engaged in what he believed to be prohibited political activity for school employees. Dr. Duroy recommended that Mr. Santiago set forth his complaint in a letter to him.

In his letter to Dr. Duroy, dated May 3, 2002, Mr. Santiago alleged that Dr. Sico concealed the induction ceremony for new students of the Panther Academy from certain Board members for political purposes. Mr. Santiago further requested that the superintendent demote Dr. Sico from his position as assistant superintendent of schools. The letter was copied to the Board, Dr. Sico, assistant superintendents, building principals, the State Department of Education and the New Jersey School Boards Association.

ANALYSIS

The Commission found a violation to credit the allegation that Mr. Santiago's conduct, particularly in copying Dr. Sico's subordinates on his letter asking the superintendent to demote Dr. Sico, was in violation of N.J.S.A. 18A:12-24.1(j). It provides:

> I will refer all complaints to the chief administrative officer and will act on the complaints after failure of an administrative solution.

[2] The Panther Academy recruits 8th grade students of the Paterson School District and other districts to participate in math and science enrichment courses.

The Commission finds that the board president and superintendent were not properly notified and political activity occurred at the Panther Academy ceremony. Therefore, the Commission does not find any fault with the fact that Mr. Santiago wrote the letter to the chief administrative officer as he requested. Clearly, such action is what N.J.S.A. 18A:12-24.1(j) contemplates when a board member has or hears a complaint. The Commission finds that a violation of the Code of Ethics occurred; however, when, instead of writing the letter in confidence and waiting for the chief administrative officer's response to the letter, he copied it to the Board, assistant superintendents, building principals, the State Department of Education and the New Jersey School Boards Association. Building principals are school employees under Dr. Sico's supervision. Personnel matters are not supposed to be addressed publicly pursuant to N.J.S.A. 10:4-12(b). Here, Mr. Santiago did not wait for an administrative solution before notifying Dr. Sico's staff and others of his complaint. The Commission concludes that by so doing, Mr. Santiago violated N.J.S.A. 18A:12-24.1(j).

DECISION

For the foregoing reasons, the Commission concludes that Mr. Santiago acted on his complaint prior to the failure of an administrative solution in violation of N.J.S.A. 18A:12-24.1(j) of the Code of Ethics for School Board Members. Due to the conduct that precipitated Mr. Santiago's action, specifically Dr. Sico's failure to properly notify Mr. Santiago of a District-related event and the distribution of political buttons at the event, the Commission recommends that the Commissioner of Education impose a penalty of reprimand.

This decision has been adopted by a formal resolution of the School Ethics Commission. This matter shall now be transmitted to the Commissioner of Education for action on the Commission's recommendation **for sanction only**, pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, Mr. Santiago may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Paul C. Garbarini, Chairperson

Resolution Adopting Decision – C01-03

Whereas, the School Ethics Commission has considered the pleadings filed by the parties, the documents submitted in support thereof and the testimony presented; and

Whereas, at its meeting of June 24, 2003, the Commission found that Juan Santiago violated N.J.S.A. 18A:12-24.1(j) of the Act and recommended that the Commissioner of Education impose a sanction of reprimand; and

Whereas, the Commission requested that its staff prepare a decision consistent with the aforementioned conclusion; and

Whereas, at its meeting of July 22, 2003, the Commission reviewed the draft decision and agrees with the decision;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter and directs its staff to notify all parties to this action of the Commission's decision herein.

Paul C. Garbarini, Chairperson

I hereby certify that this Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on July 22, 2003.

Lisa James-Beavers
Executive Director

IN THE MATTER OF JUAN SANTIAGO,	:	
PATERSON BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
PASSAIC COUNTY.	:	DECISION
	:	

The record of this matter and the decision of the School Ethics Commission ("Commission"), finding that Juan Santiago, member of the Paterson Board of Education, violated *N.J.S.A.* 18A:12-24.1(j), set forth in the Code of Ethics for School Board Members of the School Ethics Act, and recommending a penalty of reprimand have been reviewed. Upon issuance of the decision of the Commission, respondent was provided 13 days from the mailing date of the decision to file written comments on the recommended penalty for the Commissioner's consideration.

Comments filed by counsel on behalf of respondent state that he does not disagree with the Commission's decision. He appreciates that, notwithstanding it is common practice for District board members to copy parties on letters sent to the superintendent, particularly with respect to personnel or confidentiality issues, this practice must cease. Respondent understands his action was improper and agrees to accept a letter of reprimand for such action.

Initially, it must be emphasized that, pursuant to *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6A:3-9.1, the determination of the Commission as to violation of the School Ethics Act **is not reviewable by the Commissioner** herein. Only the Commission may determine whether a violation of the School Ethics Act occurred. The Commissioner's jurisdiction is limited to

reviewing the sanction to be imposed based upon a finding of a violation by the Commission. Therefore, this decision is restricted solely to a review of the Commission's recommended penalty.

Upon a thorough review of the record and full consideration of respondent's comments, the Commissioner determines to accept the Commission's recommendation that reprimand is the appropriate penalty in this matter for the reasons expressed in the Commission's decision. In so ruling, the Commissioner is satisfied that, in recommending a penalty for the violation found, the Commission fully considered the nature of the offense and weighed the effects of aggravating and mitigating circumstances. Therefore, the Commission's recommended penalty in this matter will not be disturbed.

Accordingly, IT IS HEREBY ORDERED that Juan Santiago be reprimanded as a school official found to have violated the School Ethics Act.*

COMMISSIONER OF EDUCATION

Date of Decision: August 19, 2003

Date of Mailing: August 20, 2003

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* aned *N.J.A.C.* 6A:4-1.1 *et seq.*

494-05

494-03 SEC

IN THE MATTER OF PAUL	:	
BLOCKER, LAWNSIDE BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION, CAMDEN COUNTY.	:	DECISION
_____	:	

August 21,2003

SCHOOL ETICS COMMISSION	:	**BEFORE THE**
	:	**SCHOOL ETHICS COMMISSION**
v.	:	
	:	**RESOLUTION**
PAUL BLOCKER	:	
Lawnside Board of Education	:	**SEC Docket No.: T03-03**
Camden County	:	
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-33 requires new board members to attend training within one year of election or appointment to the board to gain the skills and knowledge necessary to serve as a school board member; and

WHEREAS, Respondent Paul Blocker was appointed to a term on the Lawnside Board of Education in September 2001; and

WHEREAS, the New Jersey School Boards Association (NJSBA) advises prospective board members of the training requirement in the "candidate kit"; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on January 3, 2003 and February 19, 2003; and

WHEREAS, the NJSBA conducted seven training sessions between April 2002 and April 2003 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes;* and

WHEREAS, the last training session to fulfill the requirement was held in March 2003; and

WHEREAS, the Commission issued an Order on May 21, 2003, directing him to Show Cause why he had not attended training up until that time; and

WHEREAS, the Commission granted an extension for similarly situated board members to attend one of the June training sessions; and

WHEREAS, Mr. Blocker failed to provide any response to the Order to Show Cause and further failed to attend a June training session; and

/

WHEREAS, the Commission notified Respondent, by letter dated July 15, 2003, that the Commission would discuss this matter at its July 22, 2003 meeting, that he had the right to attend, and could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, Respondent did not respond to this letter, nor provide any reason for failing to attend the required training program for more than the one year allowed by law; and

WHEREAS, the Commission finds that this failure to attend board member training from September 2001 to April 2003 constitutes a violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds removal from the Board to be the appropriate penalty for failure to attend training;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Mr. Blocker violated N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education remove him from the Board of Education herewith.

Dated: July 22, 2003

Paul C. Garbarini, Chairperson

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed, the board member may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 River View Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on July 22, 2003.

Lisa James-Beavers, Executive Director

LJB/PSC/m:ethics/trainingresT03-03

AGENCY DKT. NO. 261-7/03

IN THE MATTER OF PAUL	:	
BLOCKER, LAWNSIDE BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION, CAMDEN COUNTY.	:	DECISION
	:	

Whereas, the School Ethics Commission (Commission) has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named Board member from office for failure to attend the Board member training sessions required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-1.6; and

Whereas the Commission sent ample notice to the above-named Board member of his failure to attend such training sessions; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.6(e), on May 21, 2003, the Commission issued an Order to Show Cause why he had not attended training up until that time; and

Whereas, the Commission granted an extension for similarly situated board members to attend one of the June training sessions; and

Whereas, the above-named Board member did not reply to the Order to Show Cause and further failed to attend a June training session; and

Whereas, the Commission voted on July 22, 2003 to recommend that the above-named Board member be removed from the Board and memorialized such decision through a resolution forwarded to the Commissioner of Education, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, on July 29, 2003, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to said resolution; and

Whereas, no comments were received from, or on behalf of, the above-named Board member; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the Commission and concurs with and adopts as his own the recommendations of the Commission; now therefore

IT IS ORDERED that the above-named Board member is removed from office as of the filing of this decision.*

COMMISSIONER OF EDUCATION

Date of Decision: August 21, 2003

Date of Mailing: August 22, 2003

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

495-03

495-03 SEC

IN THE MATTER OF LOUIS SCALDINO, :

LINDEN BOARD OF EDUCATION, : COMMISSIONER OF EDUCATION

UNION COUNTY. : DECISION

:

August 21, 2003

SCHOOL ETHICS COMMISSION	:	**BEFORE THE**
	:	**SCHOOL ETHICS COMMISSION**
v.	:	
	:	**RESOLUTION**
LOUIS SCALDINO	:	
Linden Board of Education	:	**SEC Docket No.: T28-03**
Union County	:	
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-33 requires new board members to attend training within one year of election or appointment to the board to gain the skills and knowledge necessary to serve as a school board member; and

WHEREAS, Respondent Louis Scaldino was elected to serve a three-year term on the Linden Board of Education in April 2002; and

WHEREAS, the New Jersey School Boards Association (NJSBA) advises prospective board members of the training requirement in the "candidate kit"; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on January 3, 2003 and February 19, 2003; and

WHEREAS, the NJSBA conducted seven training sessions between April 2002 and April 2003 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes;* and

WHEREAS, the last training session to fulfill the requirement was in March 2003; and

WHEREAS, the Commission issued an Order on May 21, 2003, directing Respondent to Show Cause why he had not attended training up until that time; and

WHEREAS, the Commission granted an extension for similarly situated board members to attend one of the June training sessions; and

WHEREAS, Mr. Scaldino responded and advised Commission staff on July 17, 2003, that he was registered for the October 2003 training session; and

WHEREAS, the Commission notified Respondent by letter dated July 15, 2003, that it would discuss this matter at its July 22, 2003 meeting, that he had the right to attend, and

could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, Respondent provided no reasons for failing to attend the required training program for the one year allowed; and

WHEREAS, the Commission finds that this failure to attend board member training from April 2002 to April 2003 constitutes a violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds suspension to be the appropriate penalty for failure to attend through June; and

WHEREAS, the Commission finds that if Mr. Scaldino fails to attend training by the end of **October 2003**, the Commission finds that it would be appropriate to have him removed from the board;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Mr. Scaldino violated N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education suspend him until he attends, but remove him from the board if he fails to attend by the October training session.

Dated: July 22, 2003

Paul C. Garbarini

Paul C. Garbarini, Chairperson

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed, the board member may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 River View Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on July 22, 2003.

Lisa James-Beavers

Lisa James-Beavers, Executive Director

(LJB/PSC/m:ethicstrainingresT28-03.doc)

AGENCY DKT. NO. 259-7/03

IN THE MATTER OF LOUIS SCALDINO,	:	
LINDEN BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
UNION COUNTY.	:	DECISION
	:	

Whereas, the School Ethics Commission (Commission) has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named Board member from office for failure to attend the Board member training sessions required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-1.6; and

Whereas the Commission sent ample notice to the above-named Board member of his failure to attend such training sessions; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.6(e), on May 21, 2003, the Commission issued an Order to Show Cause why he had not attended a training up until that time; and

Whereas, the Commission granted an extension for similarly situated board members to attend one of the June training sessions; and

Whereas, the above-named Board member advised that he was registered for the October 2003 training session; and

Whereas, the Commission voted on July 22, 2003 to recommend that the above-named Board member be suspended from the Board until he attends the October 2003 session and removed if he fails to attend the October 2003 session, and memorialized such decision through a resolution forwarded to the Commissioner of Education, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, on July 29, 2003, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to said resolution; and

Whereas, no comments were received from, or on behalf of, the above-named Board member; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the Commission and concurs with and adopts as his own the recommendations of the Commission; now therefore

IT IS ORDERED that the above-named Board member is suspended from office as of the filing of this decision and shall remain suspended pending completion of the requisite training, and, in the event he fails to complete the training session in October 2003, the above-named Board member shall be summarily removed from office as of that date.*

COMMISSIONER OF EDUCATION

Date of Decision: August 21, 2003

Date of Mailing: August 22, 2003

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

496-05

496-03SEC

IN THE MATTER OF JAY	:	
CARTER, BRANCHVILLE BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION, SUSSEX COUNTY.	:	DECISION
	:	

August 21, 2003

AGENCY DKT. NO. 262-7/03

IN THE MATTER OF JAY	:	
CARTER, BRANCHVILLE BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION, SUSSEX COUNTY.	:	DECISION
	:	

Whereas, the School Ethics Commission (Commission) has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named Board member from office for failure to attend the Board member training sessions required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-1.6; and

Whereas the Commission sent ample notice to the above-named Board member of his failure to attend such training sessions; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.6(e), on May 21, 2003, the Commission issued an Order to Show Cause why he had not attended training up until that time; and

Whereas, the Commission granted an extension for similarly situated board members to attend one of the June training sessions; and

Whereas, the above-named Board member did not reply to the Order to Show Cause and further failed to attend a June training session; and

Whereas, the Commission voted on July 22, 2003 to recommend that the above-named Board member be removed from the Board and memorialized such decision through a resolution forwarded to the Commissioner of Education, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, on July 29, 2003, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to said resolution; and

Whereas, no comments were received from, or on behalf of, the above-named Board member; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the Commission and concurs with and adopts as his own the recommendations of the Commission; now therefore

IT IS ORDERED that the above-named Board member is removed from office as of the filing of this decision.*

COMMISSIONER OF EDUCATION

Date of Decision: August 21, 2003

Date of Mailing: August 22, 2003

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

497-03

#497-03SEC

IN THE MATTER OF RANDIE ZIMMERMAN, :

ROCKY HILL BOARD OF EDUCATION, : COMMISSIONER OF EDUCATION

SOMERSET COUNTY. : DECISION

SYNOPSIS

The School Ethics Commission determined that respondent Board President violated *N.J.S.A.* 18A:12-24.1(e) and (g) by taking private action that compromised the Board, sending letters under her title of Board President and not acting in concert with her fellow Board members. The Commission recommended the penalty of reprimand.

Upon review of the record, the Commissioner, whose decision was restricted solely to a review of the Commission's recommended penalty, concurred with the Commission's recommendation and, thus, ordered respondent reprimanded as a school official found to have violated the School Ethics Act.

August 21, 2003

IN THE MATTER	:	
	:	**BEFORE THE SCHOOL**
OF	:	**ETHICS COMMISSION**
	:	
RANDIE ZIMMERMAN	:	**SEC Docket No.: C49-02**
ROCKY HILL BOARD OF EDUCATION,	:	
SOMERSET COUNTY	:	**DECISION**
	:	

PROCEDURAL HISTORY

This matter arises from a complaint alleging that Rocky Hill Township Board of Education (Board) member Randie Zimmerman violated the Code of Ethics of the School Ethics Act, N.J.S.A. 18A:12-21 et seq., when she investigated a complaint by a member of the public and drafted a letter that appeared to have the endorsement of her Board. The complaint alleged that Ms. Zimmerman took private action that may compromise the board in violation of N.J.S.A. 18A:12-24.1(e); used the schools for personal gain or for the gain of friends in violation of N.J.S.A. 18A:12-24.1(f); failed to provide accurate information in violation N.J.S.A. 18A:12-24.1(g); and failed to refer all complaints to the chief administrative officer and act on the complaints at public meetings only after the failure of an administrative solution in violation of N.J.S.A. 18A:12-24.1(j) of the Code of Ethics within the Act.

Ms. Zimmerman filed her answer to the complaint setting forth that she tried to contact the superintendent in order to address her neighbor's concerns, but her calls were not returned. It was only then that she went to the school to investigate the neighbor's concerns and eventually wrote the letter that became the subject of this complaint. She denied having violated any provision of the Code of Ethics.

The Commission discussed the case at its meeting on March 25, 2003. The parties appeared, Ms. Zimmerman with counsel. At its public meeting on that date, the Commission voted to find probable cause to credit the allegations in the complaint that Ms. Zimmerman violated N.J.S.A. 18A:12-24.1(e) and (g). The Commission found no probable cause that respondent's conduct violated N.J.S.A. 18A:12-24.1(f) or (j). The Commission found that the material facts were not in dispute and therefore agreed to accept a written submission from Ms. Zimmerman.

The Commission received a timely written submission from Ms. Zimmerman in which she denied having committed any violation of the Code of Ethics for School Board Members. However, in the event that the Commission reaches a different conclusion, she asserted that the lowest sanction of reprimand would be the appropriate penalty.

FACTS

The Commission was able to discern the following facts based on the pleadings, documents submitted and testimony. The Commission found these facts to be undisputed.

At all times relevant to this complaint, complainant Ms. Regan-Seither and Ms. Zimmerman were members of the Rocky Hill Township Board of Education. Ms. Zimmerman has been a member since 1998. Since April 2001, Ms. Zimmerman has served as the president of the Board. Rocky Hill sends all of its students to the Montgomery School District.

On or about September 13, 2002, a parent of a child who is sent to the Montgomery School District and who happens to be a neighbor of Ms. Zimmerman, expressed concerns to Ms. Zimmerman regarding her ill child being placed in a kindergarten classroom that appeared to her to be a large, windowless closet. In response, Ms. Zimmerman tried to contact the superintendent, Dr. Stuart Schnur, but she was unable to reach him.

On September 18, 2002, Ms. Zimmerman personally appeared at the Village School to discuss the matter with the school principal, but the principal refused to see her without an appointment. On September 25, 2003, she informed members of the Board, without having the issue placed on the agenda, that she intended to return to the school on parents' night to see whether the parent's concerns were warranted. The Board did not discuss any specific actions that Ms. Zimmerman would undertake on the Board's behalf nor was there any motion made regarding any such action.

On September 25, 2002, at parents' night, Ms. Zimmerman was informed that one of the parents had drafted a letter to Dr. Schnur. That parent requested that the other parents who were there sign and forward copies of the letter to him. Although complainant alleged that Ms. Zimmerman had the letters at the Board meeting, Ms. Zimmerman testified that she obtained a copy of the letter on computer disk from a parent and printed it out when she went home with her own signature. In any event, she forwarded the parent's letter to Dr. Schnur with a cover letter that she drafted. The parent's letter sets forth that the classroom in question is a converted resource/storage room that has only one exit so the children have no escape route if there is a fire outside the classroom door. The letter further provided that the room has no window for sunlight or fresh air, no ventilation system and has insufficient space for classroom materials and resources. The letter goes on to suggest that Dr. Schnur placed a first year teacher in that room because she would not be able to complain about the situation without risking her job. In her cover letter, Ms. Zimmerman refers to the "substandard kindergarten classroom" and says that the room is an "obvious Fire Code Violation" because there must be two available exits to any classroom." She signed both letters as Rocky Hill

School Board President and, on the parent's letter, copied the school principal, the President of the Montgomery School Board and the Somerset County Superintendent.

In a letter dated October 7, 2002, Dr. Schnur, apparently upset with Ms. Zimmerman's letter, challenged the accuracy of the correspondence and accused her of an ethics code violation. He noted that the room was not a resource/storage room, but a classroom that had been approved by the county superintendent for music instruction in 2001-2002 and for a kindergarten classroom in 2002-2003. In the letter, he also faulted her for representing that she was acting with the knowledge and support of her Board during a conversation that he had with her while she was at the school.

Ms. Zimmerman denies having had such a conversation with Dr. Schnur and believes that this fact is material to the resolution of the case.

ANALYSIS

The Commission found probable cause that Ms. Zimmerman's conduct violated N.J.S.A. 18A:12-24.1(e), which sets forth:

> N.J.S.A. 18A:12-24.1(e) of the Code of Ethics sets forth:
>
> > I will recognize that authority rests with the board of education and will make no personal promises nor take any private action that may compromise the board.

The Commission found sufficient evidence that Ms. Zimmerman took private action using her position as Board President to create the impression that she was representing the interests of her Board when she complained about the classroom in question. Even if the Commission discounts Dr. Schnur's assertion that Ms. Zimmerman represented to him that she was acting on behalf of her Board, there is sufficient evidence to sustain a finding that Ms. Zimmerman took private action that may compromise the Board. Ms. Zimmerman's writing of such a strongly worded letter and copying the county superintendent could have resulted in the revocation of the use of the room by the county superintendent. The letter that she provided him, referencing an "obvious fire code violation" surely could have compromised the Board and greatly damaged its relationship with the Board's receiving district. For the foregoing reasons, the Commission concludes that Ms. Zimmerman violated N.J.S.A. 18A:12-24.1(e).

Complainant next found probable cause that Ms. Zimmerman violated N.J.S.A. 18A:12-24.1(g), which provides:

> I will hold confidential all matters pertaining to the schools which, if disclosed, would needlessly injure individuals or the schools. In all other matters, I will provide accurate information and, in concert with my

fellow board members, interpret to the staff the aspirations of the community for its school.

The Commission found probable cause that Ms. Zimmerman did not provide accurate information and act in concert with her fellow board members to interpret to the staff the aspirations of the community for its school. Ms. Zimmerman does not dispute that, particularly while serving as board president, she has the duty to provide accurate information. The classroom had received approval from the Department of Education and was not a fire code violation. Yet, Ms. Zimmerman called the room substandard and "an obvious fire code violation." She further signed the letter as Board President and proceeded to copy the Montgomery Board of Education and the County Superintendent on the parent's letter, which further suggested that Dr. Schnur placed a first year teacher in that room because she could not complain about the situation without risking her job. The Commission concludes that she did not provide accurate information. Further, she did not discuss these strong allegations with her own Board or give the administration opportunity to address the concerns raised. Therefore, she did not act in concert with her fellow board members to interpret to the staff the aspirations of the community for its school. For the foregoing reasons, the Commission finds that Ms. Zimmerman violated N.J.S.A. 18A:12-24.1(g).

DECISION

For the foregoing reasons, the School Ethics Commission concludes that Ms. Zimmerman violated N.J.S.A. 18A:12-24.1(e) and (g) of the School Ethics Act.

The Commission, in determining the appropriate penalty, considered the fact that Ms. Zimmerman was trying to do the right thing in making inquiries on behalf of a constituent. However, by signing the negative letter of the parents as if it were her own and adding her title of Board President, she went too far and violated the Code of Ethics. The Commission recommends that the Commissioner of Education impose a penalty of reprimand.

This decision has been adopted by a formal resolution of the School Ethics Commission. This matter shall now be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction only, pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Paul C. Garbarini
Chairperson

Resolution Adopting Decision – C49-02

Whereas, the School Ethics Commission has considered the pleadings filed by the parties, the documents submitted in support thereof and the testimony; and

Whereas, at its meeting of June 24, 2003, the Commission found probable cause to credit the allegations that Respondent violated the School Ethics Act, N.J.S.A. 18A:12-24.1(e) and (g); and

Whereas, after considering Respondent's submission in response to the finding of probable cause, the Commission determined that Respondent violated N.J.S.A. 18A:12-24.1(e) and (g) of the Act; and

Whereas, the Commission requested that its staff prepare a decision consistent with the aforementioned conclusion; and

Whereas, the Commission has reviewed the decision and agrees with the decision;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter on July 22, 2003 and directs its staff to notify all parties to this action of the Commission's decision herein.

Paul C. Garbarini, Chairperson

I hereby certify that this decision was
adopted by the School Ethics Commission
at its public meeting on July 22, 2003.

Lisa James-Beavers
Executive Director

AGENCY DKT. NO. 249-7/03

IN THE MATTER OF RANDIE ZIMMERMAN, :
ROCKY HILL BOARD OF EDUCATION, : COMMISSIONER OF EDUCATION
SOMERSET COUNTY. : DECISION

The record of this matter and the decision of the School Ethics Commission ("Commission"), including the recommended penalty of reprimand, have been reviewed. Upon issuance of the decision of the Commission, respondent was provided 13 days from the mailing of such decision to file written comments on the recommended penalty for the Commissioner's consideration. Respondent submitted no comments.

This matter comes before the Commissioner to impose a sanction upon Respondent Randie Zimmerman, President of the Rocky Hill Board of Education, based on findings of fact and conclusions of law by the Commission that she violated *N.J.S.A.* 18A:12-24(e) of the School Ethics Act by taking private action using her position as Board President to create the impression that she was representing the interests of her Board, and that she violated *N.J.S.A.* 18A:12-24(g) of the School Ethics Act for not providing accurate information and for not acting in concert with her fellow Board members to interpret to the staff the aspirations of the community for its school.

Initially, it must be emphasized that pursuant to *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6A:3-9.1, the determination of the Commission as to violation of the Act is **not reviewable by the Commissioner.** Only the School Ethics Commission may determine whether a violation of the School Ethics Act occurred. The Commissioner's jurisdiction is limited to

reviewing the sanction to be imposed following a finding of a violation by the School Ethics Commission. Therefore, this decision is restricted solely to review of the recommended penalty and its implementation.

Upon a thorough review of the record, the Commissioner determines to accept the Commission's recommendation that reprimand is the appropriate penalty in this matter for the reasons expressed in the Commission's decision. In so ruling, the Commissioner is satisfied that, in recommending a penalty for the violations it found, the Commission fully considered the nature of the offense and weighed the effects of aggravating and mitigating circumstances. Therefore, the Commission's recommended penalty in this matter will not be disturbed.

Accordingly, IT IS hereby ORDERED that Randie Zimmerman be reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 8/21/03

Date of Mailing: 8/25/03

* This decision, as the Commissioner's final determination regarding penalty in this matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

498-03

#498-03SEC

IN THE MATTER OF STEVEN NICHOLAS,	:	
HALEDON BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
PASSAIC COUNTY.	:	DECISION

August 21, 2003

SCHOOL ETHICS COMMISSION	:	**BEFORE THE**
	:	**SCHOOL ETHICS COMMISSION**
v.	:	
	:	**RESOLUTION**
STEVEN NICHOLAS	:	
Haledon Board of Education	:	**SEC Docket No.: T25-03**
Passaic County	:	
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-33 requires new board members to attend training within one year of election or appointment to the board to gain the skills and knowledge necessary to serve as a school board member; and

WHEREAS, the School Ethics Commission passed a resolution on March 23, 1999 which states in pertinent part,

> Any school board member newly elected or appointed as of April, 1999 and forward, who would have previously been exempted from attending a new board member orientation because of previous service on a board of education prior to June, 1992, is no longer exempt and must attend a new board member orientation conducted by the NJSBA;

and

WHEREAS, Respondent Steven Nicholas was elected to serve a three-term on the Haledon Board of Education in April 2002; and

WHEREAS, the New Jersey School Boards Association (NJSBA) advises prospective board members of the training requirement in the "candidate kit"; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on January 3, 2003 and February 19, 2003; and

WHEREAS, the NJSBA conducted seven training sessions between April 2002 and April 2003 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes;* and

WHEREAS, the last training session to fulfill the requirement was offered in March 2003; and

WHEREAS, the Commission granted an extension for similarly situated board members to attend one of the June training sessions; and

WHEREAS, the Commission issued an Order on May 21, 2003, directing Respondent to Show Cause why he had not attended training up until that time; and

WHEREAS, Mr. Nicholas responded by letters, dated June 30, 2003 and July 14, 2003, generally advising that he attended training before and thus, was "grandfathered" with regard to the training requirement and thus, asked the Commission to reconsider its demand that he be "re-trained," and asked the Commission staff to confirm his previous attendance with his board secretary or NJSBA; and

WHEREAS, in a letter dated July 15, 2003, Respondent was notified by Commission staff that he was required to produce a record of his attendance at a training session between 1992 and July 18, 2003, in order to have this matter dismissed against him, and that without such proof, this matter would be considered at the Commission's meeting on July 22, 2003, where Respondent was invited to be heard, but, that he could be found in violation of the School Ethics Act; and,

WHEREAS, the Commission was able to confirm that Respondent attended an NJSBA training conference in 1987, through representatives at the NJSBA, but was unable confirm his attendance at any training session since the inception of the School Ethics Act in 1992; and

WHEREAS, Respondent's attendance at a training session prior to June 1992 does not warrant his exemption to the training requirement, pursuant to the Commission's March 23, 1999 Resolution, and

WHEREAS, the Commission has considered Respondent's reasons for failing to attend the required training program for the one year allowed; and

WHEREAS, the Commission finds that this failure to attend board member training from April 2002 to April 2003 constitutes a *per se* violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds suspension to be the appropriate penalty for failure to attend; and

WHEREAS, the Commission finds that if Mr. Nicholas fails to attend by the end of **October 2003**, the Commission finds it appropriate to have him removed from the board;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Mr. Nicholas violated N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that

the Commissioner of Education suspend him until he attends training, but remove him from the Board if he fails to attend one of the October training sessions.

Dated: July 22, 2003

Paul C. Garbarini, Chairperson

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed, the board member may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 River View Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on July 22, 2003.

Lisa James-Beavers, Executive Director

ljb/psc/m:ethics/trainingresT25

AGENCY DKT. NO. 264-7/03

IN THE MATTER OF STEVEN NICHOLAS,	:	
HALEDON BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
PASSAIC COUNTY.	:	DECISION

Whereas, the School Ethics Commission (Commission) has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named Board member from office for failure to attend the Board member training sessions required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-1.6; and

Whereas the Commission sent ample notice to the above-named Board member of his failure to attend such training sessions; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.6(e), on May 21, 2003, the Commission issued an Order to Show Cause why he had not attended a training up until that time; and

Whereas, the Commission granted an extension for similarly situated board members to attend one of the June training sessions; and

Whereas, the above-named Board member responded by letters of June 30, 2003 and July 14, 2003 asserting that he had attended training before and was, therefore, "grandfathered" with regard to the training requirement and, thus, asked the Commission to reconsider its demand that he be "re-trained," and asked the Commission staff to confirm his previous attendance with his Board secretary or the New Jersey School Boards Association (NJSBA); and

Whereas, the above-named Board member was advised by the Commission by letter of July 15, 2003, that he was required to produce a record of his attendance at a training session between 1992 and July 18, 2003, in order to have this matter dismissed against him, and that without such proof this matter would be considered at the Commission's meeting on July 22, 2003, where he was invited to be heard, but, that he could be found to be in violation of the School Ethics Act; and

Whereas, the Commission confirmed that the above-named Board member had attended an NJSBA training session in 1987, but was unable to confirm his attendance at any training session since the inception of the School Ethics Act in 1992; and

Whereas, the Commission considered the above-named Board member's reasons for failing to attend the required training program for the one year allowed and determined that his attendance at a training session prior to June 1992 does not warrant his exemption to the training requirement, pursuant to the Commission's March 23, 1999 Resolution; and

Whereas, the Commission found that the above-named Board member's failure to attend board member training from April 2002 to April 2003 constitutes a *per se* violation of *N.J.S.A.* 18A:12-33; and

Whereas, the Commission voted on July 22, 2003 to recommend that the above-named Board member be suspended from the Board until he attends the October 2003 session and removed if he fails to attend the October 2003 session, and memorialized such decision through a resolution forwarded to the Commissioner of Education, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, on July 29, 2003, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to said resolution; and

Whereas, no comments were received from, or on behalf of, the above-named Board member; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the Commission and concurs with and adopts as his own the recommendations of the Commission; now therefore

IT IS ORDERED that the above-named Board member is suspended from office as of the filing of this decision and shall remain suspended pending completion of the requisite training, and, in the event he fails to complete the training session in October 2003, the above-named Board member shall be summarily removed from office as of that date.*

COMMISSIONER OF EDUCATION

Date of Decision: 8/21/03

Date of Mailing: 8/25/03

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

499-03

#499-03SEC

IN THE MATTER OF MICHAEL BAILEY,:

MONROE TOWNSHIP BOARD OF : COMMISSIONER OF EDUCATION

EDUCATION, GLOUCESTER COUNTY. : DECISION

_____:

August 21, 2003

SCHOOL ETHICS COMMISSION	:	**BEFORE THE**
	:	**SCHOOL ETHICS COMMISSION**
v.	:	
	:	**RESOLUTION**
MICHAEL BAILEY	:	
Monroe Township Board of Education	:	**SEC Docket No.: T12-03**
Gloucester County	:	
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-33 requires new board members to attend training within one year of election or appointment to the board to gain the skills and knowledge necessary to serve as a school board member; and

WHEREAS, Respondent Micheal Bailey was elected to a term on the Monroe Township Board of Education in April 2002; and

WHEREAS, the New Jersey School Boards Association (NJSBA) advises prospective board members of the training requirement in the "candidate kit"; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on January 3, 2003 and February 19, 2003; and

WHEREAS, the NJSBA conducted seven training sessions between April 2002 and April 2003 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes;* and

WHEREAS, the last training session to fulfill the requirement was held in March 2003; and

WHEREAS, the Commission issued an Order on May 21, 2003, directing him to Show Cause why he had not attended training up until that time; and

WHEREAS, the Commission granted an extension for similarly situated board members to attend one of the June training sessions; and

WHEREAS, Mr. Bailey failed to provide any response to the Order to Show Cause and further failed to attend a June training session; and

WHEREAS, the Commission notified Respondent, by letter dated July 15, 2003, that the Commission would discuss this matter at its July 22, 2003 meeting, that he had the right to attend, and could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, Respondent did not respond to this letter, nor provide any reason for failing to attend the required training program for more than the one year allowed by law; and

WHEREAS, the Commission finds that this failure to attend board member training from September 2001 to April 2003 constitutes a violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds removal from the Board to be the appropriate penalty for failure to attend training;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Mr. Bailey violated N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education remove him from the Board of Education herewith.

Dated: July 22, 2003

Paul C. Garbarini, Chairperson

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed, the board member may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 River View Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on July 22, 2003.

Lisa James-Beavers, Executive Director

LJB/PSC/m:ethics/trainingresT12-03

AGENCY DKT. NO. 265-7/03

IN THE MATTER OF MICHAEL BAILEY,:

MONROE TOWNSHIP BOARD OF : COMMISSIONER OF EDUCATION

EDUCATION, GLOUCESTER COUNTY. : DECISION

_____:

Whereas, the School Ethics Commission (Commission) has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named Board member from office for failure to attend the Board member training sessions required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-1.6; and

Whereas the Commission sent ample notice to the above-named Board member of his failure to attend such training sessions; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.6(e), on May 21, 2003, the Commission issued an Order to Show Cause why he had not attended training up until that time; and

Whereas, the Commission granted an extension for similarly situated board members to attend one of the June training sessions; and

Whereas, the above-named Board member did not reply to the Order to Show Cause and further failed to attend a June training session; and

Whereas, the Commission voted on July 22, 2003 to recommend that the above-named Board member be removed from the Board and memorialized such decision through a resolution forwarded to the Commissioner of Education, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, on July 29, 2003, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to said resolution; and

Whereas, no comments were received from, or on behalf of, the above-named Board member; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the Commission and concurs with and adopts as his own the recommendations of the Commission; now therefore

IT IS ORDERED that the above-named Board member is removed from office as of the filing of this decision.*

COMMISSIONER OF EDUCATION

Date of Decision: 8/21/03

Date of Mailing: 8/25/03

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

487-03

487-03 SEC

IN THE MATTER OF WILLIAM EVANS, BELLMAWR BOARD OF EDUCATION, CAMDEN COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

August 19, 2003

SCHOOL ETHICS COMMISSION	:	**BEFORE THE**
	:	**SCHOOL ETHICS COMMISSION**
v.	:	
	:	**RESOLUTION**
WILLIAM EVANS	:	
Belmawr Board of Education	:	**SEC Docket No.: T05-03**
Camden County	:	
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-33 requires new board members to attend training within one year of election or appointment to the board to gain the skills and knowledge necessary to serve as a school board member; and

WHEREAS, William Evans was elected to serve a three-year term on the Hammonton Board of Education in April 2002; and

WHEREAS, the New Jersey School Boards Association (NJSBA) advises prospective board members of the training requirement in the "candidate kit"; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on January 3, 2003 and February 19, 2003; and

WHEREAS, the NJSBA conducted seven training sessions between April 2002 and April 2003 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes;* and

WHEREAS, the last training session to fulfill the requirement was held in March 2003; and

WHEREAS, the Commission issued an Order on May 21, 2003, directing him to Show Cause why he had not attended training up until that time; and

WHEREAS, the Commission granted an extension for similarly situated board members to attend one of the June training sessions; and

WHEREAS, he responded and advised that was unable to attend in June due to family obligations but that he would attend the October training session; and

WHEREAS, the Commission notified him by letter dated July 15, 2003, that the Commission would discuss this matter at its July 22, 2003 meeting, that he had the right to attend, and could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission has considered Respondent's reasons for failing to attend the required training program for the one year allowed; and

WHEREAS, the Commission finds that this failure to attend board member training from April 2002 to April 2003 constitutes a violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds suspension to be the appropriate penalty for failure to attend through June; and

WHEREAS, the Commission finds that if Mr. Evans fails to attend by **October 2003,** the Commission finds that it would be appropriate to have him removed from the board;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Mr. Evans violated N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education suspend him until he attends, but remove him from the board if he fails to attend by the October training session.

Dated: July 24, 2003

Paul C. Gabarini

Paul C. Gabarini, Chairperson

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed, the board member may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 River View Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on July 22, 2003.

Lisa James-Beavers

Lisa James-Beavers, Executive Director

(psc/ljb/m: ethics/trainingresT05-03.doc)

AGENCY DKT. NO. 257-7/03

IN THE MATTER OF WILLIAM EVANS, BELLMAWR BOARD OF EDUCATION, CAMDEN COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

Whereas, the School Ethics Commission (Commission) has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named Board member from office for failure to attend the Board member training sessions required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-1.6; and

Whereas the Commission sent ample notice to the above-named Board member of his failure to attend such training sessions; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.6(e), on May 21, 2003, the Commission issued an Order to Show Cause why he had not attended a training up until that time; and

Whereas, the Commission granted an extension for similarly situated board members to attend one of the June training sessions; and

Whereas, the above-named Board member advised that he was unable to attend in June due to family obligations but that he would attend the October 2003 training session; and

Whereas, the Commission voted on July 22, 2003 to recommend that the above-named Board member be suspended from the Board until he attends the October 2003 session and removed if he fails to so attend, and memorialized such decision through a resolution forwarded to the Commissioner of Education, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, on July 29, 2003, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to said resolution; and

Whereas, no comments were received from, or on behalf of, the above-named Board member; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the Commission and concurs with and adopts as his own the recommendations of the Commission; now therefore

IT IS ORDERED that the above-named Board member is suspended from office as of the filing of this decision and shall remain suspended pending completion of the requisite training, and, in the event he fails to complete such training by October 2003, the above-named Board member shall be summarily removed from office as of the date of the October 2003 session.*

COMMISSIONER OF EDUCATION

Date of Decision: August 19, 2003

Date of Mailing: August 20, 2003

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

488-03

488-03SEC

IN THE MATTER OF KIM SCOTT HEINLE, TUCKERTON BOARD OF EDUCATION, OCEAN COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

August 19, 2003

SCHOOL ETICS COMMISSION	:	**BEFORE THE**
	:	**SCHOOL ETHICS COMMISSION**
v.	:	
	:	**RESOLUTION**
KIM SCOTT HEINLE	:	
Tuckerton Board of Education	:	**SEC Docket No.: T23-03**
Ocean County	:	
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-33 requires new board members to attend training within one year of election or appointment to the board to gain the skills and knowledge necessary to serve as a school board member; and

WHEREAS, Respondent Kim Scott Heinle was elected to serve a three- term on the Tuckerton Board of Education in April 2002; and

WHEREAS, the New Jersey School Boards Association (NJSBA) advises prospective board members of the training requirement in the "candidate kit"; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on January 3, 2003 and February 19, 2003; and

WHEREAS, the NJSBA conducted seven training sessions between April 2002 and April 2003 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes;* and

WHEREAS, the last training session to fulfill the requirement was held in March 2003; and

WHEREAS, the Commission issued an Order on May 21, 2003, directing Respondent to Show Cause why he had not attended training up until that time; and

WHEREAS, the Commission granted an extension for similarly situated board members to attend one of the June training sessions; and

WHEREAS, Mr. Heinle responded by letter advising that he was unable to attend in June due to business and family obligations but that he would attend the October training session; and

WHEREAS, the Commission notified him by letter dated July 15, 2003, that the Commission would discuss this matter at its July 22, 2003 meeting, that he had the right to attend, and could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission has considered Respondent's reasons for failing to attend the required training program for the one year allowed; and

WHEREAS, the Commission finds that this failure to attend board member training from April 2002 to April 2003 constitutes a violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds suspension to be the appropriate penalty for failure to attend through June; and

WHEREAS, the Commission finds that if Mr. Heinle fails to attend by **October 2003**, the Commission finds that it would be appropriate to have him removed from the board;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Mr. Heinle violated N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education suspend him until he attends, but remove him from the board if he fails to attend by the October training session.

Dated: July 22, 2003

Paul C. Garbarini, Chairperson

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed, the board member may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 River View Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on July 22, 2003.

Lisa James-Beavers, Executive Director

psc/ljb/m:ethics/trainingresT23

AGENCY DKT. NO. 256-7/03

IN THE MATTER OF KIM SCOTT HEINLE, TUCKERTON BOARD OF EDUCATION, OCEAN COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

Whereas, the School Ethics Commission (Commission) has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named Board member from office for failure to attend the Board member training sessions required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-1.6; and

Whereas the Commission sent ample notice to the above-named Board member of his failure to attend such training sessions; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.6(e), on May 21, 2003, the Commission issued an Order to Show Cause why he had not attended a training up until that time; and

Whereas, the Commission granted an extension for similarly situated board members to attend one of the June training sessions; and

Whereas, the above-named Board member advised that he was unable to attend in June due to business and family obligations but that he would attend the October 2003 training session; and

Whereas, the Commission voted on July 22, 2003 to recommend that the above-named Board member be suspended from the Board until he attends the October 2003 session and removed if he fails to so attend, and memorialized such decision through a resolution forwarded to the Commissioner of Education, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, on July 29, 2003, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to said resolution; and

Whereas, no comments were received from, or on behalf of, the above-named Board member; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the Commission and concurs with and adopts as his own the recommendations of the Commission; now therefore

IT IS ORDERED that the above-named Board member is suspended from office as of the filing of this decision and shall remain suspended pending completion of the requisite training, and, in the event he fails to complete such training by October 2003, the above-named Board member shall be summarily removed from office as of the date of the October 2003 session.*

COMMISSIONER OF EDUCATION

Date of Decision: August 19, 2003

Date of Mailing: august 20, 2003

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

489-03

#489-03SEC

IN THE MATTER OF LAURETTA	:	
BRUNETT, AUDUBON PARK	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION,	:	DECISION
CAMDEN COUNTY.	:	
	:	

August 20, 2003

SCHOOL ETHICS COMMISSION	:	**BEFORE THE**
	:	**SCHOOL ETHICS COMMISSION**
v.	:	
	:	**RESOLUTION**
LAURETTA BRUNETT	:	
Audobon Park Board of Education	:	**SEC Docket No.: T04-03**
Camden County	:	
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-33 requires new board members to attend training within one year of election or appointment to the board to gain the skills and knowledge necessary to serve as a school board member; and

WHEREAS, Respondent Lauretta Brunett was elected to a three-year term on the Audobon Park Board of Education in April 2002; and

WHEREAS, the New Jersey School Boards Association (NJSBA) advises prospective board members of the training requirement in the "candidate kit"; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on January 3, 2003 and February 19, 2003; and

WHEREAS, the NJSBA conducted seven training sessions between April 2002 and April 2003 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes;* and

WHEREAS, the last training session to fulfill the requirement was held in March 2003; and

WHEREAS, the Commission issued an Order on May 21, 2003, directing Respondent to Show Cause why she had not attended training up until that time; and

WHEREAS, the Commission granted an extension for similarly situated board members to attend one of the June training sessions; and

WHEREAS, Respondent failed to provide any response to the Order to Show Cause and further failed to attend a June training session; and

WHEREAS, the Commission notified Respondent, by letter dated July 15, 2003, that the Commission would discuss this matter at its July 22, 2003 meeting, that she had the right to attend, and could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, Respondent did not respond to this letter, nor provide any reason for failing to attend the required training program for more than the one year allowed by law; and

WHEREAS, the Commission finds that this failure to attend board member training from April 2002 to April 2003 constitutes a violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds removal from the Board to be the appropriate penalty for failure to attend training;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Ms. Brunett violated N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education remove her from the Board of Education herewith.

Dated: July 22, 2003

Paul C. Garbarini, Chairperson

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed, the board member may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 River View Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on July 22, 2003.

Lisa James-Beavers, Executive Director

LJB/PSC/m:ethics/trainingresT04-03

AGENCY DKT. NO. 258-7/03

IN THE MATTER OF LAURETTA BRUNETT, AUDUBON PARK BOARD OF EDUCATION, CAMDEN COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

Whereas, the School Ethics Commission (Commission) has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named Board member from office for failure to attend the Board member training sessions required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-1.6; and

Whereas the Commission sent ample notice to the above-named Board member of her failure to attend such training sessions; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.6(e), on May 21, 2003, the Commission issued an Order to Show Cause why she had not attended training up until that time; and

Whereas, the Commission granted an extension for similarly situated board members to attend one of the June training sessions; and

Whereas, the above-named Board member did not reply to the Order to Show Cause and further failed to attend a June training session; and

Whereas, the Commission voted on July 22, 2003 to recommend that the above-named Board member be removed from the Board and memorialized such decision through a resolution forwarded to the Commissioner of Education, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, on July 29, 2003, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to said resolution; and

Whereas, no comments were received from, or on behalf of, the above-named Board member; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the Commission and concurs with and adopts as his own the recommendation of the Commission; now therefore

IT IS ORDERED that the above-named Board member is removed from office as of the filing of this decision.*

COMMISSIONER OF EDUCATION

Date of Decision: 8/20/03

Date of Mailing: 8/21/03

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

500-03SEC

IN THE MATTER OF LORI GRUBER, :

MAGNOLIA BOARD OF EDUCATION : COMMISSIONER OF EDUCATION

CAMDEN COUNTY. : DECISION

August 21, 2003

SCHOOL ETHICS COMMISSION	:	**BEFORE THE**
	:	**SCHOOL ETHICS COMMISSION**
v.	:	
	:	**RESOLUTION**
LORI GRUBER	:	
Magnolia Board of Education	:	**SEC Docket No.: T07-03**
Camden County	:	
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-33 requires new board members to attend training within one year of election or appointment to the board to gain the skills and knowledge necessary to serve as a school board member; and

WHEREAS, Respondent Lori Gruber was elected to serve a three-year term on the Magnolia Board of Education in April 2002; and

WHEREAS, the New Jersey School Boards Association (NJSBA) advises prospective board members of the training requirement in the "candidate kit"; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on January 3, 2003 and February 19, 2003; and

WHEREAS, the NJSBA conducted seven training sessions between April 2002 and April 2003 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes;* and

\"**WHEREAS,** the last training session to fulfill the requirement was held in March 2003; and

WHEREAS, the Commission issued an Order on May 21, 2003, directing Respondent to Show Cause why she had not attended training up until that time; and

WHEREAS, the Commission granted an extension for similarly situated board members to attend one of the June training sessions; and

WHEREAS, Ms. Gruber responded and advised that she was unable to attend in June due to health reasons and family obligations but that she would attend the October training session; and

WHEREAS, the Commission notified her by letter dated July 15, 2003, that it would discuss this matter at its July 22, 2003 meeting, that she had the right to attend, and could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission has considered Respondent's reasons for failing to attend the required training program for the one year allowed; and

WHEREAS, the Commission finds that this failure to attend board member training from April 2002 to April 2003 constitutes a violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds suspension to be the appropriate penalty for Respondent's failure to attend through June; and

WHEREAS, the Commission finds that if Respondent fails to attend by **October 2003,** the Commission finds that it would be appropriate to have her removed from the board;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Ms. Gruber violated N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education suspend her from the Board until she attends, but remove her from the Board if she fails to attend by the October training session.

Dated: July 22, 2003

Paul C. Gabrinetz
Paul C. G Chairperson

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed, the board member may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 River View Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on July 22, 2003.

Lisa James-Beavers
Lisa James-Beavers, Executive Director

(ljb/psc/m:ethics/trainingresT07-03.doc)

AGENCY DKT. NO. 263-7/03

IN THE MATI'ER OF LORI GRUBER,	:	
MAGNOLIA BOARD OF EDUCATION	:	COMMISSIONER OF EDUCATION
CAMDEN COUNTY.	:	DECISION

Whereas, the School Ethics Commission (Commission) has acted pursuant to the authority granted to it by *N.J.S.A.* 18A: 12-21 *et seq.* to recommend removal of the above-named Board member from office for failure to attend the Board member training sessions required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-l.6; and

Whereas the Commission sent ample notice to the above-named Board member of her failure to attend such training sessions; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.6(e), on May 21, 2003, the Commission issued an Order to Show Cause why she had not attended a training up until that time; and

Whereas, the Commission granted an extension for similarly situated board members to attend one of the June training sessions; and

Whereas, the above-named Board member responded and advised that she had been unable to attend a training session due to health reasons and family obligations but that she would attend the October 2003 training session; and

Whereas, the Commission voted on July 22, 2003 to recommend that the above-named Board member be suspended from the Board until she attends the October 2003 session and removed if she fails to attend the October 2003 session, and memorialized such

decision through a resolution forwarded to the Commissioner of Education, pursuant to *N.J.S.A.* lSA:12-29; and

Whereas, on July 29, 2003, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to said resolution; and

Whereas, no comments were received from, or on behalf of, the above-named Board member; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the Commission and concurs with and adopts as his own the recommendations of the Commission; now therefore

IT IS ORDERED that the above-named Board member is suspended from office as of the filing of this decision and shall remain suspended pending completion of the requisite training, and, in the event she fails to complete the training session in October 2003, the above-named Board member shall be summarily removed from office as of that date.*

COMMISSIONER OF EDUCATION

Date of Decision: August 21., 2003

Date of Mailing: August 26, 2003

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to ***N.J.S.A.*** 18A:6-27 ***et seq.*** and ***N.J.A.C.*** 6A:4-l.1 ***et seq.*** Pursuant to ***N.J.A.C.*** 6A:4-l.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

501-05

501-03SEC

IN THE MATTER OF KEITH KEELER, BLOOMINGDALE BOARD OF EDUCATION, PASSAIC COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

August 21, 2003

SCHOOL ETHICS COMMISSION	:	**BEFORE THE**
	:	**SCHOOL ETHICS COMMISSION**
v.	:	
	:	**RESOLUTION**
KEITH KEELER	:	
Bloomingdale Board of Education	:	**SEC Docket No.: T24•03**
Passaic County	:	
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-33 requires new board members to attend training within one year of election or appointment to the board to gain the skills and knowledge necessary to serve as a school board member; and

WHEREAS, Respondent Keith Keeler was appointed to a term on the Bloomingdale Board of Education in June 2001; and

WHEREAS, the New Jersey School Boards Association (NJSBA) advises prospective board members of the training requirement in the "candidate kit"; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on January 3, 2003 and February 19, 2003; and

WHEREAS, the NJSBA conducted seven training sessions between April 2002 and April 2003 at varying locations and continuously published the dates and times of the sessions in its publication, ***School Board Notes;*** and

WHEREAS, the last training session to fulfill the requirement was in March 2003; and

WHEREAS, the Commission issued an Order on May 21, 2003, directing Respondent to Show Cause why he had not attended training up until that time; and

WHEREAS, the Commission granted an extension for similarly situated board members to attend one of the June training sessions; and

WHEREAS, Respondent advised that he was registered for the September 2003 training session; and

WHEREAS, the Commission notified him by letter dated July 15, 2003, that the Commission would discuss this matter at its July 22, 2003 meeting, that he had the right

/

to attend, and could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission considered that although Respondent provided no reasons for failing to attend the required training program for more than the one year allowed, he has registered for September 2003 training; and

WHEREAS, the Commission finds that this failure to attend board member training from June 2001 to April 2003 constitutes a violation ofN.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds suspension to be the appropriate penalty for failure to attend through June; and

WHEREAS, the Commission finds that if Mr. Keeler fails to attend by the end of **September 2003,** the Commission finds that it would be appropriate to have him removed from the board;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Mr. Keeler violated N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education suspend him until he attends, but remove him from the board if he fails to attend by the September training session.

Dated: July 22, 2003

Paul C. Garguilo
Paul C. Gairperson

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed, the board member may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 River View Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on July 22, 2003.

Lisa James-Beavers, Executive Director

(psc/ljb/m: ethics/trainingresT24-03.doc)

AGENCY DKT. NO. 253-7/03

IN THE MATIER OF KEITH KEELER,BLOOMINGDALEBOARD OF EDUCATION, PASSAIC COUNTY.	: : : :	COMMISSIONER OF EDUCATION DECISION

Whereas, the School Ethics Commission (Commission) has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named Board member from office for failure to attend the Board member training sessions required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-1.6; and

Whereas the Commission sent ample notice to the above-named Board member of his failure to attend such training sessions; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.6(e), on May 21, 2003, the Commission issued an Order to Show Cause why he had not attended a training up until that time; and

Whereas, the Commission granted an extension for similarly situated board members to attend one of the June training sessions; and

Whereas, the above-named Board member advised that he was registered for the September 2003 training session; and

Whereas, the Commission voted on July 22, 2003 to recommend that the above-named Board member be suspended from the Board until he attends the September 2003 session and removed if he fails to attend the September 2003 session, and memorialized such decision through a resolution forwarded to the Commissioner of Education, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, on July 29, 2003, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to said resolution; and

Whereas, by copy of a letter dated August 12, 2003, from the Board's School Business Administrator/Board Secretary, the Commissioner was advised that the above-named Board member resigned his position as a member of the Bloomingdale Board of Education effective August 11, 2003, rendering the issue of Board member training for this individual moot; now therefore

IT IS ORDERED that this matter is hereby dismissed as moot.*

COMMISSIONER OF EDUCATION

Date of Decision: August 21, 2003

Date of Mailing: August 27, 2003

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to ***N.J.S.A.*** 18A:6-27 ***et seq.*** and ***N.J.A.C.*** 6A:4-1.1 ***et seq.*** Pursuant to ***N.J.A.C.*** 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

502-03

502-03SEC

IN THE MATIER OF DAVID	:	
TAWIL, DEAL BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION, MONMOUTH COUNTY.	:	DECISION
	:	

August 21, 2003

SCHOOL ETHICS COMMISSION	:	**BEFORE THE**
	:	**SCHOOL ETHICS COMMISSION**
v.	:	
	:	**RESOLUTION**
DAVID TAWIL	:	
Deal Board of Education	:	**SEC Docket No.: T21-03**
Monmouth County	:	
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et seg. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-33 requires new board members to attend training within one year of election or appointment to the board to gain the skills and knowledge necessary to serve as a school board member; and

WHEREAS, Respondent David Tawil was elected to serve a three- term on the Deal Board of Education in April 2002; and

WHEREAS, the New Jersey School Boards Association (NJSBA) advises prospective board members of the training requirement in the "candidate kit"; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on January 3, 2003 and February 19, 2003; and

WHEREAS, the NJSBA conducted seven training sessions between April 2002 and April 2003 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes;* and

WHEREAS, the last training session to fulfill the requirement was in March 2003; and

WHEREAS, the Commission granted an extension for similarly situated board members to attend one of the June training sessions; and

WHEREAS, the Commission issued an Order on May 21, 2003, directing Respondent to Show Cause why he had not attended training up until that time; and

WHEREAS, Mr. Tawil responded by letter advising that he was unable to attend weekend sessions for religious reasons, which require observance from sunset Friday through sunset Saturday, and certifies that he was in Hong Kong at the time of the one weekday session offered by NJSBA in October 2002. He further states that he will attend the October 2003 weekday training session; and

WHEREAS, the Commission notified him by letter dated July 15, 2003, that the Commission would discuss this matter at its July 22, 2003 meeting, that he had the right to attend, and could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission has considered Respondent's reasons for failing to attend the required training program for the one year allowed; and

WHEREAS, the Commission finds that this failure to attend board member training from April 2002 to April 2003 constitutes *aper se* violation ofN.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds suspension to be the appropriate penalty for failure to attend; and

WHEREAS, the Commission finds that if Mr. Tawil fails to attend by the end of **October 2003,** the Commission finds it appropriate to have him removed from the board;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Mr. Tawil violated N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education suspend him until he attends training, but remove him from the Board if he fails to attend by the October training session.

Dated: July 22, 2003

Paul C. Garbarini x
Paul C. Garbarini, Chairperson

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed, the board member may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 River View Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on July 22, 2003.

Lisa James-Beavers, Executive Director

psc/ljb/m:ethics/trainingresT21

AGENCY DKT. NO. 260-7/03

IN THE MATIER OF DAVID	:	
TAWIL, DEAL BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION, MONMOUTH COUNTY.	:	DECISION
_____	:	

Whereas, the School Ethics Commission (Commission) has acted pursuant to the authority granted to it by ***N.J.S.A.*** lSA:12-21 ***et seq.*** to recommend removal of the above-named Board member from office for failure to attend the Board member training sessions required by ***N.J.S.A.*** lSA:12-33 and ***N.J.A.C.*** 6A:28-l.6; and

Whereas the Commission sent ample notice to the above-named Board member of his failure to attend such training sessions; and

Whereas, pursuant to ***N.J.A.C.*** 6A:28-1.6(e), on May 21, 2003, the Commission issued an Order to Show Cause why he had not attended a training up until that time; and

Whereas, the Commission granted an extension for similarly situated board members to attend one of the June training sessions; and

Whereas, the above-named Board member responded and advised that he would attend the October 2003 training session; and

Whereas, the Commission voted on July 22, 2003 to recommend that the above-named Board member be suspended from the Board until he attends the October 2003 session and removed if he fails to attend the October 2003 session, and memorialized such decision

through a resolution forwarded to the Commissioner of Education, pursuant to ***N.J.S.A.*** 18A:12-29; and

Whereas, on July 29, 2003, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to said resolution; and

Whereas, counsel, on behalf of the above-named Board member, states that there were seven training sessions conducted between April 2002 and April 2003, all, except one offered in October, were on Saturdays. Counsel reports that the above-named Board member is unable to attend weekend sessions for religious reasons, which require observance from sunset Friday through sunset Saturday, and he was in Hong Kong on a business trip at the time of the one weekday session offered in October. Counsel further reports that respondent plans to attend the October 2003 weekday training session;

Whereas, under these particular circumstances, the Commissioner finds the Commission's recommended suspension of the above-named Board member at this time an unduly harsh sanction but he agrees with the Commission that if the above-named Board member fails to attend the weekday training session in October, 2003, which provides him ample time to arrange his business and personal affairs, he should be removed from the Board; now therefore

IT IS ORDERED that the above-named Board member shall satisfy his training obligation by attending the weekday training session in October 2003, and, in the event he fails

to complete this training session, the above-named Board member shall be summarily removed from office as of that date.*

COMMISSIONER OF EDUCATION

Date of Decision: August 2J 2003

Date of Mailing: August 27, 2003

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.* C. 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

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11504-03SEC

IN THE MATIER OF SIOBHAN	:	
RYAN, BELMAR BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION, MONMOUTH COUNTY.	:	DECISION
	:	

August 21, 2003

SCHOOL ETHICS COMMISSION	:	**BEFORE THE**
	:	**SCHOOL ETHICS COMMISSION**
v.	:	
	:	**RESOLUTION**
SIOBHAN RYAN	:	
Belmar Board of Education	:	**SEC Docket No.: T20-03**
Monmouth County	:	
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-33 requires new board members to attend training within one year of election or appointment to the board to gain the skills and knowledge necessary to serve as a school board member; and

WHEREAS, Respondent Siobhan Ryan was elected to a three-year term on the Belmar Board of Education in April 2002; and

WHEREAS, the New Jersey School Boards Association (NJSBA) advises prospective board members of the training requirement in the "candidate kit"; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on January 3, 2003 and February 19, 2003; and

WHEREAS, the NJSBA conducted seven training sessions between April 2002 and April 2003 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes;* and

WHEREAS, the last training session to fulfill the requirement was held in March 2003; and

WHEREAS, the Commission issued an Order on May 21, 2003, directing Respondent to Show Cause why she had not attended training up until that time; and

WHEREAS, the Commission granted an extension for similarly situated board members to attend one of the June training sessions; and

WHEREAS, Respondent failed to provide any response to the Order to Show Cause and further failed to attend a June training session; and

WHEREAS, the Commission notified Respondent, by letter dated July 15, 2003, that the Commission would discuss this matter at its July 22, 2003 meeting, that she had the right to attend, and could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, Respondent did not respond to this letter, nor provide any reason for failing to attend the required training program for more than the one year allowed by law; and

WHEREAS, the Commission finds that this failure to attend board member training from April 2002 to April 2003 constitutes a violation ofN.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds removal from the Board to be the appropriate penalty for failure to attend training;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Ms. Brunett violated N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education remove her from the Board of Education herewith.

Dated: July 22, 2003

Paul C. G, Chairperson

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. lSA:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed, the board member may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 River View Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on July 22, 2003.

Lisa James-Beavers, Executive Director

LJB/PSC/m:ethics/trainingresT20-03

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*If*505-03SEC

IN THE MATTER OF ROBERTS. :

CORRENTI, KEARNY BOARD OF :

EDUCATION, HUDSON :

COUNTY. :

COMMISSIONER OF EDUCATION

DECISION

August 21, 2003

SCHOOL ETHICS COMMISSION	:	**BEFORE THE**
	:	**SCHOOL ETHICS COMMISSION**
v.	:	
	:	**RESOLUTION**
ROBERTS. CORRENTI	:	
Kearny Board of Education	:	**SEC Docket No.: T15-03**
Hudson County	:	
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A: 12-21 et seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-33 requires new board members to attend training within one year of election or appointment to the board to gain the skills and knowledge necessary to serve as a school board member; and

WHEREAS, Respondent Robert S. Correnti was elected to serve a three-year term on the Kearny Board of Education in April 2002; and

WHEREAS, the New Jersey School Boards Association (NJSBA) advises prospective board members of the training requirement in the "candidate kit"; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on January 3, 2003 and February 19, 2003; and

WHEREAS, the NJSBA conducted seven training sessions between April 2002 and April 2003 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes;* and

WHEREAS, the last training session to fulfill the requirement was held in March 2003; and

WHEREAS, the Commission issued an Order on May 21, 2003, directing him to Show Cause why he had not attended training up until that time; and

WHEREAS, the Commission granted an extension for similarly situated board members to attend one of the June training sessions; and

WHEREAS, Mr. Correnti responded and advised that he would attend the October training session and subsequently had the NJSBA confirm that he was registered for the October session by letter dated July 18, 2003; and

WHEREAS, the Commission notified Respondent that the Commission would discuss this matter at its July 22, 2003 meeting, that he had the right to attend, and could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, Respondent provided no reasons for failing to attend the required training program for the one year allowed; and

WHEREAS, the Commission finds that this failure to attend board member training from April 2002 to April 2003 constitutes a violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds suspension to be the appropriate penalty for failure to attend through June; and

WHEREAS, the Commission finds that if Mr. Correnti fails to attend by **October 2003,** the Commission finds that it would be appropriate to have him removed from the board;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Mr. Correnti violated N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education suspend him until he attends, but remove him from the board if he fails to attend by the October training session.

Dated: July 22, 2003

Paul C. Garbarini, Chairperson

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed, the board member may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 River View Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on July 22, 2003.

Lisa James-Beavers, Executive Director

AGENCY DKT. NO. 254-7/03

IN THE MATTER OF ROBERTS.	:	
CORRENTI, KEARNY BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION, HUDSON	:	DECISION
COUNTY.	:	

Whereas, the School Ethics Commission (Commission) has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 ***et seq.*** to recommend removal of the above-named Board member from office for failure to attend the Board member training sessions required by *N.J.S.A.* 18A: 12-33 and *N.J.A.C.* 6A:28-1.6; and

Whereas the Commission sent ample notice to the above-named Board member of his failure to attend such training sessions; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.6(e), on May 21, 2003, the Commission issued an Order to Show Cause why he had not attended a training up until that time; and

Whereas, the Commission granted an extension for similarly situated board members to attend one of the June training sessions; and

Whereas, the above-named Board member responded and advised that he would attend the October 2003 training session and subsequently had the NJSBA confirm that he was registered for the October session by letter dated July 18, 2003; and

Whereas, the Commission voted on July 22, 2003 to recommend that the above-named Board member be suspended from the Board until he attends the October 2003 session and removed if he fails to attend the October 2003 session, and memorialized such decision

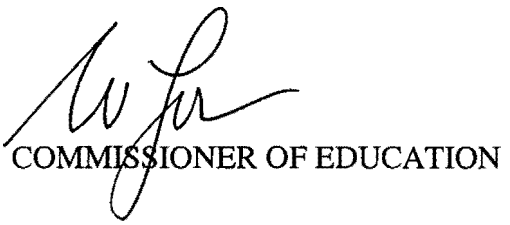
through a resolution forwarded to the Commissioner of Education, pursuant to ***N.J.S.A.*** 18A:12-29;and

Whereas, on July 29, 2003, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to said resolution; and

Whereas, no comments were received from, or on behalf of, the above-named Board member; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the Commission and concurs with and adopts as his own the recommendations of the Commission; now therefore

IT IS ORDERED that the above-named Board member is suspended from office as of the filing of this decision and shall remain suspended pending completion of the requisite training, and, in the event he fails to complete the training session in October 2003, the above-named Board member shall be summarily removed from office as of that date.*



COMMISSIONER OF EDUCATION

Date of Decision: 8/21/03

Date of Mailing: 8/28/03

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

11506-03

T.A., on behalf of minor children, A.A. & W.A.,:

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY, : DECISION

RESPONDENT. :

_____:

August 21, 2003

L-1. t[illegible]i<[illegible]-[illegible]i[illegible]ce'lecbfrimends and I so move that the board approve Stipu(a1ion of Settlervieflt in the matter of T.A. o/b/o A.A. and W.A. vs1nfp'(AASBit:} [illegible]Rfo'n Board of Education in accordance with the information in the hands of each board member and recorded in the non-public portion of these minutes.

I CERTIFY THAT THE FOREGOING RESOLUTION WAS ADOPTED BY THE TOWNSHIP OF UNION BOARD OF EDUCATION AT ITS REGULAR MEffiNG ON JULY 15, 2003.

JAMES J. DAMATO
BOARD SECRETARY

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OAL DKT. NO. EDU 01013-03
AGENCY DKT. NO. 331-10/02

T.A., on behalf of minor children, A.A. & W.A.,:		
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 8/21/03

Date of Mailing: 8/28/03

11527-03

IN THE MATTER OF THE TENURE	:	
HEARING OF ADAM MUJICA,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION ON REMAND
OF THE CITY OF PATERSON, PASSAIC	:	
COUNTY.	:	

SYNOPSIS

Board certified tenure charges against respondent teacher alleging that he had, on numerous occasions, made sexually inappropriate remarks and gestures to students including commenting on female students' bodies, discussed his personal sex life, discussed the sexual aspects of a television program and addressed female students by the name of the title character, made sexual gestures and squeezed a sexual toy during class. Respondent denied all charges, and argued that the charges and testimony against him were motivated by a plot conceived by the physical education department to have him terminated from his position.

After hearing extensive testimony and argument and assessing the credibility of the witnesses, the A U concluded that the Board's witnesses were credible and that it had proven Charges one through five and eight, that Charge seven had been partially proven, and that Charges six and nine should be dismissed. The A U further determined that the charges that were sustained constituted conduct unbecoming a teaching staff member and, because of the nature of the charges, recommended dismissal of respondent.

The Commissioner adopted the determination of the A U that the Board had sustained most of its charges by a preponderance of the evidence and ordered that respondent be dismissed from his position. The State Board of Education affirmed the Commissioner's Decision.

The Appellate Division affirmed that the District had proven its charges of unbecoming conduct, but remanded the decision for reconsideration of the penalty.

On remand, the Commissioner reiterated that, even without giving weight to respondent's past, undetermined accusations, the unbecoming conduct established herein warranted his dismissal as a tenured teacher.

September 2, 2003

OAL DKT. NO. EDU 10130-00
AGENCY DKT. NO. 417-11/00
COMMISSIONER'S DECISION NO. 294-01
STATE BOARD NO. 36-01

IN THE MATTER OF THE TENURE	:	
HEARING OF ADAM MUJICA,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION ON REMAND
OF THE CITY OF PATERSON, PASSAIC	:	
COUNTY.	:	

For the Petitioner: Gregory Johnson, Esq.

For the Respondent: John H. Norton, Esq.

The Commissioner decided this matter on September 7, 2001, adopting the Administrative Law Judge's (ALJ) conclusion that respondent, a tenured teacher in the State-operated School District of the City of Paterson, was guilty of conduct unbecoming a teaching staff member.[1] The Commissioner ordered that respondent be dismissed from his employment as of the date of that decision. The State Board of Education affirmed the Commissioner's decision on February 6, 2002. On appeal, the Appellate Division affirmed the State Board's decision that the evidence supported the seven charges of unbecoming conduct, but remanded the matter for reconsideration of the penalty. The Court therein stated:

> In disciplinary actions against public employees, under ***West New York v. Bock,*** 38 ***N.J.*** 500, 524 (1962), the employee's past disciplinary record may be considered at the penalty phase only if it resulted in a formally adjudicated action or if the charge was admitted by the employee. ***Accord, In re Wenderwicz,*** 195 ***N.J.***

[1] The Commissioner agreed that the District had proven Charges One, Two, Four, Five and Eight and had partially proven Charges Three and Seven.

Super. 126, 134 (App. Div. 1984). *(State-operated School District of the City of Paterson v. Adam Mujica,* Appellate Division, A-3610-01T5, slip op. at 12-13)

Because the Court determined that the ALJ and the Commissioner "utilized earlier alleged misconduct" against respondent in deciding to dismiss him from his tenured teaching position, *(id.* at 11), and since neither of the past charges had been adjudicated against respondent at the time of his hearing on the tenure charges, the Court remanded this matter for reconsideration of respondent's penalty, "without any weight given to the past, undetermined accusations." *(Id.* at 13)

Upon reconsideration of the appropriate penalty in this matter, and mindful that the Appellate Division clearly affirmed that respondent was guilty of conduct unbecoming a teaching staff member, the Commissioner maintains that respondent's pattern of unprofessional conduct, as demonstrated by the District herein, was sufficient to warrant his dismissal. *See In the Matter of the Tenure Hearing of Roberts,* 94 *N.J.A.R.2d* (EDU) 284; *In the Matter of the Tenure Hearing of Sheridan,* 92 *N.J.A.R.2d* (EDU) 257, *affd* State Board 92 *N.J.A.R* 2d (EDU) 393; *In the Matter of the Tenure Hearing of Van Gilson,* 93 *N.J.A.R.2d* (EDU) 378, 382, 385, *aff'd* State Board 93 *N.J.A.R.2d* (EDU) 630; *In the Matter of the Tenure Hearing of Henry Komorowski, State-operated School District of the City of Jersey City, Hudson County,* decided by the Commissioner July 27, 2000, *aff'd* State Board December 6, 2000, *aff'd* Appellate Division March 4, 2002, A-2486-00T2; and *In the Matter of the Tenure Hearing of Ward Campbell,* 93 *N.J.A.R.2d* (EDU) 196, *aff'd* State Board 93 *N.J.A.R.2d* (EDU) 604, *aff'd* Appellate Division 95 *N.J.A.R.2d* (EDU) 211.

Accordingly, without any weight given to his past, undetermined accusations, the Commissioner concludes that respondent's unbecoming conduct necessitates his dismissal as a tenured teacher.

IT **IS SO** ORDERED.2

COMMISSIONER OF EDUCATION

Date of Decision: 9/2/03

Date of Mailing: 9/3/03

2 This decision may be appealed to the State Board of Education pursuant to *N.J.S.A:* 1SA:6-27 ***et seq.*** and *N.J.A.* C 6A:4-1.1 ***et seq.***

5-2-g-o_5

11528-03

O.S., on behalf of minor child, K.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY AND ANTHONY P. CAVANNA, SUPERINTENDENT,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioning parent challenged the Board's placement of her daughter, K.S., in the 6th grade, rather than the 7th grade. The Board contended it took into consideration her age and English proficiency. The Board urged that the petition be dismissed for mootness because K.S. was withdrawn from the District.

The AU concluded that, even though the matter would appear moot, because this issue is one that is capable of frequent repetition, it is not rendered moot. In light of the record and testimony of witnesses, the AU concluded that the Board did not act in an arbitrary or discriminating manner in applying its entrance age policy (#5112) to determine that petitioner's daughter was not eligible for admission to its 7th grade for the 2003-2004 school year. The petition was dismissed.

The Commissioner concurred with the A1J that the matter should not be dismissed as moot. The Commissioner, however, concluded that the Initial Decision misperceived the question at issue herein necessitating remand to the OAL to address and resolve the propriety of the District's actions. Petitioner contended that the District acted in violation of its established regulation for new students, R 5120 (Assignment of Pupils), by its failure to objectively evaluate K.S. through testing in its determination of an appropriate grade placement for her as required by that document. The remand is for expansion of the record as to Board policy #5120 and regulation R 5120 and the interrelationship between the two, along with the reasonableness of the District's deviation from established policies/procedures in making the grade placement determination for K.S.

September 2, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1840-03
AGENCY REF. NO. 395-12/02

O.S. on behalf of K.S.,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY and ANTHONY P. CAVANNA, SUPERINTENDENT
Respondents

Before **O.S.,** petitioner pro se

Robert Tessaro, Esq., for respondents

Record closed: June 10, 2003 Decided: July 25, 2003

ROBERT J. **GIORDANO,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, O.S., the mother of the minor, K.S., appeals the determination of the respondent Board of Education of the Borough of Fort Lee to place K.S. in the sixth

grade at the time of enrollment in the school district. A petition of appeal was filed with the Commissioner of Education on November 22, 2002. Respondent filed an answer to the petition on December 16, 2002. Thereafter, the Department of Education confirmed that the petitioner had withdrawn the original petition and filed a second petition on December 10, 2002. Respondent filed an answer to the second petition on January 10, 2003. Thereafter, the matter was transmitted by the Department of Education to the Office of Administrative Law (OAL) on March 4, 2003 as a contested case pursuant to *N.J.S.A.* 52:14B-1 to 15 and *N.J.S.A.* 52: 14F-1 to 13. A hearing in the matter was held on April 16, 2003. Prior to the conclusion of the hearing, counsel for the respondent moved for dismissal of the petitioner's appeal as moot since petitioner had acknowledged that the parents had withdrawn K.S. from the District, first to be home schooled and then enrolling her in a private school, the European Learning Center. The undersigned reserved on the motion pending the receipt of post-hearing briefs. The record remained open for the submission of the post-hearing briefs. The submissions were received by the undersigned by May 30, 2003. The record was held open to June 10, 2003 for the submission of responses by the parties. No responses being submitted by that date, the record was closed on June 10, 2003.

ISSUES

The issues to be resolved are whether the Board has the authority and/or discretion to apply an educational policy utilizing chronological age in determining the grade placement of the minor child, K.S. upon entering and enrolling in its schools and whether the Board has improperly utilized English language proficiency in making such determination.

FACTUAL DISCUSSION

Testimony

Jack Foster

The respondent has employed Jack Foster for thirty-four years, the last five years as principal of the Lewis F. Cole Middle School. He received his undergraduate degree at Montclair State University in 1968 and he holds certificates for teaching, supervisor and principal. He obtained a Master's Degree in Education Administration at William Paterson University in 1981. During his tenure at Fort Lee School District, he has been a teacher and Department Head of various departments. He has also served as principal of a K-12 summer program for remediation and enrichment. The witness was qualified as an expert in the area of educational administration.

Foster described the enrollment patterns in the District. There are 3400 students enrolled in the District. There are 570 students in the Middle School grades 7-8. Fort Lee is a multi-cultural community. The population is approximately forty percent Asian. There is also a fairly high transitional population. The students in the District speak thirty different languages. There are a good number of Russian students and the number is increasing.

The witness explained that he is normally not involved in the placement of the students enrolled in the District. However, he did become aware of this matter in August 2002. He explained that generally parents would register the child at the placement office. There are four elementary schools in the District. The elementary student will be enrolled at the elementary school where the student resides. There is one middle school and one high school.

In this case, the witness was advised there was a problem regarding placement. He met with the parents in August 2002. He advised the parents that he wanted to meet the child. Foster testified that the child was placed in accordance with the District

policy 5120. The placement of the child was age appropriate. The cutoff for Kindergarten is October 31. The District attempts to apply this cutoff throughout. There is a policy to track the students for possible advanced study. The District has accelerated programs to help keep the children challenged.

At the time the parents wanted to have K.S. placed in the Middle School, the sixth grade was the age appropriate placement for her. K.S. was eleven years old at the time. Students in the seventh grade would be twelve or thirteen years old. Foster testified that he spoke to the parents at great length about the placement. He explained to them that his primary concern was age appropriateness. He did acknowledge that K.S. spoke little or no English. Foster testified that to his knowledge, K.S. did well in the last marking period in some areas, specifically art.

The witness was shown a four-page report from Russia regarding K.S. (R-1). These were the records from the prior educational institution in Russia. The records indicated that K.S. was born on February 28, 1991. Foster testified that the country in which the student resides makes the assignment of grade levels. Often, these grade levels do not correspond with the grade levels here. In placing the foreign student, proper consideration is given to age, courses of study, and grades achieved.

Foster described the nature of the programs available in the elementary schools and in the Middle School. Honors programs are started in the seventh grade. Students in the Middle School have seven classes per day and change class every 43 minutes. The classes in the sixth grade are primarily self-contained. The District does have English as a Second Language (ESL) program. The District also has bi-lingual programs, but not in Russian.

After several meetings with the parents, it was determined that the best placement for K.S. would be in the sixth grade for the 2002-2003 school year.

On cross-examination, the witness related the history of the matter. He testified that the concerns regarding placement came to him from the placement office. He

spoke with the mother first by telephone, then at an in-person meeting. The child was not present at that meeting. K.S. was present at a second meeting. The witness recalled her as quiet and shy. He said that they were barely able to greet each other, but he did try to make her feel comfortable. The witness acknowledged that he is not qualified to evaluate her language skills. The District does not have any devise to permit the evaluation of skills. There are many cases of transfer students with different language proficiency levels. Foster opined that language plays a major role in success in school.

Foster acknowledged there are no standardized tests offered in the native languages of foreign students. The ESL department does all standardized testing. Math skills and language arts skills are measured on standardized tests. Another factor to consider is social acceptance. He explained that the seventh grade students in the District for the 2002-2003 school year were born between October 1989 and October 1990. The placement decisions are the reasonable exercise of discretion and are not made in a discriminatory manner.

Vincent Taffaro

Dr. Vincent Taffaro testified next for the respondent. He has been the Assistant Superintendent of the School District for the last thirteen months. Prior to that, he was the principal of School Number 4 for fifteen years. He has also served as assistant principal and classroom teacher in the Fort Lee School District for a total of thirty-one years.

Dr. Taffaro graduated St. Peter's College in 1971. He received a Master's Degree from Jersey City State College in 1977. He received a Doctorate Degree from Fordham University in Educational Administration in 1995. He is certified in teaching, as a supervisor, principal and superintendent of schools. The witness was qualified as an expert in educational administration.

He became aware of a problem in August 2002, related to the placement of K.S. in the school system. He went to the registration office and spoke to the registration officer, Carol Fratee. He also spoke to Mr. Foster. Dr. Taffaro identified the Fort Lee District policy regarding the assignment of pupils (R-2). He testified that age is a factor in the placement decision. He stated that often other countries use different levels, sections, or degrees in the grade system. It is difficult to ascertain from that what would be the appropriate grade level in the school systems here. When he spoke to the parents in August, they were concerned that their child was not being properly placed. They felt she should be in the seventh grade.

Dr. Taffaro felt that based on her age and grade level that the appropriate placement for K.S. was the sixth grade. He advised the parents of this decision both by telephone and in person. He explained to them that they could appeal this decision to the Superintendent of Schools, Dr. Cavanna. Dr. Cavanna met with the parents as well. According to the witness, Dr. Cavanna concurred with the placement decision. Dr. Cavanna sent a letter to the parents outlining the basis for the decision on November 13, 2002 (R-3). Among the factors used in the decision was the chronological age of the student as well as her ability in the English language. He felt that the age of the student is an appropriate factor. He would have been concerned about placing this child in the Middle School. He also felt that the ability of the child to speak English is important in considering the socialization of the child.

The District provides a modified program in the fifth and sixth grades. The students change for several of the classes. This is considered a transitional time for the students. Fort Lee provides an ESL program. The parents will complete a form providing information regarding the length of time in the country and describing the proficiency in the English language. The children are given a language proficiency test. K.S. was given this test on September 12, 2002. Her score indicated that she was at the 42.5 percentile in language proficiency. Parents are free to withdraw their children from the ESL program.

Dr. Taffaro acknowledged that he could not make a judgment as to the grade level of the curriculum in Russia. The decision to place K.S. in the sixth grade were those outlined in the November 13, 2002 letter to the parents.

Peter Emr

The next witness to testify was Peter Emr. He has been the principal at elementary School Number 4 since March 2002. Previously, he had been the assistant principal at Lewis Cole Middle School for two years. He has also been principal in Hackensack for the K through adult education program and assistant principal in the Glen Ridge Middle School. He is an educational consultant in K through adult education in computer-based learning.

The witness received his Bachelor's Degree and Master's Degree from Jersey City State College. He also has approximately fifteen credits in psychology counseling at Seton Hall University.

Mr. Emr learned about the situation involving K.S. in August 2002. He recalled that he was advised that the child was to be placed in School Number 4. The child was registered for the Middle School, but redirected to School Number 4. He recalled meeting with the parents after the start of the school year. When the school year started in September, K.S. was placed in the sixth grade. She was there until November 12, 2002. He testified that K.S. had multiple absences during that time. In October alone, she was absent seven days.

The witness testified that there was a meeting with the parents after they removed K.S. from the school. That meeting was not about the placement but an injury she had apparently suffered in the playground at one time.

He recalled that K.S. participated in the ESL program and the regular education program at School Number 4. He believes that the parents received the report card for the first marking period, which ended October 12, 2002. As he recalled, K.S. did

satisfactorily in all her courses. He testified that toward the end of her stay at the school, K.S. exhibited some behavioral problems. Emr testified that in his opinion, the age appropriate placement in the sixth grade was the best placement for K.S. A seventh grade placement would have been a mistake.

Mr. Emr testified that the parents withdrew the child from the District. He understood that she was going to be home schooled by the parents. A letter dated November 26, 2002, to the Assistant Superintendent of Schools, advised that the parents were withdrawing K.S. from the District and would begin home schooling (R-5).

The witness acknowledged that he became aware that K.S. was obtaining higher scores on assignments from the private tutor at home than she had gotten in school. He stated he did not know how she was scored on those tests. He testified that K.S. had some difficulty in mathematics with computations.

O.S.

O.S. testified on behalf of her daughter. She explained that K.S. did not have enough time to study the sixth grade studies because she was also receiving instruction in seventh grade material from the tutor. K.S. was called "stupid" by her classmates because she was going through the sixth grade again. Petitioner acknowledged that the District maintained a policy regarding entrance age, Policy 5112 (P-6).

The parents insisted that K.S. be tested. They wanted Mr. Foster to meet her. They were upset that at that meeting, Mr. Foster just greeted her and asked questions about things like the sports she liked. They then asked the Superintendent to have K.S. tested.

O.S. explained that K.S. started school in September 1997 in grade 0. She remained in grade Othrough June 1998. In September 2001, K.S. entered her fifth year of school. After the third level of a ten-year program, she was tested and placed in the sixth level of the eleven-year program.

The witness acknowledged that prior to filing the within appeal, she withdrew her daughter from the District. She had her home schooled for one week. She then placed her in the European Learning Center in Fairlawn, New Jersey. Mr. Foster told her that K.S. would not be accepted into the seventh grade in the District.

She also indicated that she did not have a problem with the ESL program in the District. She made her mind up that the placement in the sixth grade was a mistake. When she met with the woman at the registration office, she was told that K.S. would be referred to the seventh grade even though there was an age problem.

FINDINGS OF FACT

Based on the testimonial and documentary evidence presented, and having the opportunity to observe the demeanor of the witnesses and to assess their credibility, I make the following **FINDINGS** of **FACT:**

1. K.S. is a minor born on February 28, 1991.
2. K.S. started school in 1997 in Russia.
3. She attended school in the 1st class in 1999.
4. K.S. attended the 2nd class in 2000.
5. K.S. attended the 3rd class in 2001.
6. In 2002, K.S. attended Junior High School in Russia in the 6th class.
7. K.S. was registered for enrollment in the Fort Lee School District by her parents in August 2002, for the 2002-2003 school year.
8. At the time of enrollment, K.S. was eleven years of age.
9. She was being enrolled for the 2002-2003 school year commencing September 2002.
10. Although the parents requested she be enrolled in the seventh grade, K.S. was referred for enrollment in the sixth grade at elementary school Number 4.
11. The District uses October 31 as the cutoff date for eligibility.

12. For the 2002-2003 school year, students generally eligible for placement in the seventh grade were born between October 1989 and October 1990.
13. K.S. was age appropriate for placement in the sixth grade for the 2002-2003 school year.
14. The English language proficiency test score for K.S. was 42.5 percentile at the beginning of the 2002-2003 school year.
15. Pursuant to District Policy 5112, a child is eligible for entrance into kindergarten that will have attained the age of five years on or before October 31 of the year in which entrance is sought.

LEGAL DISCUSSION

The respondent urges that the petition of appeal must be dismissed for mootness because K.S. was withdrawn from the District, first to be home schooled, and then placed in a private school by the parents. The mootness doctrine is "[t]he principle that when the matter in dispute has already been resolved, there is no actual controversy that would be affected by a judicial decision." Black's Law Dictionary 697 (Abridged 6th Ed.1991). It is well established that questions that have become moot or academic prior to judicial scrutiny generally have been held to be an improper subject for judicial review ... for reasons of judicial economy and restraint, courts will not decide cases in which the issue is hypothetical, a judgment cannot grant effective relief, or the parties do not have concrete adversity of interest. *Anderson v. Sills,* 143 *N.J. Super.* 432 (Ch. Div. 1976). Likewise, the Commissioner of Education does not consider moot issues. *J.B. and P.B. v. Bd of Educ of Asbury Park,* OAL DKT. EDU 7940-87 (Oct. 12, 1988) adopted Comm. Ed. (Nov. 23, 1988). See, *Feldman v. Bd. of Educ. of Lindwood,* OAL DKT. EDU 1665-94 (Oct. 14, 1994), adopted Comm. Ed., where the petitioners argued that their child was deprived of the opportunity to participate in a gifted and talented program as required by *N.J.A.C.* 6:8-4.5(4), because the school district did not have an honors program for first graders. After petitioners transferred their child to a private school, the ALJ held:

> . . . the removal of A.F. from the policies and dictates of the Linwood school system destroys the concrete, immediate adversity necessary to sustain a justiciable controversy. Accordingly, I FIND that the removal of A.F. from the Linwood school system renders the matter moot and as a result, petitioner's complaint is herein dismissed.

However, appellate courts occasionally will rule on such matters where they are of substantial importance and are capable of repetition while evading review. *Advance Elec.* Co., *Inc. v. Montgomery Tp. Bd. of Educ.* 351 *N.J Super.* 160 (App. Div. 2002).

The petitioner urges that the assignment of K.S. in the sixth grade denies equal access to education, based on the unlawful consideration of English language proficiency. The New Jersey Constitution (1947), Art. VIII, Sec. IV. par. 1 provides that it is the duty of the State to educate our children and that such education is of supreme importance, *State v. Vaughn,* 44 *N.J.* 142, 145 (1965); *Pingry Corp. v. Hillside Tp.,* 46 *N.J.* 457, 460-461 (1966). It has been held that it is within the authority and discretion of board of education to exclude children within its jurisdiction who sought to transfer into first grade from private kindergarten or day school program who had not attained age of six years on or before October 1 of school year, even though the board made an exception for children not meeting such age requirement who moved into district after attending a public supported kindergarten. *H.A.B., Guardian for S.T.B. v. Manalapan-Englishtown Regional School Dist., Monmouth County,* 92 *N.J.A.R.* 2d (EDU) 640, 1992 WL 405315, (1992). A local board of education may promote or place pupils enrolled into public schools for its district according to the prescription of its own rules. *Boulogne v. Bd. of Ed. of the City of Jamesburg, Middlesex County,* 1964, S.L.D. 107; *Wilcox v. Bd. of Ed. of the Borough of Oceanport, Monmouth County,* 1954-55 S.L.D. 75; *Staats v. Bd. of Ed. of Montgomery Twp., Somerset County,* 1938 S.L.D. 669. *Shenk/er v. Bd. of Ed. of the Bor. of Ho-Ho-Kus, Bergen County,* 1974 S.L.D. 772. The Commissioner of Education in the Shenkler case analyzed the authority of local boards based on cases decided prior to that time. There, the Commissioner noted at pages 777-778 that:

> In Boulogne, supra, the Commissioner was concerned with a policy of local board of education, which required that pupils be six years of age on or before December 31 in order to qualify for entrance to first grade. Such policy was consistent with another Board policy with respect to qualifications for entry to kindergarten.

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." 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:

> 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.) (Now, N.J.S.A.18A:33-1) 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 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.

No child under the age of five years shall be admitted to any public school, except such as may be provided pursuant to law for children of his age. No board of education shall be required to accept by transfer from public or private school any pupil who was not eligible by reason of age for admission on October 1 of that school year, but the board may in its discretion admit any such pupil if he or she meets such entrance requirements as may be established by rules or regulations of the board. *N.J.S.A.* 18A:38-5.

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. *N.J.S.A.* 18A:4-24. 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, Bergen County,* decided by the Commissioner March 13, 1963 (1963 S.L.D. 85), affirmed State Board of Education May 1, 1963 (1963 S.L.D. 89), one of the questions was whether a board of education could make psychological testing a prerequisite to early admission to kindergarten. The Commissioner held:

> ... 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.

The Legislature, in its wisdom, provided local boards of education with wide discretion to admit or not to admit a child into its schools that was not eligible to be admitted by reason of not having attained the age for admission on or before October 1 of the school year.

CONCLUSIONS

On its face, the instant matter would appear to be rendered moot by virtue of the fact that the petitioners have withdrawn K.S. from the District, thus obviating the adversity necessary to sustain a justiciable controversy. However, by the very evidence adduced on behalf of the respondent, this issue is one that is capable of frequent repetition. The Fort Lee School District is a multi-cultural, transient community with an increasing immigrant population. The provision of an education is of the utmost importance. Thus, I **CONCLUDE** that the issue as presented here is not rendered moot.

As to the issue of whether the respondent may establish enrollment eligibility based on chronological age, the case law leads but to one conclusion. The legislative authority has been conferred upon a local board of education to make and enforce rules

for its own governance under *N.J.S.A.* 18A: 11-1, to include policies adopted by it consistent with *N.J.S.A.* 18A:38-5. The Board herein has done just that. It has determined to use its discretion in determining the appropriate placement of students transferring into the District. There is no evidence extant that the Board here utilized any unlawful consideration in determining the placement of K.S. To the contrary, the evidence leads to the opposite conclusion. K.S. tested at a language proficiency of less than fifty percentile. Notwithstanding this, she was not placed in a grade lower than her age appropriate placement. Only in such case could the petitioner arguably assert that K.S. was misassigned to a class because of her lack of language skills. The respondent Board has, through *N.J.S.A.* 18A:11-1, adopted a rule, not inconsistent with any provision of Title 18A, not to accept children into its kindergarten who have not attained the age of five years on or before October 31 of the school year in which entrance is sought. The Board has extended its rule to apply throughout in determining grade placement for those children within its jurisdiction who seek eligibility for enrollment into the school system at any age. Interestingly, the child's mother acknowledged that K.S. started school in Russia in 1997. As such, she would have been in school for five years prior to enrollment in the Fort Lee District. For the foregoing reasons, I **CONCLUDE** that the Board has not acted in an arbitrary or discriminating manner in applying its entrance age policy to determine that petitioner's daughter was not eligible for admission to its seventh grade for the 2002-2003 school year.

ORDER

Based on the foregoing, I hereby **ORDER** that the appeal of petitioner is and shall be **DISMISSED.**

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

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

to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:148-10.

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

7/25/03
DATE

ROBERT J. GIORDANO, ALJ

Receipt Acknowledged:

7-25-03
DATE

DEPARTMENT OF EDUCATION

E-mail Receipt of Initial Decision Confirmed by the Department of Education on: 7 l::LS \ C3

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'JUL 2 9 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

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APPENDIX

WITNESSES

For respondents:

Jack Foster
Vincent Taffaro
Peter Emr

For petitioner:

O.S.

EXHIBITS

For respondents:

R-1 Student's Information-Translated from Russian
R-2 Policy 5120 - Assignment of Pupils
R-3 Letter dated November 13, 2002, Dr. Cavanna to O.S.
R-4 Student Profile Sheet
R-5 Letter dated November 26, 2002, O.S. to Vincent Taffaro

For petitioner:

P-1 Spelling test-October 11, 2002
P-2 Math Quiz-October 30, 2002
P-3 Math Quiz-October 27, 2002
P-4 Math quiz-November 1, 2002
P-5 List of Seventh Grade books

P-6 Policy 5112 - Entrance Age

P-7 Policy 5120 -Assignment of Pupils

P-8 Confirmation from Ministry of Education-Translated from Russian

P-9 General Education-Sixth Grade-Translated from Russian

OALDKT. NO. EDU 1840-03
AGENCY DKT. NO. 395-12/02

O.S., on behalf of minor child, K.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY AND ANTHONY P. CAVANNA, SUPERINTENDENT,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions were filed in accordance with *N.J.A.C.* 1:1-18.4.

Petitioner's exceptions charge that "[i]n his findings of fact, legal discussion and conclusion, [the Administrative Law Judge (ALJ)] completely ignored the whole premise and basis for my petition of appeal." (Petitioner's Exceptions at 1) She claims that throughout this matter, in both her written submissions and at the hearing, she continually stressed that resolution of this matter revolved around one single piece of evidence, a District regulation (P-7) which "requires that all new pupils must be administered the District Approved Standardized Test to ensure proper grade placement." *(Ibid.)* Notwithstanding this clear regulation, which on its face makes no exception for students with limited English proficiency, the District repeatedly denied K.S. an opportunity to take these tests. As such, petitioner contends, the District was in clear violation of its own policies and/or procedures in the placement of her child. Rather than recognizing and addressing this violation, the ALJ erroneously concluded that chronological age,

in and of itself, is a sufficient basis to determine grade placement. In so concluding, she argues, the ALJ's case citations and legal discussion centered around acceptance into kindergarten and first grade, along with the bold assertion that the District has extended the kindergarten/first grade age entrance policy to all grades through high school, an assertion that is without foundation as there is no written policy in the Fort Lee School District so stating. {Petitioner's Exceptions at 2)

Upon his full and independent review and after due consideration of petitioner's exception arguments, the Commissioner finds and concludes that the Initial Decision misperceives the question at issue herein necessitating remand to the OAL to address and resolve the propriety of the District's actions, under the particular circumstances existing in this matter, as explicated below.

Initially, however, the Commissioner concurs with the AI.J that, notwithstanding K.S.'s withdrawal from the District and her subsequent enrollment in a private school, this matter should not be dismissed as moot. Rather, as recognized by the AI.J, "[t]he Fort Lee School District is a multi-cultural, transient community with an increasing immigrant population" {Initial Decision at 13), and, therefore, the issue involved here is of substantial importance and one capable of frequent repetition, qualifying it as an exception to the mootness doctrine. *See Advance, Inc. v. Montgomery Tp.,* 351 *N.J. Super.* 160 {App. Div. 2002).

This said, the Commissioner next observes that, in his Initial Decision, the AI.J categorizes the issues to be resolved in this matter as:

> whether the Board has the authority and/or discretion to apply an educational policy utilizing chronological age in determining the grade placement of the minor child, K.S. upon entering and enrolling in its schools and whether the Board has improperly utilized English language proficiency in making such determination. {Initial Decision at 2)

Based on his review here, the Commissioner finds that the AU's categorization does not adequately identify the issue in controversy. It is by now well-established that a board of education possesses the statutory right to promote or place pupils enrolled in its schools according to the prescription of its own rules. *Shenkler v. Bd. of Ed. of the Borough of Ho-Ho-Kus*, 1974 *S.L.D.* 772, *aff'd* State Board 1975 *S.L.D.* 1157; *Boulogne v. Bd. of Ed. of the City of Jamesburg,* 1964 *S.L.D. 107; Wilcox v. Bd. of Ed. of the Borough of Oceanport,* 1954-55 *S.L.D.* 75. It is, likewise, well-established that when a local school board acts within its authority, its decision is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that the decision was arbitrary, capricious or unreasonable. *Thomas v. Bd. of Ed. of Morris Tp.,* 89 *N.J. Super.* 327, 332 (App. Div. 1965), *aff'd* 46 *N.J.* 581 (1966). The record in this matter indicates that this District has established both a Policy, #5120, and a Regulation, R 5120, with respect to ascertaining the appropriate grade level placement for new or returning students from a private or public school outside of the District *(see* R-2 and P-7), although the interrelationship between these two documents is unclear. The gravamen of the instant petitioner's contention here is that the District acted in violation of its established regulation by its failure to objectively evaluate K.S. through testing in its determination of an appropriate grade placement for her as required by that document. Although recognizing that testing for English language proficiency for students such as K.S. is mandated by *N.J.A.C.* 6A:15-1.1 *et seq.,* the Commissioner finds the examination herein should focus on whether the District's reliance on the results of this test and its "Entrance Age" policy (P-6), dealing with the admission of children to kindergarten and first grade, to determine whether K.S. would more appropriately be placed in 6th or ? th grade, when it appears to have in place a generally applicable

policy or practice for determining grade placement which it ostensibly uses for all other new students, was arbitrary, capricious or unreasonable.

Accordingly, this matter is hereby remanded to the OAL for expansion of the record as to Board policy #5120 and regulation R 5120 and the interrelationship between the two, along with the reasonableness of the District's deviation from established policies/procedures in making the grade placement determination for K.S.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 9/02/03

Date of Mailing: 9/3/03

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 ***et seq.*** and *N.J.A.C.* 6A:4-1.1 ***et seq.***

529-03

11529-03

T.D'O. and R.D., on behalf of minor children, J.F.D., S.M.D. and S.C.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning parents challenged the Board's decision to deny enrollment to their children based on N.J.A.C. 6A:28-2.4(a)(l)(vii), which provides that where the students' dwelling is located within 2 or more local districts, the district of domicile for school attendance purposes shall be that of the municipality to which the resident pays the majority of property tax.

The ALJ found that it was undisputed that petitioners' property was located both in Fort Lee and Englewood and that the majority of the property taxes for the residence were paid to the City of Englewood. Therefore, it would be unfair for respondent to bear the financial burden of providing a free public education to petitioners' children while the City of Englewood received the benefit of the bulk of petitioners' taxes. The ALJ concluded that petitioners' children were not entitled to a free public education in the Borough of Fort Lee. *Citing Zadran,* the ALJ also concluded that, under the facts of this case, it would be inequitable to assess tuition against petitioners for the period of their children's attendance in respondent's schools.

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

September 2, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3920-02
AGENCY DKT. NO. 107-4/02

T.D.'O AND R.D. ON BEHALF OF MINOR CHILDREN J.F.D., S.M.D. AND S.C.,
Petitioners,
v.
BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY,
Respondent.

Kenneth J. **Lindenfelser,** Esq., for petitioners

Robert Tessaro, Esq., for respondent

Record Closed: June 26, 2003 Decided: July 31, 2003

BEFORE **LESLIE Z. CELENTANO,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners T.D.'O and R.D. challenge the determination made by respondent Fort Lee Board of Education ("Board" or "District") that minor children J.F.D., S.M.D., and S.C. were not domiciled in the District and thus were not entitled to a free public education in the District.

A prior challenge to the Board's residency determination was heard by the Honorable Margaret M. Hayden, administrative law judge (ALJ), *R.O. on Behalf of Minor Children* S.C., S.O.'O *and J.D.'O v. Board of Education of Fort Lee, Bergen County,* EDU 7327-00, Initial Decision (February 21, 2001), *adopted in part, modified in part,* Comm'r of Educ. (April 2, 2001) <http://lawlibrary.rutgers.edu/oal/search.html>. Judge Hayden concluded in that matter that as petitioners were domiciled in Englewood, petitioners' children were not entitled to attend schools in the District. The Commissioner concurred, but ordered a tuition assessment against petitioners for the period of time after which the Board had determined the children were ineligible to attend school in the district. The amount of tuition owed was eventually compromised at the sum of $7,500 for the 2000-2001 school year.

The within matter was transmitted to the Office of Administrative Law (OAL) on May 13, 2002, for resolution as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. Counsel for the Board filed a motion for summary decision and petitioners cross-moved for summary decision. A hearing was scheduled for June 13, 2003, at the OAL in Newark and on that date the parties agreed that the matter would be decided on the papers. The Board's reply to petitioners' cross-motion for summary decision was received on June 26, 2003, and on that date the record closed.

FACTUAL DISCUSSION

The essential facts in this matter are not disputed. In approximately March 2000 the District office conducted a review of students enrolled in District schools who were residing in homes on streets straddling the boundary line with the adjacent municipality of Englewood. Petitioners resided at that time in a home located at 460 Westview Place, Englewood, New Jersey, pursuant to the recorded deed. Simultaneous with the review conducted by the District, petitioner T.D.'O submitted a verification of attendance form certifying her address as 460 Westview Place, Englewood, New Jersey. Following the submission of this information by T.D.'O, the District undertook an inquiry regarding the petitioners' property. The deed to the property showed the premises as being

located both in Fort Lee and in Englewood. The inquiry conducted by the Board also determined that the portion of the property located within Fort Lee was assessed for land only, with an annual real estate tax bill of $335.65. The Englewood Tax Assessor's Office assessed the property for land and improvements, resulting in an annual City of Englewood tax bill of $4,412.

As a result of this investigation, petitioners were advised that slightly more than two feet of a corner of the property was located in Fort Lee and the remainder of the property was located in Englewood. The superintendent of the District then determined to terminate the enrollment of petitioners' children. Following that determination petitioners had a hearing before the Board, at which time the decision to terminate enrollment was upheld.

Petitioners appealed that determination and by decision dated April 2, 2001, the Commissioner of Education affirmed in part and modified in part the decision of Judge Hayden, based upon the District's motion for summary decision, that petitioners' children were not entitled to a free public education in the District. The Commissioner modified that portion of Judge Hayden's decision that declined to assess tuition for the period of ineligible attendance, and the amount of tuition due was eventually compromised at the sum of $7,500.

At some point thereafter petitioners were informally advised that based upon the recommendation of the former superintendent, the children could remain in District schools if a portion of the residence were located within the District. Petitioners then represented to the Board that they would construct an addition adding living quarters within the District boundaries. Construction was commenced in August 2001. On November 1, 2001, the District enrollment officer, Thomas Sweeney, reported that his inspection of the premises at 460 Westview Place revealed that neither the inside nor the outside of the new structure was finished, in fact the interior construction was "99% incomplete." A further check by Mr. Sweeney with the Building Department revealed that no inspection had been conducted. Correspondence was sent by the District to petitioners advising that the children had been permitted to remain in District schools based upon a representation that construction of the addition would be diligently

pursued, and inquiring as to the status of the addition. Petitioners thereafter corresponded with the District, indicating that there had been some design changes and delays encountered but that the project was moving forward in a timely fashion.

On November 29, 2001, the superintendent of the District advised petitioners by letter that the New Jersey State Board of Education had adopted a new regulation requiring students to attend school in a district where the majority of the property tax for the dwelling in which they reside is paid. Petitioners were informed that as a result of the change in law the children would no longer be permitted to attend District schools, since even after completion of the addition the amount of taxes paid to the City of Englewood would far exceed the amount of taxes paid to the Borough of Fort Lee.

Petitioners continued with the construction of the addition and the certificate of occupancy was issued on May 14, 2002. Petitioners filed the within appeal seeking to have their children remain in the District without the payment of any tuition for the 2001-2002 or 2002-2003 school years.

MOTION FOR SUMMARY DECISION AND DISCUSSION

Summary decision is available in the administrative process pursuant to *N.J.A.C.* 1:1-12.5. The motion for summary decision shall be served with briefs and with or without supporting affidavits. The decision sought may be rendered if the papers and discovery that have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. When a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue that can only be determined in an evidentiary proceeding. If the adverse party does not so respond, a summary decision, if appropriate, shall be entered. *N.J.A.C.* 1:1-12.5. Additionally, the facts must be considered in the light most favorable to the opposing party. *Boyer v. Anchor Disposal,* 135 *N.J.* 86 (1994). Moreover, under the most recent guidelines delivered by our New Jersey Supreme Court, summary judgment is encouraged when the proper circumstances present themselves:

> Under this new standard, a determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Liberty Lobby, supra,* 477 *U.S.* at 249, 106 S. *Ct.* at 2511, 91 *L. Ed.* 2d at 212. Credibility determinations will continue to be made by a jury and not the judge. If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a "genuine" issue of material fact for purposes of *Rule* 4:46-2. *Liberty Lobby, supra,* 477 U.S. at 250, 106 S. *Ct.* at 2511, 91 *L. Ed.* 2d at 213. The import of our holding is that when the evidence "is so one-sided that one party must prevail as a matter of law," *Liberty Lobby, supra,* 477 U.S. at 252, 106 S. *Ct.* at 2512, 91 *L. Ed.* 2d at 214, the trial court should not hesitate to grant summary judgment.
>
> *[Brill v. Guardian Life Ins.* Co. *of America,* 142 *N.J.* 520, 540 {1995).]

This standard is equally applicable in the context of administrative proceedings. Even where a statute calls for a "hearing," where a motion for summary decision is made and supported by documentary evidence and where the objector submits no evidence to demonstrate a genuine issue of material fact, the motion procedure constitutes the hearing and no trial-type hearing is necessary. *Contini v. Newark Bd. of Educ.,* 286 *N.J. Super.* 106, 120-21 (App. Div. 1995), *certif. denied,* 145 *N.J.* 372 (1996). The matter is then considered in light of the applicable law.

In the instant matter, petitioners argue that respondent's motion for summary decision should be denied, but do not specify what material facts are in dispute. Contrary to petitioners' contentions, therefore, the underlying facts are clear and this matter is ripe for summary decision. *N.J.A.C.* 1:1-12.5(b); *Brill, supra,* 142 *N.J.* 520.

LEGAL DISCUSSION AND CONCLUSION

N.J.S.A. 1SA:38-1 provides that the public schools of a district are free to persons domiciled within the district who are over five and under twenty years of age. Domicile is the place of a person's abode, where he or she has the present intention of remaining and to which, if absent, he or she intends to return. *Mercadante v. City of Paterson,* 111 *N.J. Super.* 35, 39 (Ch. Div. 1970), *aff'd,* 58 *N.J.* 112 (1971). A person may have more than one residence but only one domicile, which is the place that the person regards as his or her true and permanent home. *Board of Educ. of Middle Township, Cape May County v. K.K.,* 93 *N.J.A.R.2d* (EDU) 461.

Petitioners assert and respondent does not dispute that petitioners have at all times acted in good faith. Petitioners also reference "the agreement made with the Board" which they relied upon in going ahead with plans for the addition.[1] Petitioners also assert the doctrines of laches, estoppel and equity in urging that the District be required to retain the children in the District schools.

N.J.A.C. 6A:28-2.4(a)(1)(vii), which was adopted on November 7, 2001, and became effective on December 17, 2001, provides as follows:

> Where a student's dwelling is located within two or more local school districts, or bears a mailing address that does not reflect the dwelling's physical location within a municipality, **the district of domicile for school attendance purposes shall be that of the municipality to which the resident pays the majority of his or her property tax,** or to which the majority of property tax for the dwelling in question is paid by the owner of a multi-family dwelling.
>
> [Emphasis added.]

Here it is undisputed that petitioners' property is located both in Fort Lee and in Englewood and that the assessment in Englewood of $142,800 exceeds that in Fort Lee of $43,900 by nearly $100,000. Clearly, the majority of the property taxes for the residence are being paid to the City of Englewood.

[1] No written agreement was entered into permitting the students to remain in the District school system.

Following the completion of the addition, the taxes paid to the Borough of Fort Lee for the year 2002 totaled $814.24. Taxes of $4,559.60 were collected by the City of Englewood for the year 2002, more than five times the amount paid to the Borough of Fort Lee.

Respondent cites the matter of *Zadran v. Board of Education of the Township of Belleville,* 97 *N.J.A.R.2d* (EDU) 335, *aff'd in part, rev'd in part,* State Bd. of Educ. (April 1, 1998), wherein the petitioner resided in a condominium located on the border between Belleville and Newark. The petitioner in that matter had a Belleville address and believed that he resided in Belleville, however, in actuality the unit sat directly on the boundary line, with the majority of the unit located in the city of Newark. Petitioner paid real estate taxes to Newark only, but his children were enrolled in Belleville schools. The ALJ concluded, and the Commissioner agreed, that the petitioner's children were domiciled in the city of Newark and not eligible to attend public school in Belleville free of charge, and that therefore tuition reimbursement was owed to Belleville. The ALJ noted that "it would be inequitable to impose the financial burden of educating the Zadran children on the citizens of Belleville while the citizens of Newark enjoy the benefit of tax revenues derived from their living arrangements." The State Board of Education affirmed the conclusion that the Zadran children were domiciled in Newark. I note, however, that the State Board also concluded that despite the "legal and geographical realities" in the case, it would be inequitable under the particular facts of the case to assess tuition against the petitioner for the period of his children's attendance in the Belleville schools, citing *State, Department of Environmental Protection v. Stavola,* 103 *N.J.* 425, 436 n.2 (1986) (any administrative agency in determining how best to effectuate public policy is limited by applying principles of fundamental fairness).

Petitioners in the instant matter urge that the principles of laches, estoppel and equity require that the District accept the children as students in District schools without requiring the payment of tuition. It is unclear, as petitioners make no argument in their papers relative to the concept of !aches, how respondent is guilty of laches in this matter.

The amended regulation[2] was adopted on November 7, 2001, with an effective date of December 17, 2001, and on November 29, 2001, correspondence was sent to petitioners from the Board enclosing a copy of the new regulation. Clearly this is not a situation where the District failed to act quickly enough. Laches is an equitable defense, asserted where neglect or omission to assert a right, over a period of time, causes prejudice to an adverse party. *Enfield v. FWL, Inc.,* 256 *N.J. Super.* 502, 520 (Ch. Div. 1991), *aff'd,* 256 *N.J. Super.* 466 (App. Div.), *certif. denied,* 130 *N.J.* 9 (1992). The delay in enforcing a known right must be unexplained and inexcusable and it must prejudice the party claiming it. *Gladden v. Board of Trustees of the Pub. Employees' Retirement Sys.,* 171 *N.J. Super.* 363, 370-71 (App. Div. 1979); *Allstate Ins. Co. v. Howard Sav. Inst.,* 127 *N.J. Super.* 479,489 (Ch. Div. 1974).

As the State Supreme Court articulated in *Lavin v. Board of Education of the City of Hackensack,* 90 *N.J.* 145, 151 (1982), quoting *Atlantic City v. Civil Service Commission,* 3 *N.J. Super.* 57, 60 (App. Div. 1949):

> "Laches in a general sense is the neglect, for an unreasonable and unexplained length of time, under circumstances permitting diligence, to do what in law should have been done. More specifically, it is inexcusable delay in asserting a right . . . . " 30 C.J.S. § 112, pp. 520, 521.

Clearly, petitioners' claim of !aches is without merit.

With regard to the argument advanced by petitioners that the principle of equitable estoppel precludes the removal of the children from the District's schools, petitioners cite to the matter of *Carlsen v. Masters, Mates and Pilots Pension Plan Trust,* 80 *N.J.* 334, 339 (1979), wherein the New Jersey Supreme Court defined equitable estoppel as

> the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed . . . as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse.

[2] *N.J.A.C.* 6A:28-2.4(a)(l)(vii).

The basic requirements for claiming equitable estoppel against anyone - intentional misrepresentation and detrimental reliance thereon - must be proven against the State government. *Citizens for Equity v. New Jersey Dep't of Envtl. Protection,* 252 *N.J. Super.* 62, 79-80 (App. Div. 1990), *affd,* 126 *N.J.* 391 (1991). Since estoppel against the government may be detrimental to the public interest and could interfere with essential governmental functions, however, New Jersey courts require a claimant to prove more than just the basic elements of estoppel. *O'Malley v. Department of Energy,* 109 *N.J.* 309, 316 (1987). In *O'Mal/ey* the Court held that the Department of Energy was not estopped from returning an employee to his permanent position when a promotional examination was not administered between the date of his provisional appointment and date of "demotion." The Court referred to the Civil Service Act of 1986, *N.J.S.A.* 11A:1, in holding that a failure to administer a timely civil service examination does not vest a provisional appointee with the right to retain the provisional appointment until such time as the examination is given. *Id.* at 316. Courts have focused on the requirement of "knowing and intentional misrepresentation" by the party to be estopped. *Id.* at 317. This intent can be seen where the governmental agent "engages in conduct that is calculated to mislead the [petitioner]." *W.V. Pangbome & Co. v. New Jersey Dep't of Transp.,* 116 *N.J.* 543, 553 (1989).

The "intent" requirement is further defined by the Court's ruling that "the party seeking the benefit of estoppal [against the State] has the burden of establishing that an officer of the State, conscious of the State's true interest and aware of the private owner's misapprehension, stood by while the private owner acted in detrimental reliance." *City of Newark v. Natural Resource Council in Dep't of Envtl. Protection,* 82 *N.J.* 530, 545, *cert. denied,* 449 U.S. 983, 101 *S. Ct.* 400, 66 *L. Ed.2d* 245 (1980), citing *O'Neill v. State Highway Dep't,* 50 *N.J.* 307, 318 (1967). Words such as "conscious" and "awareness" connote intentional conduct.

Thus, in addition to the traditional equitable estoppel elements, New Jersey courts also require a showing of intentional misrepresentation or other intentional misconduct, or at least a negligent disregard as to the consequences (detrimental reliance) of the acts by the government in order for a claimant to be able to assert equitable estoppel against the government.

In the within matter there is no allegation of any misrepresentation, intentional or otherwise. The then superintendent's suggestion to petitioners was made based upon the law at the time. The thrust of petitioners' argument is that the District has breached an agreement entered into with petitioners, and upon which petitioners relied. However, no agreement was entered into by the parties. Although I am sympathetic to petitioners' belief at the outset that they resided in Fort Lee, the fact remains that petitioners reside in Englewood and have an Englewood address, as reflected in their deed. As Judge Hayden articulated in the prior proceedings, "the fact that [petitioner] held himself out to others as living in Fort Lee does not change geography." *R.D., supra,* EDU 7327-00, Initial Decision (February 21, 2001) <http://lawlibrary.rutgers.edu/oal/search.html>.

Based upon all of the foregoing, I **FIND** that there are no material facts at issue. I **FIND** that petitioners pay the majority of their property taxes to the City of Englewood and, accordingly, it would be unfair for the Borough of Fort Lee to continue to bear the financial burden of providing a free public education to petitioners' children while the City of Englewood receives the benefit of the bulk of petitioners' property taxes.

The burden of proof rests with petitioners. In proceedings such as this, the parent has the burden of proof by a preponderance of the evidence to establish that the children meet the eligibility requirements. In this matter there is no dispute that J.F.D., S.M.D. and S.C. are not domiciled within the District, and I therefore **CONCLUDE** that petitioners' children are not entitled to a free public education in the Borough of Fort Lee.

The District has asserted a counterclaim for tuition at the per diem rate of $42.69 for the ineligible attendance of each child from the date petitioners were notified of the enactment of *N.J.A.C.* 6A:28-2.4(a)(1)(vii). The rationale applied by the State Board of Education in the *Zadran* case is equally applicable here. The inequity that would result from the assessment of tuition against the petitioners for the period of their children's attendance in District schools is no less compelling than the inequity in *Zadran,* notwithstanding the "legal and geographical realities" in the within matter.

As the Court articulated in *Stavola, supra,* 103 *N.J.* at 436 n.2:

> "When specific parties are particularly affected by a proposed rule, fair play and administrative due process dictate that an agency must conscientiously concern itself with and make reasonable efforts to accommodate the rights and interests of the affected individual and genuinely account for the individualized effect of its proposed action." *Bally Mfg. Corp. v. New Jersey Casino Control Comm'n,* 85 *N.J.* 25, 345 (1981) (Handler, J., concurring).
>
> "[T]here are no simple answers as to what constitutes fundamental fairness" and "[e]ach case must be considered and evaluated on its merits." *In re Kallen,* 92 *N.J.* 14, 27 (1983).

I **CONCLUDE** that under the facts of this case, tuition should not be assessed against petitioners for the period of their children's attendance in District schools.

ORDER

It is hereby **ORDERED** that petitioners' appeal of respondent's determination is **DISMISSED.** It is further **ORDERED** that J.F.D., S.M.D. and S.C. are ineligible for attendance in respondent's school district.

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

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

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

[illegible]
DATE

LESLIE Z. CELENTANO, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

[illegible]
DATE

Mai[illegible]

ACT[illegible]R AND
[illegible] LAW JUDGE

AUG 5 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

da

EXHIBIT LIST

For Petitioners:

A	Letter to petitioners from counsel for the Board dated November 5, 2001
B	Letter from petitioners to counsel for the Board dated November 14, 2001
C	Letter to petitioners from Interim Superintendent of Schools Dr. DiGiovanni, dated November 29, 2001
D	Letter to petitioners from Dr. DiGiovanni dated March 25, 2002
E-H	Pictures of petitioners' home
I	Certificate of Occupancy dated May 14, 2002

For Respondent:

A	Change of address form submitted by petitioners
B	Deed dated June 17, 1998, and deed dated July 1, 1993
C	Deed dated June 17, 1998
D	Tax office information from Fort Lee
E	Memorandum from Tom Sweeney to petitioners dated June 7, 2000
F	Letter dated May 10, 2000, from Fort Lee Fire Prevention Bureau revoking petitioners' Certificate of Occupancy
G	Student Verification of Right of Attendance
H	Survey of petitioners' property dated July 8, 1993
I	Survey of petitioners' property dated May 25, 2000
J	Resolution entered into by the Board on June 6, 2000
K	Decision of the Commissioner of Education (in prior proceeding) dated April 2, 2001, and Initial Decision of Judge Hayden dated February 21, 2001
L	Memorandum to Dr. DiGiovanni from Tom Sweeney
M	Letter to petitioners from Interim Superintendent DiGiovanni dated November 29, 2001
N	Letter to petitioners from Interim Superintendent DiGiovanni dated March 25,2002

0 Tax Assessment Information from City of Englewood

P Tax Bill from the City of Englewood

T.D'O. and R.D., on behalf of minor children, J.F.D., S.M.D. and S.C.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The Board's exceptions were timely filed pursuant to ***N.J.A.C.*** 1:1-18.4. No reply was filed by petitioners.

The Board's exceptions, objecting to the Administrative Law Judge's (ALJ) failure to award it tuition in this matter, essentially recast and reiterate a factual recitation and arguments advanced below which the Commissioner determines were fully addressed by the ALJ in her decision and, therefore, will not be revisited herein.

Upon careful and independent review of the record in this matter, the Commissioner concurs with the A U that J.F.D., S.M.D. and S.C. are not domiciled in the Borough of Fort Lee and, thus, are not entitled to a free public education in the District's schools. The Commissioner, similarly, agrees with the A U that, under the particular circumstances existing here, it would be inequitable to assess tuition against petitioners for the period of their children's attendance in Fort Lee schools. *Zadran v. Board of Education of the Township of*

Belleville, 97 *N.J.A.R.* 2d (EDU) 335, *aff'd in part, rev'd in part,* State Board of Education, April 1, 1998.

Accordingly, the Initial Decision of the OAL is adopted for the reasons clearly stated therein and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 9/2/03

Date of Mailing: 9/4/03

* This decision may be appealed to the State Board of Education pursuant to ***N.J.S.A.*** 18A:6-27 ***et seq.*** and ***N.J.A.C.*** 6A:4-1.1 ***et seq.***

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11531-03

E.B., on behalf of minor children, R.B. and R.V., :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY, :

RESPONDENT. :

COMMISSIONER OF EDUCATION

DECISION

September 4, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 9660-01

AGENCY DKT. NO. 469-11/01

E.B. o/b/o of MINOR CHILDREN,

R.B. AND R.V.,

Appellant,

v.

BOARD OF EDUCATION OF UNION TOWNSHIP, UNION COUNTY,

Respondent.

E.B., parent of **R.B. and R.V.,** appearing pursuant to *N.J.A.C.* 1:1-5.4(a)7, for petitioner

Joseph M. Wenzel, Esq., for respondent
(Law Offices of T.M. McCormack, attorney)

Record Closed: September 10, 2002 Decided: July 25, 2003

BEFORE **IRENE JONES,** ALJ:

On December 19, 2002 this matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to *N.J.S.A.* 52:148-1 to -15 and *N.J.S.A.* 52:14F1 to -13. The matter was scheduled for hearing on several occasions but adjourned because the parties were discussing settlement. On September 10, 2002 a Stipulation of Settlement/Dismissal was filed and was inadvertently misplaced during the OAL's relocation.

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

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

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

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

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

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

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DAE /

IRENE JONES,

Receipt Acknowledged:

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DATE

DEPARTMENT OF EDUCATION

Mail eo

ACTING D!RECTOR AND
EFADC::NiSTA/\TIVE **LAW JUDGE**

AUG
DATE

OFFICE OF ADMINISTRATIVE LAW

sej

LUM, DANZIS, CRASCO, POSITAN & KL!INBERG, LLC
103 Eisenhower Parkway
Roseland, NJ 07068-1049
(973) 403-9000
(973) 403.9021 (FAX)
Attorneys for Respondent

E.B. o/rJ/o R.B. and R.B.

Pmtioncr,

·VS·

Board of Education. ofth Tov.nsh p of Union, Union County

RC$pondcnt.

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

OAL Docket No. EDU-9660-0lN

Civil Action

SETTLEMENT STIPULATION, DISMISSAL AND MUTUAL RELEASE

AGREEMENT and stipulation made this 23rd day of April, between E.B.• on behalf of minor children, R.B. and R.B., Petitioner, and the Board of Education of the Township of Union, Union County, Respondent.

WHEREAS disputes and differences have arisen between the parties with re$pect to the residency of the minor children.

WHEREAS, Petitioner and Respondent desire to finally compromise and settle their differmces by entering into this stipulation;

NOW THEREFORE in consideration of their mutual covenants set forth herein. Petitioner and Respondent hereby agree as follows:

I. Payment. E.B. shall pay the Board of Education of the Township of Union the total cash sum of Two thou.sand two hundred fifty dollars ($2,250.00). This amount is to be paid by Petitioner in the following manner:

$2,250.001hall b. ""• simultangously wilh the signinr ofth/4 ttlpulation.

This amount once paid in full ($2,250.00) represents the settlement of all claims and by and for tuition due and owing for educational service$ providt.d to minor children for School Year 2001-2002. If the full amount is not paid by certined check or attorney trust account check on or before May 3, 2002; the Board *of* Education of the Township of Union reserves the right to enforce this settlement agreement through a coun proceeding for the full amount due plus attorney's fees and costs or in the alternative initiate an action for the full amount of tuition alleged due ti-om the Petitioner.

2. Genertl Release by Petitioner. E.B., on her own behalf and on the behalf of her heirs, penonal representatives, successors and assigns, including but not limited to minor children. hereby releases and forever discharges the Board of Education of the Township of"Union and their employees, agents, officers, directon and attorneys, from any and all actions, causes of action. suits, debts, dues, sums of money, accounts, bills, invoices, covenants, contracts. controversies, agreements, promises, damages, costs, attorneys fees, interest, warranties, representations, claims and demands whatsoever, in law or equity. which Petitioner or anyone claiming by, through or under ever had or now has against the Board of Education of the. Township of Union or its employees, agents, officers, directors or attorneys by reason of any matter, cause or thing whatsoever from the beginning of the world to the date of this instrument. Toe undersigned hereby agree that the effect *of* this general release includes, but is not limited to. the elimination of an.

and all further liability on the part of the Board of Education of the Township of Union, with respect to all matters claimed by E.B. in that certain petition filed with the State of New Jersey Department of Education. Bureau of Controversies and Disputes, Agency Docket No. 469-11/01, captioned "E.B. on behalf of minor children, R.B. and R.B., Petitioner vs. Board of Education of the Township o(Union, Union County, Respondent'\ Petitioner hereby represent and acknowledge that this is a legally binding instrument, that there • e no representations or promises made to them which are not contained in this inatrument, and that the only obligation of Petitioner shall be to pay the Board of Education of the Township of Union the said above-mentioned sum of s2.2s0.oo.

3. General Release by tb.e Board of Education of the Township of Ualon. The Board of Edu.cation o'f the Township of Union, on.their own behalf and on tho behalf of their successors and assigns, hereby releases and forever discharges Petitioner and her heirs, personnel representatives, successors and assi$_{g\,n\,s}$, from any and all actions, causes of action, suits. debts. dues, sums of money. counts.. bills, in.voices, covenants, contracts. controversies. agreements, promises. damage9, costs, attomeys fees., interest;. warranties, representations, claims and demands whatsoever. in law or equity, which the Board of Education of the Township or Union or anyone claiming by, throuah or under ever bad or now has against Petitioner by reason of any matter, cause or thing whatsoever from the beginning of the world to the date of this ins1rumcnt The Wldcrsigncd hereby agree that .the effect of this general release includes. but is not limited to. the elimination of any and all further liability on the part of Petitioner, with respect to all matters claimed by the Board of Education of the Township of Urtiott in that certain counterclaim filed with the State of New Jersey Department of Education. BureaJJ. of Controversies and Disputes,

Agency Docket No. 469-11/01, captioned "E.B. on behalf of minor children, R.B. and R.B., Petitioner vs. Board of Education of the Township of Union, Union Cowty. Respondent", The Board of Education of the Township of Union hereby represents and acknowledges that this is ll legally bindinl instrument. that there are no representations or promises made which are not contained in this instnunent, and that the only obliption *Ot* Petitioner shall be to pay the Board or Education *of* the Township of'Union the said above-mentioned sum of$2,2S0.00.

4. DlsmJssal. The parties hereby agree and stipulate that this case is voluntarily dismissed with prejudice and without costs.

IN WITNESS WHEREOF, the parties hereto have executed this stipulation as of the day and year &st written above.

PETITIONER:
Elvire Bastien

P.ESPONDBNT:
Board of Education of Township of Union

By.-f}1¥-

Title: BQld.Sc;gctary

A'TTEST:

Carl *T.* Herman. Esq.
Anomey for Petitioner

ATI'EST:

Joseph M. Wenzel, Esq.
Attorney for Respondent

OAL DKT. NO. EDU 9660-01
AGENCY DKT. NO. 469-11/01

E.B., on behalf of minor children, R.B. and R.V.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Settlement Agreement and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.* C. 1: 1-19.1, have been reviewed.[1] [2]

Upon review, the Commissioner approves the settlement terms and adopts the Settlement Agreement as the final decision in this matter. In so doing, however, the Commissioner observes that the settlement included with the Initial Decision sets forth terms that were to be effectuated prior to approval of the settlement terms by the Commissioner pursuant to *N.J.A.* C. 1: 1-19.1. The ALJ and the parties are cautioned against effectuating terms of a settlement agreement presented to the Commissioner for his review prior to receiving approval from the Commissioner.

The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 9I 4/ 03

Date of Mailing: 9/5/03

[1] It is noted that party representation is listed erroneously in the Initial Decision. Petitioners are represented by Carl J. Herman, Esq., and the Board by Joseph M. Wenzel, Esq. (Lum, Danzis, Drasco & Positan, LLC).

[2] Correspondence indicating Mr. Damato's authorization to approve settlement on behalf of the Board was submitted to the record at the Department's request.

#538-03E

CONTROL BUILDING SERVICES, INC.,	:	
PETITIONER,	:	
V.	:	
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY, PATERSON BOARD OF EDUCATION, EDWIN DUROY, MICHAEL AZZARA AND PRITCHARD INDUSTRIES,	:	COMMISSIONER OF EDUCATION
	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

September 8, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON MOTION
FOR EMERGENT RELIEF
OAL DKT. NO. EDU 7429-03
AGENCY DKT. NO. 268-7/03

CONTROL BUILDING SERVICES, INC.,

Petitioner,

v.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY, PATERSON BOARD OF EDUCATION, EDWIN DUROY, MICHAEL AZZARA AND PRITCHARD INDUSTRIES,

Respondents.

Joseph B. Fiorenzo, Esq., for petitioner
(Sokol, Behot and Fiorenzo, attorneys)

Jack Gillman, Esq., for the State-Operated School District of the City of Paterson, Paterson Board of Education, Edwin Duroy and Michael Azzara

Patrick T. Collins, Esq., for Pritchard Industries
(Franzblau Dratch, attorneys)

BEFORE **RICHARD McGILL,** ALJ:

The dispute in this matter concerns the award of a contract for custodial services by the State-Operated School District of the City of Paterson ("School District") to Pritchard Industries ("Pritchard") pursuant to the Public School Contracts Law, *N.J.S.A.* **18A:18A-1** to -59. The complaining party in this matter is Control Building Service, Inc. ("Control" or "petitioner"), which is the incumbent provider of custodial services to the School District. In a Verified Complaint which was originally filed with the Superior Court of New Jersey and subsequently

transferred to the Commissioner of Education, Control alleges that the process of awarding the contract violated various provisions of the Public School Contracts Law and the Public School Education Act of 1975, as amended, *N.J.S.A.* 18A:7A-3 to -52. In conjunction with the transfer, Control filed a motion to continue a preliminary injunction entered by the New Jersey Superior Court.

Control originally filed the Verified Complaint in the Superior Court of New Jersey on or about June 29, 2003, and an order preliminarily restraining the respondents from executing the contract and Pritchard from performing the services was entered on June 30, 2003. An order maintaining the temporary restraints and transferring the matter to the Commissioner of Education was entered on July 28, 2003.

Control's filing with Commissioner of Education was received on July 31, 2003, and the matter was transmitted to the Office of Administrative Law on August 5, 2003, for determination as a contested case. Oral argument in regard to Control's motion to continue the preliminary restraints entered by the Superior Court of New Jersey was conducted on August 13, 2003.

In terms applicable to this administrative proceeding, Control has in effect applied for emergent relief or a stay pursuant to *N.J.A.C.* 6A:3-1.6(a). As set forth in *N.J.A.C.* 6A:3-1.6(b), the factors to consider in regard to an application for emergent relief are as follows:

1. The petitioner will suffer irreparable harm if the requested relief is not granted;

2. The legal right underlying petitioner's claim is settled;

3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and

4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

The first consideration is whether Control will suffer irreparable harm if the requested relief is not granted. Harm is considered to be irreparable if it cannot be remedied by money damages. Injunctive relief is generally viewed as the only effective means to safeguard the policy

objectives of public bidding statutes. *Disposmatic Corp. v. Mayor & Council of Kearny,* 162 *N.J. Super.* 489, 495-96 (Ch. Div. 1978). Specific to this case, award of the contract to Pritchard will cause Control to lose key managerial personnel assigned to the oversight of the School District's custodial contract. In addition, custodial staff members who become employees of Pritchard may lose their medical benefits for a period of ninety days as described further below. Under the circumstances, petitioner along with others will suffer irreparable harm if the requested relief is not granted.

The second consideration is whether the legal right underlying petitioner's claim is settled. Here, Control's claim is based on well-settled law in regard to bidding on public contracts and a specific statutory provision from the Public School Education Act of 1975, as amended. It follows that the legal right underlying petitioner's claim is well settled.

The third consideration is whether petitioner has a likelihood of prevailing on the merits of the underlying claim. Evaluation of this consideration requires an understanding of the principles underlying statutes governing bidding on public contracts. In *Meadowbrook Carting Co. v. Island Heights Borough,* 138 *N.J.* 307 (1994), our Supreme Court set forth these principles as follows:

> The competitive-bidding process is incorporated in the Local Public Contracts Law. *N.J.S.A.* 40A:11-3 and -4 require that municipalities and counties advertise for bids on public contracts that exceed the statutory threshold amount. The purpose of the Local Public Contracts Law is to "secure for the public the benefits of unfettered competition." *Terminal Constr. Corp. v. Atlantic County Sewerage Auth.,* 67 *NJ.* 403,410,341 *A.2d* 327 (1975); *see also Township of River Vale v. R.J. Longo Constr. Co.,* 127 *NJ.Super.* 207, 215, 316 *A.2d* 737 (Law Div. 1974) (stating that purpose of competitive bidding for local public contracts is not protection of individual interests of bidders, but rather advancement of public interest in securing most economical result by inviting competition in which all bidders are placed on equal basis). The statutes authorizing competitive bidding accomplish that purpose by promoting competition on an equal footing and guarding against "favoritism, improvidence, extravagance and corruption." *Township of Hillside v. Sternin,* 25 *NJ.* 317, 322, 136 A.2d 265 (1957); *see also L. Pucillo & Sons, Inc. v. Mayor of New Milford,* 73 *NJ.* 349, 356, 375 *A.2d* 602 (1977) *(L. Pucillo)* (stating that purpose of act is " •to guard against favoritism, improvidence, extravagance and corruption' ") (quoting *Terminal Constr. Corp., supra,* 67 *NJ.* at 410,341 *A.2d* 327).

Accordingly, the statutory rule in New Jersey is that publicly advertised contracts must be awarded to "the lowest responsible bidder." *N.J.S.A.* 40A: 11-6.1; *see also Hillside, supra,* 25 *N.J.* at 323, 326, 136 *A.2d* 265 (construing predecessor to Local Public Contracts Law). This Court has interpreted that requirement to mean that the contract must be awarded not simply to the lowest bidder, but rather to the lowest bidder that complies with the substantive and procedural requirements in the bid advertisements and specifications. *Hillside, supra,* 25 *N.J.* at 324, 136 *A.2d* 265 ("The significance of the expression 'lowest bidder' is not restricted to the amount of the bid; it means also that the bid conforms with the specifications."); *see also William A. Carey & Co. v. Borough of Fair Lawn,* 37 *N.J. Super.* 159, 165, 117 *A.2d* 140 (App. Div. 1955) ("The lowest bidder, within the contemplation of the statute [the predecessor of *N.J.S.A.* 40A:11-1 to *-49][ ]* is the one whose bid is not only the lowest for the work to be done but also conforms to the requirements of the notice to bidders.").

Strict compliance is required, and a municipality generally is without discretion to accept a defective bid. See *L. Pucillo, supra,* 73 *N.J.* at 356, 375 *A.2d* 602; *426 Bloomfield Ave. Corp. v. City of Newark,* 262 *N.J. Super.* 384, 387, 621 *A.2d* 59 (App. Div. 1993). "The long-standing judicial policy in construing cases governed by the Local Public Contracts Law *** has been to curtail the discretion of local authorities by demanding strict compliance with public bidding guidelines." *L. Pucillo, supra,* 73 *N.J.* at 356, 375 *A.2d* 602. This Court has adopted that approach largely as a prophylactic measure. *Ibid.* As Justice Francis observed in *Hillside, supra,* "In this field it is better to leave the door tightly closed than to permit it to be ajar, thus necessitating forevermore in such cases speculation as to whether or not it was purposely left that way." 25 *N.J.* at 326, 136 *A.2d* 265.

As a result, all bids must comply with the terms imposed, and any material departure invalidates a nonconforming bid as well as any contract based upon it. *Id.* at 323, 136 A.2d 265. "It is firmly established in New Jersey that material conditions contained in bidding specifications may not be waived." *Terminal Constr. Corp., supra,* 67 *N.J.* at 411, 341 A.2d 327 (citing *Hillside, supra,* 25 *N.J.* at 324, 136 *A.2d* 265). However, minor or inconsequential discrepancies and technical omissions can be the subject of waiver. *Ibid; Hillside, supra,* 25 *N.J.* at 324, 136 *A.2d* 265. That limitation on the doctrine of strict compliance was acknowledged in *Terminal Construction Corp., supra:*

> Essentially this distinction between conditions that may or may not be waived stems from a recognition that there are certain requirements often incorporated in bidding specifications [that] by their nature may be relinquished without there being any possible frustration of the policies underlying competitive bidding. In sharp contrast, advertised conditions whose waiver is capable of becoming a vehicle for corruption or favoritism, or capable of encouraging improvidence or extravagance, or likely to affect the amount of any bid or to influence any potential bidder to refrain from bidding, or which are capable of affecting the

> ability of the contracting unit to make bid comparisons, are the kind of conditions [that] may not under any circumstances be waived. [67 *N.J.* at 412, 341 *A.2d* 327.]
>
> [*Id.* at 313-15.]

Generally, specifications may not be modified after the submission of bids. *Hillside Twp. v. Sternin,* 25 *NJ.* 317, 327 (1957). Further, private understandings which undermine the requirement that all bidders bid on the same specifications are impermissible. *Belousofsky v. Board of Education of City of Linden,* 54 *N.J. Super.* 219, 222-23 (App. Div. 1959). However, imposition of post-bid conditions adverse to the bidder is permissible. *Palamar Const., Inc. v. Tp. of Pennsauken, 196 NJ. Super.* 241,253 (App. Div. 1983).

Several statutes and a regulation are applicable to this case. In accordance with *NJ.SA.* 18A: 18A-4(a), every contract for the performance of services, the cost of which in aggregate exceeds the bid threshold, shall be awarded only by resolution of the board of education to the lowest responsible bidder after public advertising for bids and bidding therefor. A board of education may reject all bids for various reasons including a determination by the board to substantially revise the specifications for goods and services. *NJ.S.A.* 18A:18A-22(d). Change orders to a contract which has been awarded to a bidder are permissible but only under limited circumstances. *NJ.A.C.* 6A:23-7.1{a). Finally, beginning in the fourth year of State operation, the State district superintendent shall bring fiscal matters before the board of education for a vote. *NJ.SA.* 18A:7A-48(b).

The general course of events is reasonably clear from the certifications and exhibits submitted in this matter. Pursuant to contracts awarded after public bidding, Control has provided custodial services to the School District since July 1996. In March 2003, the School District gave public notice of an invitation to bid for its custodial services in accordance with a set of specifications. Two of the specifications are significant in relation to the dispute in this matter. One specification required full employer contribution toward employee health benefits after three months of service. This provision raised a concern that custodial workers would lose their medical benefits for a period of ninety days under a new contractor. Another specification required a one-hour paid meal break for custodians on the shift from 3:00 p.m. to 11:00 p.m. The closing time and date for submission of bids was 11:00 a.m. on April 3, 2003.

At that point in time, Control had a collective bargaining agreement applicable to 214 employees. In accordance with the agreement, health benefits were required for all employees who completed one year of employment. As of July 1, 2003, 196 of those employees would be eligible for health benefits. While the source is not entirely clear from the submissions in regard to the request for emergent relief, there was an expectation or understanding that any new contractor would take on the same custodial workers performing services for the School District as were employees of Control.

Bids were opened on April 3, 2003. Control submitted a bid of $6,841,000. Pritchard's bid of $6,247,000 was lower by $594,000. Two other bids were higher than the amount submitted by Control.

After reviewing the details of Pritchard's bid, the Union raised the concern that medical benefits could not possibly be provided for the estimated amount included in the bid. In addition, it appears that some individuals including members of the Paterson Board of Education ("Board") did not consider the ninety-day interruption in medical benefits to be acceptable. The inference may be drawn that this circumstance raised a concern among certain individuals that the Board would reject all bids and require revisions to the specifications.

In an apparent attempt to deal with this situation, Pritchard wrote a letter dated April 16, 2003, to the School District proposing to provide medical coverage during the first three months at an estimated cost of $123,600. In exchange, Pritchard suggested that the paid meal break for the shift from 3:00 p.m. to 11:00 p.m. be changed to unpaid with an estimated savings of $120,348.83. Pritchard would not charge the difference to the school district. It may be noted that Control estimated the cost of this provision to be in the area of $600,000.

There followed a series of communications between Pritchard's representative and Business Administrator Michael Azzara. The result was an agreement that Pritchard would provide medical coverage to employees as of July 1, 2003, and that the funds to cover the additional expense would be derived from a change order which would provide for an unpaid one-hour meal period for custodians on the shift from 3:00 p.m. to 11:00 p.m. In fact, the

Business Administrator prepared a change order with a date of July 16, 2003, to implement the agreement.

On May 30, 2003, the custodial contract was presented to the Board for consideration. The Board voted to table the matter by a vote of eight to one. In a memorandwn dated June 11, 2003, the School District's attorney expressed the opinion that the change order as proposed by the Business Administrator would be illegal. In addition, the ninety-day hiatus in medical coverage for new employees created a situation where all bidders were not on an equal basis because Control as the incumbent could not benefit therefrom.

The next public meeting of the Board was held on June 11, 2003. At 11:57 p.m., District Superintendent Edwin Duroy handed out a resolution stating that all custodial bids would be rejected and that the contract would be rebid. The comments of the members of the Board reflect consternation that an important matter would be raised at such a late hour and a desire for additional time to consider the resolution. The Board voted to table the resolution without acting on it that evening.

In a letter dated June 13, 2003, to the State Department of Education, the Business Administrator opposed the District Superintendent's recommendation to reject the bids for the custodial services and rebid. The Business Administrator recommended that the contract be awarded to Pritchard. In addition, the Business Administrator stated that the paid lunch break was put in the specifications in error based upon erroneous information that it was required by the current Union contract.

As late as June 19, 2003, District Superintendent Du.roy continued to recommend rejection of all bids and re-bid of the contract. A meeting among School District personnel and bidders was scheduled for June 24, 2003. The meeting was canceled on June 23, 2003.

By letter dated June 24, 2003, the Commissioner of Education directed that the contract be awarded to the responsible low bidder. Thereafter, District Superintendent Duroy awarded the contract to Pritchard. As noted above, the initial temporary restraints were imposed by Order dated June 30, 2003. By letter dated July 22, 2003, the Commissioner of Education rescinded his

prior directive in the letter dated June 24, 2003, citing new facts that had come to light and greater complexity of the issues.

Consideration of these facts in light of the legal principles pertaining to the bidding for public contracts reveals several potentially fatal flaws in the process. First, it is questionable whether all bidders were in equal positions from the start. All bidders other than the incumbent could benefit from the three-month period without medical benefits for new employees. However, Control as the incumbent with existing employees may have been bound by contract to provide health benefits during this period. Second, School District personnel were aware of two problems with the specifications. One problem is that the custodial workers could lose their health benefits for a three-month period. Second, the specifications provided for a costly paid lunch break which was included therein based upon the erroneous belief that it was required by the Union contract. This requirement appears to be quite improvident. These problems would appear to the sufficiently serious to warrant rejection of all bids, revision of the specifications and a re-bid of the contract as recommended by District Superintendent Duroy. Given the concerns expressed by members of the Board, they likely would have followed the recommendation of Dr. Duroy if they had been given a reasonable opportunity to do so. This approach would have placed all bidders on an equal basis in relation to changes in the specifications. Instead, the School District took the approach of negotiating changes in the specifications with only one bidder, namely, Pritchard. This is the sort of favoritism that the laws pertaining to bidding on public contracts are designed to prevent. It follows that Control has a likelihood of success in regard to its allegations of violations of the Public School Contracts Law.

Control also alleges that District Superintendent Duroy violated *N.J.S.A.* 18A:7A-48(b), which requires that fiscal matters be brought before the Board for a vote. This provision requires a good faith effort to provide the Board with a reasonable and meaningful opportunity to vote on fiscal matters. In this case, the Board was not given that type of opportunity and the record does not indicate that a good faith effort was made to do so. It follows that Control has a reasonable probability of success with its contention that the award of the contract to Pritchard by District Superintendent Duroy was *ultra vires* and therefore null and void.

In regard to the equities and interest of the parties, both Control and Pritchard seek the financial benefit of the contract. An additional concern for Control is the potential loss of managerial personnel, if Pritchard provides the custodial service during the pendency of this proceeding. Evidently, the several respondents connected with the School District did not take identical views of the situation. One consideration is that the low bid would produce a savings for the School District relative to the other bids. On the other hand, the Board had concerns with the harshness of the custodial employees losing their medical benefits for a three-month period. Further, the requirement of a paid one-hour lunch break appears improvident such that a revision of the specifications to eliminate this requirement could produce a savings for the School District. Finally and most importantly, parties should not benefit from acts which, as discussed above, are likely violations of various laws. On balance, the equities and interests of the parties indicate that the most appropriate course of action is to maintain the status quo during the pendency of this proceeding.

In view of the above, I **CONCLUDE** that the emergent relief requested by Control should be granted. Accordingly, it is **ORDERED** that the Preliminary Injunction as previously entered by the New Jersey Superior Court, Law Division, Passaic County, on June 30, 2003, and maintained in effect by Order dated July 28, 2003, shall continue in effect during the pendency of this proceeding.

This order on application for emergency relief may be adopted, modified or rejected by the Commissioner of Education, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the Commissioner of Education does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

A-...'-'\1.003
DATE

RICHARD M. GLEN, ALJ

cl/pb/jb

OAL DKT. NO. EDU 7429-03
AGENCY DKT. NO. 268-7/03

CONTROL BUILDING SERVICES, INC.,	:	
PETITIONER,	:	
V.	:	
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY, PATERSON BOARD OF EDUCATION, EDWIN DUROY, MICHAEL AZZARA AND PRITCHARD INDUSTRIES,	:	COMMISSIONER OF EDUCATION
	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

The recommended Order of the Administrative Law Judge (ALJ), which included a summary of the evidence presented at the emergent hearing conducted at the Office of Administrative Law (OAL) on August 13, 2003, has been reviewed. Upon such review, the Deputy Commissioner, to whom this matter has been delegated pursuant to ***N.J.S.A.*** 18A:4-33, concurs that petitioner has satisfied the four-pronged standard set forth in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982) necessary to warrant emergent relief.

Accordingly, the recommended Order of the ALJ is adopted for the reasons expressed therein. The preliminary injunction previously entered by the New Jersey Superior Court, Law Division, Passaic County, on June 30, 2003, and maintained in effect by Order dated July 28, 2003, shall continue in effect during the pendency of proceedings which shall ':."ntinue at 4

IT IS SO ORDERED.•

DEPUTY COMMISSIONER OF EDUCATION

Date of Decision: 9/08/03

Date of Mailing: 9/10/03

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq*.

#540-03

OAL DKT. NO. EDU. 7557-00
AGENCY DKT. NO. 260-7/00

O.M., on behalf of minor child, J.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning parent challenged the Board's residency determination that minor child, J.M., was ineligible to attend respondent's public schools free of charge in accordance with *N.J.S.A.* 18A:38-1 during the 1998-1999 and 1999-2000 school years. The Board sought tuition reimbursement for the alleged period of ineligible attendance.

In light of the record and the testimony of witnesses, the ALJ concluded that petitioner failed to prove by a preponderance of evidence that J.M. was domiciled in respondent's school district during the years in question. Petition was dismissed. The ALJ concluded that petitioner must be assessed $26,612 as tuition reimbursement to the Board.

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

September 10, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7557-00
AGENCY DKT. NO. 260-7/00

O.M. ON BEHALF OF MINOR CHILD, J.M.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,

Respondent.

Michael J. Montanari, Esq., for petitioner
(Fusco & Macaluso, attorneys)

Joseph A. DeFuria, Esq., for respondent
(Gaccione, Pomaco & Beck, attorneys}

Record Closed: March 18, 2003 Decided: July 28, 2003

BEFORE **RICHARD McGILL,** ALJ:

O.M. (hereinafter "petitioner"} filed a petition with the Commissioner of Education challenging a residency determination by the Board of Education of the Township of

Bloomfield (hereinafter "respondent") in regard to minor child, J.M. Respondent counterclaims for tuition reimbursement for an alleged period of ineligible attendance.

PROCEDURAL HISTORY

Petitioner filed his petition on July 19, 2000, invoking the Commissioner's authority to hear and determine controversies arising under the school laws pursuant to *N.J.S.A.* 18A:6-9. On August 10, 2000, respondent filed an answer and counterclaim. The matter was transmitted to the Office of Administrative Law on August 21, 2000, for determination as a contested case.

The hearing in this matter was held on April 8, September 18, and December 18, 2002, at the Office of Administrative Law in Newark, New Jersey. The record closed on March 18, 2003, upon receipt of petitioner's brief.

ISSUES

The main issue in this proceeding is whether J.M. was eligible to attend respondent's public schools free of charge in accordance with *N.J.S.A.* 18A:38-1 during the 1998-1999 and 1999-2000 school years. More specifically, the question is whether J.M. was domiciled within respondent's school district during these two school years. Since petitioner established to respondent's satisfaction that J.M. was domiciled in the school district as of the beginning of the 2000-2001 school year, there is no question as to disenrollment. The final issue is whether respondent's counterclaim for tuition reimbursement should be granted.

BACKGROUND AND UNDISPUTED FACTS

Prior to May 1998, petitioner lived on D. Avenue in Newark, New Jersey, with his wife, M.M., and three children whose ages as of 1998 were four, eight and fourteen. The youngest of the three children was J.M., who had a serious medical condition such

that he had to take medication multiple times per day and required constant supervision. During the 1997-1998 school year, J.M. was registered in the Newark public schools.

On May 1, 1998, petitioner and **M.M.** purchased property on E. Street in Bloomfield, New Jersey. There were two structures on the property including a front house with three apartments and a single-family dwelling to the rear.

In September 1998, M.M. registered J.M. and J.M.'s older brother, Ju.M., to attend respondent's public schools. The registration form gave E. Street in Bloomfield as their address. Ju.M. entered respondent's Carteret School as a third grade student, and after an evaluation by the child study team, J.M. was placed in a pre-school handicapped class at the Oakview School. After one year at the Carteret School, Ju.M. transferred to a parochial school.

On June 15, 2000, petitioner and his wife purchased a home on Y. Avenue in Bloomfield. It is undisputed that J.M. was domiciled in respondent's school district subsequent to this purchase.

SUMMARY OF EVIDENCE

Petitioner testified on his own behalf, and he called his wife, **M.M.,** as a witness. Respondent's witnesses included District Compliance Officer Jeffrey Allyn and Dr. Nicholas Bruno, who is respondent's Director of Administrative Services.

2. Petitioner's Witnesses

1. M.M.

M.M. testified that she currently lives on Y. Avenue in Bloomfield. Prior to May 1998, M.M. lived with her husband and children in a two-family house on D. Avenue in Newark. From May 1998 into 2000, M.M. resided on E. Street in Bloomfield.

The front house on E. Street has three apartments. M.M.'s parents live on the first floor, and the other two apartments are rented to tenants. A.Q. is M.M.'s mother, and W.A. is M.M.'s father.

Petitioner and M.M. lived in the single-family house on the property on E. Street. This house has a living room, a bedroom, a kitchen and a bathroom on the first floor, two bedrooms on the second floor and a finished basement. Petitioner and M.M. slept in the bedroom on the first floor, and the children slept upstairs.

M.M. has been employed as a police officer for six years. From 1996 to 1998, M.M. was assigned to patrol on rotating eight-hour shifts. It was not unusual for M.M. to hold over for another shift. Since 1998, M.M. has been assigned to central communications where she works as a dispatcher. From January 1999 to the present, M.M. has worked a shift from 6:00 a.m. to 2:00 p.m. with four days on and two days off. M.M. may work an extra shift at times. M.M. was on a shift for 2:00 p.m. to 10:00 p.m. for three months over a summer. Petitioner is also employed as a police officer.

J.M. requires constant care and supervision. As the result of his medical condition and his parents' employment, J.M. often stayed with his grandparents or other relatives including M.M.'s sister and petitioner's sister.

In May 1998, M.M. and petitioner moved their furniture to the single family dwelling on E. Street. They slept at that location, took their meals there and conducted their daily business there. They also received bills and other mail at E. Street. M.M. acknowledged that she and petitioner left some belongings at their previous home on D. Street in Newark and that some mail was sent there.

In addition to the deed for the property on E. Street, M.M. produced copies of bank statements sent to her and petitioner at their address on E. Street. Statements from Valley National Bank were dated November 8, 1999, and March 8, 2000. A statement from PNC Bank was for the period from March 22, 2000, to April 19, 2000. M.M. also produced statements from Public Service Electric and Gas Company for electric and gas service at the front house on E. Street. The statements are dated September 2, 1998, December 2, 1998, February 2, 1999, and June 3, 1999. M.M. acknowledged these bills were for the first floor apartment occupied by her mother in the front house. M.M. also produced a letter from an insurance agency addressed to her and petitioner at E. Street.

On an emergency card for J.M., M.M. listed A.Q., who is M.M.'s mother; L.B., who is petitioner's mother; and M.R., who is M.M.'s sister. M.M. gave E. Street as A.Q.'s address, and she provided the same telephone number for herself and A.Q. M.M. explained that A.Q. did not have her own phone. However, she had a key to the rear house, where she was often present and could use the telephone. M.M.'s parents speak only Spanish. However, someone at the school office would speak Spanish.

J.M. spent most of his time at the home on E. Street. The school bus picked up J.M. at 9:30 a.m. for the pre-school handicapped program and dropped him off at 2:30 p.m. M.M. was often at work during this time span. J.M. was met by M.M.'s mother getting off the bus and was often taken to his paternal grandmother or another relative. J.M. often slept at a relative's home, particularly when M.M. worked night shifts.

M.M. stated that she and petitioner had telephone and cable service at E. Street. However, she did not produce any statements. M.M. acknowledged that she did not change her voter registration until the summer of 2000. However, she stated that she rarely voted in other than presidential elections. M.M. did not recall voting in a primary election in June 1999.

2. O.M.

Petitioner testified that he has been employed as a police officer for twenty-two years. Prior to May 1998, petitioner lived on D. Avenue in Newark with his wife, M.M., and children. That property is a two-family house owned by his mother, L.B., and his stepfather. In May 1998, petitioner and M.M. purchased the property on E. Street in Bloomfield. The property has a front house with three apartments and a single-family house to the rear. Petitioner's mother-in-law and father-in-law lived in the first floor apartment, M.M.'s sister and her family lived in the second floor apartment, and an elderly couple rented the third floor apartment. Petitioner lived in the house toward the rear of the property with his wife and children. The first floor had a living room, a kitchen, a bedroom and a bathroom, the second floor had two bedrooms, and there was a finished basement. Two boys slept in the first floor bedroom. Petitioner and his wife slept in one upstairs bedroom. The other son slept in the other upstairs bedroom.

Petitioner stated that he received mail at both E. Street in Bloomfield and D. Avenue in Newark. Petitioner explained that he does not want people to know where he lives because criminals might seek revenge. Petitioner received mail including mortgage papers and utility bills at E. Street in Bloomfield.

The oldest son went to parochial school in Newark. Ju.M. attend Carteret School in Bloomfield for one year and then transferred to a parochial school in Newark. J.M. was a special education student because of his medical condition and attended respondent's Oakview School.

Petitioner worked a shift from 6:00 a.m. to 2:00 p.m. with four days on and two days off. He was sometimes held over for mandatory overtime. On many occasions, petitioner would be called to work from four to eight hours. Petitioner's wife is also a police officer. M.M. was assigned to a different district, but she usually worked the same shift.

While petitioner and his wife were at work, various relatives particularly petitioner's mother-in-law or his mother took care of the children. At times, petitioner's sister in Little Falls or his mother's sister in Newark took care of the children. When the children were in school, one of these relatives would wait for the school bus. Someone was always with J.M., because he required attention twenty-four hours per day. Petitioner felt fortunate to have relatives to help with the children, because he was called to work at night many times.

Petitioner lived at the property on D. Avenue for five years prior to May 1998. Petitioner had telephone and cable service at D. Avenue, where he lived on the first floor of a two-family house. After petitioner moved to E. Street in May 1998, his niece moved into the apartment a month later. The niece paid the phone bill but kept the same number. Petitioner wanted her to keep the same phone number because he had given it to many people. The niece remained in the first floor apartment for approximately two years. She no longer has petitioner's old telephone number.

Petitioner presented various papers related to his property on E. Street in Bloomfield including records of mortgage interest payments and a property tax assessment. These papers were addressed to petitioner and M.M. at E. Street in Bloomfield.

Petitioner acknowledged that his cars are registered at an address in Little Falls, New Jersey. His wife's car is registered at the same address. Petitioner also acknowledged that his W-2 Form for 2000 shows an address in Newark at which he

lived eighteen to twenty years ago. Petitioner explained that he does not want people to know his address.

While living on E. Street, petitioner started work at 6:00 a.m. The school bus stopped right in front of the house and dropped off J.M. at the same location.

In early 2000, petitioner started looking for a new home and signed a contract to purchase a house in Nutley. Petitioner was packed and ready to move. His mother-in-law was moving to the rear house and the first floor apartment was rented to a new tenant. However, the deal fell through with the result that petitioner had to stay in his mother's home until June 2000.

In June 2000, petitioner and M.M. purchased a single-family house on Y. Avenue in Bloomfield. Petitioner still owns the property on E. Street. The three apartments in the front house are rented to tenants, and petitioner's mother-in-law and father-in-law live in the single-family house. Both J.M. and Ju.M. now attend respondent's public schools.

Petitioner acknowledged that he never registered to vote at E. Street in Bloomfield. Petitioner voted in Newark, until he registered in Bloomfield after he moved to Y. Avenue in 2000.

B. Respondent's Witnesses

1. Jeffrey Allyn

Jeffrey Allyn has been employed by respondent for twenty-two years, and he has been the district compliance officer for fifteen years. His duties include residency verification. During the last two years, Mr. Allyn has conducted residency verifications for approximately 600 residents.

The investigation in regard to J.M. began when Ju.M. asked to call home on September 2, 1998. A secretary noticed that he called a Newark telephone number. On September 3, 1998, Mr. Allyn conducted a surveillance at the address on E. Street in Bloomfield from 7:10 a.m. to 8:30 a.m. Mr. Allyn saw another male child come out of the house but not J.M. or Ju.M. The male child was later identified as M.A., who is a cousin of J.M. and Ju.M.

On September 4, 1998, Mr. Allyn conducted an observation at D. Avenue in Newark beginning at 7:15 a.m. At 8:20 a.m., Ju.M. came out with petitioner and was driven to the home on E. Street where another child was picked up. The vehicle was registered to petitioner at an address in Little Falls, New Jersey.

On September 14, 1998, petitioner's vehicle arrived at E. Street and left without picking anyone up. Ju.M. was present for school and arrived on time that day. On September 16, 1998, Ju.M. and his father left D. Avenue in Newark and went to E. Street where they picked up M.A. On September 22, 1998, petitioner and Ju.M. left D. Avenue in Newark at 8:10 a.m. Mr. Allyn acknowledged that he did not know J.M.'s starting time.

On September 28, 1998, Mr. Allyn performed a door check on the rear house at the property on E. Street. W.A., the maternal grandfather, opened the door. Asked where the children were, W.A. said that they were with someone else for the night. Observing the boys' bedroom, Mr. Allyn did not see any clothes at all and only a few toys. The other bedroom was that of W.A. and his wife. There was no bedroom for petitioner and M.M. In regard to the front house, W.A. stated that the second and third floor apartments were occupied and that the first floor apartment was vacant.

Mr. Allyn returned to D. Avenue in Newark and at 7:59 a.m. saw petitioner leave in uniform and head toward downtown Newark. At 8:20 a.m., a vehicle on which the license plate had M.M.'s first name dropped off J.M. at E. Street and then proceeded to

the Carteret School with Ju.M. This vehicle is registered to petitioner at an address in Little Falls, New Jersey, and was seen at D. Avenue at 7:00 a.m.

Mr. Allyn reported the situation to his supervisor. The determination was to continue the investigation in March 1999.

On March 19, 1999, Mr. Allyn began an observation at D. Avenue in Newark at 7:00 a.m. At 7:38 a.m., Ju.M. and J.M. left the house with petitioner in his truck.

On March 22, 1999, Mr. Allyn began an observation at D. Avenue in Newark at 7:15 a.m. At 7:45 a.m., petitioner and J.M. came out and drove in petitioner's truck to E. Street in Bloomfield.

On April 1, 1999, Mr. Allyn conducted an observation on D. Avenue in Newark from 7: 15 a.m. to 8:25 a.m. and did not see anyone come out. Another district employee, Mr. Barba, observed E. Street in Bloomfield from 8:20 a.m. At 9:42 a.m., J.M. and his mother pulled up in M.M.'s truck, and J.M. later got on the school bus. At 2:03 p.m., the school bus dropped off J.M., and he was driven by M.M. to D. Avenue.

On April 6, 1999, at 9:40 a.m., J.M. came out from the property on E. Street in Bloomfield with his grandfather. At 3:07 p.m., M.M. drove up in uniform and took J.M. to D. Avenue in Newark.

On April 7, 1999, an observation of the property on D. Avenue in Newark began at 6:00 a.m. Petitioner's truck was at this location. The windows were fogged up, indicating that the vehicle had not moved overnight. At 7:35 a.m., petitioner and Ju.M. left the residence. At 9:40 a.m., the school bus arrived at E. Street in Bloomfield and left when J.M. did not come out. At 10:07 a.m., M.M. pulled up with J.M. and then drove J.M. to Oakview School. At 1:42 p.m., the school bus returned J.M. to E. Street. M.M. came out to meet J.M., and they drove to D. Avenue in Newark in M.M.'s truck.

An observation of the property on D. Street began at 7:00 a.m. on April 8, 1999. Petitioner's truck was at that location. At 8:10 a.m., petitioner came out and moved his truck to comply with street cleaning regulations.

On April 21, 1999, an observation was made that none of the family vehicles was at D. Avenue or E. Street, indicating that petitioner and M.M. could be at work. At 8:00 a.m., J.M. was observed being driven in a vehicle registered at an address in Montclair, New Jersey.

At 7:00 a.m. on April 22, 1999, none of the family vehicles was present at D. Avenue or E. Street. After arriving home from school, J.M. remained at E. Street until the observation ended at 4:00 p.m.

An observation on April 23, 1999, continued from 7:00 a.m. to 8:25 a.m. Petitioner's truck was at D. Avenue at that time.

On April 26, 1999, an observation of the property on D. Avenue began at 7:00 a.m. Both petitioner's and M.M.'s vehicles were parked at the property on D. Avenue. At 7:52 a.m., petitioner, Ju.M. and another boy left the house and drove off in the father's truck.

On April 30, 1999, the boys were driven from E. Street to D. Avenue at 3:45 p.m. At 4:00 p.m., petitioner was washing M.M.'s truck, while the children were playing in the yard on a swing set.

On April 30, 1999, Mr. Allyn requested information from the postmaster in Newark concerning persons receiving mail at the property on D. Avenue in Newark. Mr. Allyn was advised that petitioner and M.M. were receiving mail at that address.

To summarize, there were thirteen observations in March and April 1999. At the time, Mr. Allyn could recognize J.M, and the parents knew that they were being

observed. Mr. Allyn never saw petitioner come out of the property on E. Street. However, Mr. Allyn saw petitioner come out of the home on D. Avenue on five occasions. Mr. Allyn was convinced that J.M. was not domiciled at the property on E. Street in Bloomfield.

Further investigation from May to September 1999 revealed that while Ju.M. was attending a parochial school, he used D. Avenue as his home address. Petitioner had cable service and an unlisted telephone number in his name at D. Avenue. Further, a representative of their employer confirmed that both petitioner and M.M. used D. Avenue as their address for employment purposes. These facts confirmed Mr. Allyn's opinion that J.M. never was domiciled in Bloomfield.

In June 2000, respondent requested information concerning petitioner and M.M. from the Essex County Commissioner of Registration and Superintendent of Elections, who responded by letter dated June 27, 2000. According to the letter, the voter files revealed that both petitioner and M.M. live on D. Avenue in Newark. They both voted in the June 1999 primary and listed D. Avenue as their home address. Neither petitioner nor M.M. was registered to vote at E. Street in Bloomfield.

2. Dr. Nicholas Bruno

Dr. Nicholas Bruno is employed by respondent as its Director of Administrative Services. His duties include registration of students and disenrollment.

Dr. Bruno presented the tuition computation for J.M., who is a special education student. For the 1998-1999 school year, the tuition and other costs totaled $12,273. For the 1999-2000 school year, the corresponding costs were $14,339. The total for the two-year period was $26,612.

LAW AND ANALYSIS

a. Law

A person who meets age requirements and is domiciled within a school district may attend its public schools free of charge. *N.J.S.A.* 18A:38-1 (a). A person may have many residences but only one domicile. *Somerville Bd. v. Manville Bd.,* 332 *N.J. Super.* 6, 12 (App. Div. 2000). A child's domicile is normally that of his or her parents. *Ibid.* The domicile of a person is the place where he has his true, fixed, permanent home and principal establishment, and to which whenever he is absent, he has the intention of returning, and from which he has no present intention of moving. *Matter of Unanue,* 255 *N.J. Super.* 362, 374 (Law Div. 1991), affd, 311 *N.J. Super.* 589 (App. Div. 1998), certif. denied, 157 *N.J.* 541 (1998), *cert.* denied, 526 U.S. 1051, 119 S.Ct. 1357, 143 L *Ed.* 2d 518 (1999). The court further stated as follows:

> "Home is the place where a person dwells and which is the center of his domestic, social and civil life." . . . "[T]he overwhelming proportion of the indicia as to what the decedent regarded as her real, principal and permanent home . . . as well as the central fulcrum of her life must here be found to converge . . . " in that location found to be her domicile. . . . Thus, the concepts of home and domicile mean more than physical residence. They also embody the subject's objective and subjective relationship to that residence.
>
> A person may establish a domicile in one place and then *acquire* a second residence. This does not lead to multiple domiciles, for it "is everywhere conceded that a person can have only one true domicile, which is synonymous with the common understanding of the word 'home.'". . . If a person maintains multiple residences it may become necessary to determine which one is the true domicile. Various approaches to this problem have been used by New Jersey courts.
>
> Establishing a domicile involves an act of volition. "A person has the right to choose his own domicil, and his motive in doing so is immaterial." . . . In accordance with this principle it has been held that one does not relinquish his domicile by having another residence based on reasons of health, society, business or employment. . . . Additionally, it has been held that a change of domicile "may be made to avoid taxation .

> . . [or some other motive], so long as the necessary ingredients for establishment of the new domicile are present." ... Even a change of domicile predicated on a desire to avoid a forced heirship statute has been upheld when the change was supported by other indicia of a new domicile, ...
>
> It is clear, therefore, that a choice of domicile by a person, irrespective of his motive, will be honored by the court, provided there are sufficient objective indicia, by way of proofs, supporting the actual existence of that domicile.
>
> Thus, a person may not arbitrarily designate a given residence as his domicile. It is necessary that the requisite subjective intent be present since domicile is "very much a matter of the mind-of intention." ... "Where there are multiple residences ... domicile is that place which the subject regards as his true and permanent home." ...
>
> "When a man has acquired a domicile in a particular place, that place remains his domicile until he acquires another domicile." . . . In considering whether a change of domicile has occurred, three elements must be considered: 1) whether there had been an actual and physical taking up of an abode in a particular state; 2) whether the subject had an intention to make his home there permanently or least indefinitely; and (3) whether the subject had an intention to abandon his old domicile. The court must evaluate all of the facts of the case to determine the place in which there is the necessary concurrence of physical presence and an intention to make that place one's home. *[Id.,* at 374-76 (citations omitted)].

The acts, statements and conduct of the individual, as viewed in light of all circumstances, determine a person's true intent. *Collins v. Yancey,* 55 *N.J. Super.* 514, 521 (Law Div. 1959). The parent has the burden of proof by a preponderance of the evidence. *N.J. S.A.* 1BA:38-1 (b)2.

b. Factual Discussion

Preliminarily, it may be noted that since J.M. is a child, his domicile is that of his parents, petitioner and M.M. Further, it is undisputed that petitioner and M.M. were domiciled at the property on D. Avenue in Newark prior to May 1998. Thus, the main question in this case is whether petitioner and M.M. changed their domicile from D. Avenue in Newark to E. Street in Bloomfield. The factors to consider are whether there

was an actual and physical taking up of an abode at E. Street, whether petitioner and M.M. had an intention to make their home on E. Street permanently or at least indefinitely and whether petitioner and M.M. had an intention to abandon their old domicile on D. Avenue.

The first question is whether there was an actual and physical taking up of abode at the property on E. Street. Petitioner and M.M. relied on their own testimony and documentary evidence. The latter consisted of a deed, bank statements, electric bills and a letter from an insurance agency. There is no doubt that petitioner and M.M. owned the property on E. Street. It is noteworthy, however, that the electric bills were for the front house at the property on E. Street. It also may be noted that the earliest bank statement was from November 1999. Another consideration is that there was a substantial conflict between M.M.'s testimony and that of petitioner. When asked about the living arrangements in the back house on E. Street, M.M. testified that she and her husband slept in a bedroom on the first floor, while the two boys slept in the bedrooms upstairs, one in each room. In contrast, petitioner testified that two boys slept in the bedroom on the first floor and that petitioner and M. M. slept in one bedroom upstairs with J.M. in the other.

Respondent's witness, Mr. Allyn, testified to multiple observations of D. Avenue in Newark and E. Street in Bloomfield. His testimony was fully credible as to his observations. It is noteworthy that petitioner was observed coming out of the home on D. Avenue in the morning on various occasions. None of the observations had petitioner or M.M. coming out of the property on E. Street in the morning. Perhaps the most telling evidence was the door check on September 28, 1998. On that occasion, the maternal grandfather, W.A., answered the door at the back house on E. Street. According to W.A., one bedroom in the back house was for him and his wife. During his visit, Mr. Allyn found no clothes for boys and only a few toys. The first floor apartment in the front house was vacant.

Petitioner's response is that the observations pertained to only a very small percentage of the days in the school year. Further, none of the observations occurred during the 1999-2000 school year.

The second and third factors are related in that one concerns the intention to make the new home the individual's domicile and the other concerns the abandonment of the old domi ile. One telling consideration is voter registration. In accordance with *N.J.S.A.* 19:4-1, an individual "shall be entitled to vote in the polling place assigned to the election district in which he actually resides, and not elsewhere." The election district of residence is the place where the voter is domiciled. *In re General Election,* 255 *N.J. Super.* 690, 726 (Law Div. 1992). Here, petitioner and **M.M.** never changed their voter registration from D. Avenue in Newark to E. Street in Bloomfield. In fact, petitioner and **M.M.** voted in June 1999 based upon voter registration at D. Avenue in Newark. This circumstance is indicative of an intention not to abandon the domicile at D. Avenue in Newark and change it to E. Street in Bloomfield.

Other circumstances are inconsistent with a change in domicile to E. Street in Bloomfield. First, petitioner and **M.M.** never registered a motor vehicle at E. Street. Second, petitioner and **M.M.** continued to use the address on D. Avenue for purposes of employment. Likewise, the address at D. Avenue was used as Ju.M.'s home address while he attended parochial school. Further, petitioner continued to receive mail and to have electric, telephone and cable service in his name at the property on D. Avenue.

In view of all of the above, petitioner has not demonstrated any of the three elements to establish a change of domicile to E. Street in Bloomfield. Under the circumstances, I **FIND** that petitioner has failed to prove by a preponderance of evidence that J.M. was domiciled in respondent's school district during the 1998-1999 and 1999-2000 school years. Therefore, I **CONCLUDE** that the petition in this matter should be dismissed.

c. Counterclaim

Respondent filed a counterclaim for tuition reimbursement for the periods of ineligible attendance. The applicable statute is *N.J.S.A.* 18A:38-1(b){2), which provides in pertinent part as follows:

> If in the judgment of the commissioner the evidence does not support the claim of the parent or guardian, the commissioner shall assess the parent or guardian tuition for the student prorated to the time of the student's ineligible attendance in the schools of the district. Tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance . . . .

Here, the evidence does not support petitioner's claim that J.M. was domiciled in respondent's school district, and petitioner does not challenge the tuition computation as presented by Dr. Bruno. Under the circumstances, I **FIND** that the tuition and costs for J.M. were $12,273 and $14,339 for the 1998-1999 and 1999-2000 school years, respectively, for a total of $26,612. Therefore, I **CONCLUDE** that petitioner must be assessed $26,612 as tuition reimbursement.

Accordingly, it is **ORDERED** that:

1. The petition in this matter is dismissed.

2. Petitioner is assessed $26,612 as tuition reimbursement.

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

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

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

7-1-03
DATE

RICHARD McGILL, ALJ

Receipt Acknowledged:

7-31-03
DATE

DEPARTMENT OF EDUCATION

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AUG 4 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

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APPENDIX

WITNESS LIST

For petitioner:

M.M.

O.M.

For respondent:

Jeffrey Allyn

Dr. Nicholas Bruno

EXHIBIT LIST

P-1	Deed dated May 1, 1998	Evidence
P-2	Photocopies of portions of three bank statements	Evidence
P-3	Photocopies of four electric bills	Evidence
P-4	Letter dated May 11, 1999, from Laurie Sojka	Evidence
P-5	Transfer form dated September 3, 1998	Evidence
P-6	Registration checklist dated September 3, 1998, with attached registration forms	Evidence
P-7	Emergency card dated September 15, 1998	Evidence
P-8	Photocopy of 1999 mortgage interest statement (retained)	Evidence
P-9	Photocopy of Form 1098 for 1999 Evidence	
P-10	Photocopy of property tax assessment	Evidence
P-11	Form W-2 for 2000	Evidence
P-12	Letter dated November 4, 1998, from Frank Pomaco, Esq., to Felix Montalvo-Lopez, Esq. (retained)	Identification

R-1	Application for Free and Reduced Price Meals or Free Milk dated September 14, 1998	Evidence
R-2	Tuition computation	Evidence
R-3	Letter dated June 22, 2000, from Coleen French	Evidence
R-4	Memorandum dated September 28, 1998, from Jeff Allyn to Gerry Nazzaretto	Evidence
R-5	Investigation notes dated May 3, 1999	Evidence
R-6	Investigation notes dated May 24, 1999	Evidence
R-7	Request for Boxholder Information dated April 30, 1999	Evidence
R-8	Memorandum dated September 27, 1999, from Jeff Allyn to Gerry Nazzaretto	Evidence
R-9	Letter dated June 27, 2000, from Carmine P. Casciano to J. Frank Vespa-Papaleo, Esq.	Evidence
R-10	Letter dated June 29, 2000, from Frank Pomaco, Esq.	Evidence

OAL DKT. NO. EDU. 7557-00
AGENCY DKT. NO. 260-7/00

O.M., on behalf of minor child, J.M.,	:	
PETfilONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions were untimely, pursuant to ***N.J.A.C.*** 1:1-18.4, having been filed on August 21, 2003 in response to an Initial Decision mailed on August 4, 2003.[1]

Upon careful and independent review of the record in this matter, and based on the Administrative Law Judge's (AU) credibility assessments, ***N.J.S.A.*** 52:14B-10(c), the Commissioner concurs with the AU that petitioner has failed to sustain his burden of establishing, by a preponderance of the credible evidence, that he was domiciled in Bloomfield during the 1998-99 and 1999-2000 school years, so as to entitle his child, J.M., to a free public education in the District's schools.

Accordingly, the recommended decision of the OAL is adopted for the reasons expressed therein and the within Petition of Appeal is dismissed. Petitioner is hereby directed to

[1] It is noted that at no time during the exception period did petitioner request an extension of time within which to file, pursuant to ***N.J.A.*** C 1:1-18.8.

reimburse the Board for tuition in the amount of $26,612 for the period of J.M.'s ineligible attendance in the District's schools.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 9/10/03

Date of Mailing: 9/10/03

[2] This decision may be appealed to the State Board of Education pursuant to ***N.J.S.A.*** 18A:6-27 ***et seq.*** and *N.J.A.* C. 6A:4-1.1 ***et seq.***

11541-03

IN THE MATTER OF THE TENURE HEARING	:	
OF RICHARD CONSALES, SUSSEX COUNTY	:	COMMISSIONER OF EDUCATION
TECHNICAL SCHOOLS, SUSSEX COUNTY.	:	DECISION

September 10, 2003

State of New Jersey
OFFICE OF ADMINISTRATNE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 5934-02

AGENCY DKT. NO.: 206-7/02

IN THE MATTER OF THE TENURE HEARING OF RICHARD CONSALES, SUSSEX COUNTY TECHNICAL SCHOOLS, SUSSEX COUNTY,

---

Margaret A. Miller, Esq., for petitioner
(Weiner Lesniak, LLP, attorneys)

Gary Kraemer, Esq., for respondent
(Daggett, Kraemer & Eliades, attorneys)

Record Closed: July 25, 2003 Decided: July 28, 2003

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

On July 23, 2002, this matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F1 to -13. The matter was scheduled for a conference on April 22, 2003 and at that time the parties engaged in settlement discussions. The parties reached a settlement on June 24, 2003 and submitted the signed Settlement Agreement indicating the terms of settlement on July 25, 2003. A copy is attached hereto.

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

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

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

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

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

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

July 28-V/
DATE

JEFFREY A. GERSON, ALJ

Receipt Acknowledged:

)-30-03
DATE

DEPARTMENT OF EDUCATION

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OFFICE OF ADMINISTRATIVE LAW

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AGREEMENT M"1J REL E

This Sctlieriient Agrsexnent and Release ("Agreeme ") is made and enterefi into betvveen the Sussex County Vocational and Technical Board of E4:ucation (the "Board") and Richard Consales ("Consales"). This Agreement is made pursuant Fe following terms and conditiom.

RECITALS

WHEREAS, on or about *July* 9, 2002, the Boid certified tenure charges against Consales seeking bis termlnatlon for co unbecomin la public employee, incapacity and other charges; and

WHEREAS. Consales wa$ paid through June 30 12002 and thereafter .placed on an unpaid suspension for 120 days pending the outcome ofth.e ibnure charges; and

WHEREAS. Consales filed an appeal of the tenure-lh.arges before the Commissioner of Education that was subsequently transferred to the Office o d:mini.strative La;.:r; and

WHEREAS, the OAL matter -was scheduled to comw.ence during June of2003; and

WHEREAS, the parties elected to settle all o matters and allegations in dispute in lieu of conducting the hearing, so as to avoid ending further resources and to eliminate the uncertam:ties of litigation; and

WHEREAS, the Board and Consales deem it to be 1 their best interests to set forth in a fui:mal written agreement their respective rights; duties } obligations regarding Consa!es' terntination from the Board; and

WHEREAS, the Board and Consales are now m y desirous of settling the matters and allegations in dispute; and

WHEREAS, all parties have been afforded the oppgrtunity to consider the terms of this Agreement with advice of counsel and/or a representative o, eir choice;

NOW, THEREFORE, in consideration of the pro ses and the mutual covenants herein contained, and for other good and valuable considerations. 4 parties hereby agree as follows:

I. The Sussex County Vocational and Technical Boar jofEducation (the "Board"), as used herein, shall at all times mean the Sussex County ,yocational and Technical Board of Education, its predecessors, successors and assigns Bf any and all of them, their present and former Board members, officials, officers, r resentatives, servants, employees, agents, attorneys, successors, and administrators w ether in their individual or official capacities, and all other persons, finns, corporatiol,, associations, partnerships or any other entity connected therewith.

2. Consales, as used herein, shall mean Richard Consal s, his heirs, representatives, privies, executors, administrators, assigns, successors-io-inteti st and predecessors-in-interest.

3. The Board agrees tha.t it will not pursue the TenureJfharges filed against Consales and th.at the parties shall cause to be filed a withdrawal W!b.ejudice with the OAL.

4. In consideration of the Board's covenant set forth yl Paragraph 3, Consales agrees to resign from his position as a tenured teacher with fue Board., effective June 30, 2003. Consales further agrees that for the period Septemb1 1, 2002 through June 30, 2003, he shall be deemed to have been oo administrative leavei!

5. Consales expressly agrees and understands that his t on is final and irrevocable no matter what and regardless of whether or not any a cation filed for retirement or other employment is successful. Consales' resignation of his position as a tenured teacher effective June 30, 2003 shall be deemed accepted. b t the Board upon execution of th.is Agreement. Consales forever waives any and all ri1ts or ability to seek re-employment

with the Board in any capacity. Consales further agrees to never seek reemployment "With the Board at any time in the future in any capacity.

6. In considerations of the promises set forth in Paragnwm 3 through 5, the Board shall pay Consales as follows:

(a) _The sum of $21,000 shall be paid on July 1, 003. The payment shall represent Consales' annual salary for the school year :from j eptember 1: 2002 through June 30, 2003 while on administrative leave. The parties gree that the $21,000 shall be paid through a regular payroll check with all applicaj:.,le taxes and pension contributions applied.

(b) Con.sales shall receive an additional $128,000 to'.e paid on a prorated monthly basis commencing on or about August 1, 2003 and co tinuing for twenty-'four consecutive months thereafter ($5 333.33 per month). All payments made under this subparagraph shall be paid to Consales under a iom 099 without any taxes being withheld.

(c) The Board shall continue Consales' employer-p1d health insurance for a period not to exceed 12 months from July 1, 2003 or untiJ!IlConsales is eligible to receive any level of health benefits through a new employer o by being self-employed.-

(d) This settlement is intended as and for damages fr any and all possible injuries and Consales hereby waives any and all claims for lo t wages, income or future earnings. However, should it be determined that any p a + t s made pursuant to Para h 6 herein constitute gross income within the meaning of the Internal Revenue Code and its applicable amendments, or under any othe:tl federal, state or local statute or ordinance, Consales shall be solely liable for and 1'agrees to pay any amount that may

be determined to be due and owing as taxes, interest and penalties arising out of such payments. Specifically, Consales understands and agrees that he will be provided with an annual 1099 Miscellaneous form incorporating his payments from the Board. Consales also understands and agrees that any adjustments to his withholding or any estimated tax payments are his responsibility. Further, Consales understands and agrees that the Board will report the payments made to Consales to the Internal Revenue Service, the New Jersey State Division of Taxation and other pertinent agencies, but the Board will not take a position as to whether the payments are taxable. Any and all tax liabilities arising from the payments set forth herein are the sole and exclusive responsibility of Consales and he hereby indemnifies and holds harmless the Board from any and all tax liabilities arising therefrom.

7. In consideration of the promises set forth in this Agreement, the Board agrees to allow Mr. William Leach to prepare a written recommendation for the sole and exclusive use by Consales to apply for a master's degree program. The letter shall not be used for any other purpose whatsoever. The content of the letter shall be as set forth in the attached Exhibit A and placed on Board letterhead and signed by Mr. Leach.

8. The parties further agree and understand that this Agreement is a compromise settlement of all claims asserted and unasserted in connection with Consales' separation of employment. By entering into this agreement, neither party admits that it has violated Title 18 state or federal law or any contractual provisions that might exist.

9. The parties acknowledge and agree that the payments set forth in this Agreement are in full and complete settlement of any and all claims that had been asserted or can be asserted or may be asserted or could be asserted by either party against the other for

compensatory damages, pain, suffering, emotional distress, stress, humiliation, embarrassment, mental angttlsh, medical expenses, punitive damages, interests, attorneys fees, costs of suit, loss of sick time, loss of vacation time, loss of benefits, consequential damage, reputation damage, breach of express or implied contract, interference in any contract, economic opportunity or prospective economic advantage which arose out of or could arise out of Consales' employment with the Board.

10. As an inducement for the parties to enter into this Agreement, each party does hereby remise, release and forever discharge all other parties (including the Board's employees and agents) from any and all debts, obligations, suits, actions, causes of action, claims or demands, in law or in equity, which any one party now has or hereafter may assert against the others arising out of Consales' employment by the Board including, but not limited to, all claims, liabilities, costs and attorney's fees under: (1) the tenure charge docketed before the OAL; (2) the Civil Rights Act of 1964, as amended (42 U.S.C. 2000(e) et seq.); (3) the Americans with Disabilities; (4) the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1, et seq.; (5) any directive negotiations agreement; (6) Title 18A and its rules and regulations; (7) the Constitution of the United States; (8) the Constitution of New Jersey; (9) wage and hour laws, federal and state; (10) any other federal or state statute or common law; (11) the New Jersey Tort Claims Act N.J.S.A. Title 59; (12) the Fourth and Fourteenth Amendment to the United States Constitution; and/or (13) other causes of action whether enumerated herein specifically or not. Further, Consales hereby waives any and all relief not explicitly provided for in this Agreement.

11. Consales and the Board expressly understand and agree that the payments set forth in this Agreement include any and all amounts that may be claimed by Consales or on his behalf or by his attorneys, heirs, successors or assigns, against the Board.

12. The parties agree that in consideration of the promises set forth in this Agreement that Consales shall not file, or shall immediately withdraw, with prejudice: (a) any and all appeals before the Commissioner of Education seeking any type of relief whatsoever from the Board; (b) any grievances or arbitrations relative to Consales' employment or termination; and (c) any type of judicial or administrative action of any type or nature in connection with Consales' employment, termination or payments made under this Agreement. This provision expressly pertains to the pending suits filed by Consales against Mr. Jack Utter, Vice Principal, and Joseph Cahunarata, Superintendent

13. Nothing in this Agreement shall prohibit or bar Consales from filing a Workers' Compensation claim against the Board in connection with exposure-type injuries from environmental conditions that might have existed while the Board employed Consales. Consales expressly states that no such claim currently exists, that he is unaware that any such claim potentially exists and does not anticipate filing any such claim at the time of executing this Agreement.

14. In any action commenced against a party to enforce the provisions of this Agreement, the moving party, if it is the prevailing party, shall be entitled to recover its reasonable attorneys' fees, costs and disbursements incurred in prosecuting the action.

15. Each party agrees not only to release, acquit and forever discharge the other and its employees/agents from any and all claims which arose from the incidents set forth and in any way related thereto to the tenure charge docketed before the OAL that each party

could make on its own behalf. but also those which ve been or may be made against the other by any other person or organization on bisfrts ehalf. Consales specifically waives any right to become, and promises not to become, ,member of any class in any case in which any claim is asserted against the Board and its 6mployees/agents and inYolving any eve t that has occurred on or before the date of , Settlement Agt ent and General Release.

16. The Board affirms that, as of the date of executio of this Settlement Agreement and Ge eral Release, they have no knowledge of any pe kting class action against it to which Con.sales could be a potential class member.

17. Comales specifically acknowledges that the paym referred to in Paragraph 6 her_eof constitutes any and all additional consideration o t h f se owed to him for this Settlement Agreement and General Release or arising from collective negotiations agreement, policy or regulation.

18. Unless directed to do so by Court Order or lawfully ssued subpoena with notification to the Board at the time the la'Wfully issued subpoena issued, Consales agrees that he will not give te ony or evidence against the Bo in any proceeding with respect to the incidents giving rise to the tenure charges docket]F before the OAL or with respect to the terms and conditions of this Agreement

19. The parties and their attorney(s) agree and prom.is that they will not disclose, either directly or indirectly, in any manner whatsoever; anyd ormation regarding either: (a) the substance or existence of Consales' tenure charges ifu.d/or his actions giving rise to the tenure charges; or, (b) the existence, terms or contenf of $is Settlement Agreement and General Release, to any person or organization, fcluding, but not limited to, any

govern.mental agency, members of the press and edia, present and former officers, employees and agents of the Board and other me lbers of the public. This paragraph sh.all-not preclude the parties or their attomey(s) frol# disclosing the existence or tenns of this Settlement Agreement and General Release to governmental authorities that require such information. The parties may only state, without elaboration, as follows: "The situation has been resolved to the mutual satisfactio J of Consales and the Board." In the event that the Board is approached for a reference, :e only information to be provided will be Consales .date of hire, date of resi$_{gna}$tion an salary.

20. This Settlement Agreement and General Release cotibins the full agreement of Consales and the Board and may not be modified, altered, chwiged or terminated except upon the express prior written consent of Consales and the B@ard, which consent must be signed by Consales and the Board or their d ly a thorized Jen.ts.

21. 'fh;e waiver by Consales and/or the Board of a brea h of any provision hereof shall not operate or be construed as a waiver of that breach :Py the other, or as a waiver of any subsequent breach by :the other.

22. I f any term, provision or condition of this SettlemeJ Agreement and General Release is held invalid or unenforceable by a court of competeii.t jurisdiction, such holding shall be without effect upon the validity or enforceabili l of any other provisioD.t term or condition of this Settlement .Agreement and General Release.

23. Consales hereby acknowledges and agrees that he + e r expressly waives and assumes the risk of any and all claims or damages which exi t as of this date for which Consales does not know of or· suspect to exist, whether $ough ignorance, oversight, error,

negligence, or otherwise. and which, if knoWD., wo d materially effect his decision to entei: into this Settlemeat Agreement and Genera.l Jase.

24. Con.sales represents and warrants t no other perso or entity has or has had any interest in the claims, demands, obligations, or causes of ction referred to in this Settlement Agreement and General Release; that Consales 5 not sold, assigned, transferred, conveyed or otherwise disposed of any of the cl , demands, obligations or causes of action referred to in his verbal complaint(s) and/o in this Settlement Agreement and General Release.

25. This Settlement Agreement and General Release s be construed and interpreted in accordance with the laws oftbe State of New Jersey,;

26. Consales and the Board agree to cooperate fully an execute any and all supplemen ary documents and to take all additional actions which m ly be necessary or appropriate to get full force and effect of the basic terms and interes of this Settlement Agreement and General Release.

27. This Settlement Agreement and General Release s l not be executed in counterparts and shall be enforceable only if executed by Consale;, and the Board.

28. This Settlement Agreement and General Release become effective immediately following execution by Consales and the B ard, but be contingent pon approval by the Office of Administrative Law and Commissio1'r of Education. In the event that approval is not given for this Agreement, Consales all refund all monies provided to hlm hereunder to the Board. In the event that the 1 e r l y i n g tenure charges are litigated as a result of this Agreement being voided in its en ety by the OAL or Commissioner, any amounts paid under this Agreement must be lpplied by the parties against any

potential Board liability (i.e., subsequent settle r,t, a detennination of back pay damages or the forced continuation of salary durinj the pendancy of the litigation). In the event that litigation is re-instituted and the BoarJ prevails, Consales shall re-pay any amounts paid under this Agreement, except as o t h e 7 e ordered by the Court.

29. Consales and the Board shall bear all c sts and exper es arising from the a tions of their own counsel in connection with the Settlement ieement and General Release. A; further consideration for this Settlement Agreemen;:jan.d General Release, Consales and his attorney agree that the sums set forth in Paragrapij 6 represent all of the monies which the Board has agreed and will ever agree to pay to iConsales and bis attorneys and that any additional attorneys fee which may arise from the actions of Consales' attorneys in connection with the incidents set forth and any in;dents relo!ed thereto to the tenure charge docketed before the OAL are to be home by G nsales.

30. This Settlement Agreeme11t and General Release co ta:i:ns the entire Agreement between Gonsales and the Board with regard to the matters ! et forth in **it,** and shall be binding upon and inure to the benefit of their offic:@$, officers, directors, attorneys, representatives, employees, associates, pa.rtne, agents, servants, executors, administrators, personal representatives, heirs, succ ssors and assigns of each, and all other persons, finns, corporations, associations or :iartnersbips or any other entity or persons connected th rewith, except as set forth h or as may be agreed to in writing between the parti s.

31. In entering into this Settlement Agreement and G peral Release, Consales has relied upon the legal advice of his attorney, who is the a t m e y of bis ovvn choice, as to the **terms of this Settlement** Agreement **and** General **lease which have been** completely

read and explained by his attorney and those terms are fully understood and voluntarily accepted.

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

IN WITNESS WHEREOF, Consales and the Board have hereunto set their hands.

RICHARD CONSALES

Gary Kraemer, Esq.

Richard Consales

IRACYNCKEJI
·10 No. 225H>23
IOARV PUIUC OF NEW JERSEY
Commission Expires 5/22/'JIIJS

SUSSEX COUNTY VOCATIONAL AND TECHNICAL BOARD OF EDUCATION

By:

STATE OF NEW JERSEY)
) ss.
COUNTY OF 0U5XIf)

I, (rCluj e , TucJv· ' a #iotary Public, d hereby certify that Richard Consales, personally known to me to be the same ierson whose name is subscribed to the foregoing instrument, appeared before me this day person and acknowledges that he signed and delivered the said instrument as his free and vol ta:ry act, for the uses and purposes set forth therein.

Given under m:x hand and official seal thls _Jy . Jiay of _JlnL, 2003.

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ID - 2251023
NOTARY PtJIIUC OF NEW JiRSEY
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EXHIBIT A - TO BE RE-PRINTED ONTO LETTERHEAD AND SIGNED BY LEACH

To. Whom It May Concern:

I recon:unend Richard Consales for your Master's Digree Program. I was his supervisor for the five years that he was an instructor of the Grap]#c Arts Program at Sussex County Technical School located in Sparta TO\,vnship, New Jersey.]?uring the time I supervised him, be received exceptional evaluations and I highly recommend as an excellent candidate for a Master's Degree Program.

Thank you **for** your **consideration** of this letter.

Very truly yours,

_____

William Leach

OAL DKT. NO. EDU 5934-02
AGENCY DKT. NO. 206-7/02

IN THE MATTER OF THE TENURE HEARING	:	
OF RICHARD CONSALES, SUSSEX COUNTY	:	COMMISSIONER OF EDUCATION
TECHNICAL SCHOOLS, SUSSEX COUNTY.	:	DECISION

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

Upon his careful and independent review of the terms of the settlement, together with the full record in this matter, the Commissioner cannot be satisfied that the proposed settlement meets the standards for review of settlements in tenure matters set forth in *In re Cardonick,* decided by the Commissioner April 7, 1982, *ajf'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846, 850-851, wherein the State Board found that a proposed tenure settlement or withdrawal should be accompanied by supporting documentation as to the nature of the charges, the circumstances justifying the settlement, the consent by the board of education and the teacher to the proposed agreement, the Administrative Law Judge's (AU) findings that the agreement is consistent with the public interest, and that the agreement was entered into by the teacher with a full understanding of his or her rights, including the Commissioner's duty to refer tenure determinations to the State Board of Examiners for possible revocation of certification.

Initially, the Commissioner finds that the within agreement is devoid of the content and analysis fundamental to a board's duty to act in a manner consistent with public policy. *Cardonick* at 848. Here, respondent, a tenured teacher in the Print Communications

Shop, is charged with 14 counts of unbecoming conduct, incompetence, insubordination and other just cause by virtue of his alleged fraudulent submission of time sheets, misappropriation of cash deposits, diversion of school/public monies, disparate treatment of female students, sexual harassment and/or sexism directed toward female students, degrading, violent and aggressive behavior towards students, name-calling, humiliation and ridiculing of students, jeopardizing the safety and welfare of students, awarding of grades not based on merit and failure to administer tests, as well as a host of other alleged offenses. It is well-established that, having once taken up the burden of tenure charges, a board may not lay it down without spreading forth on the record a reasonably specific explanation of why such charges can no longer be pursued or why it is now in the public interest not to pursue them. *In the Matter of the Tenure Hearing of Kenneth S. Smith, School District of the City of Orange, Essex County,* decided by the State Board of Education November 2, 1983, 1983 *S.L.D.* 489, *aff'd N.J.* Superior Court, Apellate Division, January 30, 1986. In this regard, the District now affirms only that:

> [T]he parties elected to settle all outstanding matters and allegations in dispute in lieu of conducting the hearing, so as to avoid expending further resources and to eliminate the uncertainties of litigation[.] (Settlement Agreement at 1)

Given the serious nature of the charges against respondent, the Commissioner finds the above statement by the Board insufficient to persuade the Commissioner that, in evaluating the within agreement under *Cardonick,* the circumstances in this matter justify the settlement and that the settlement is consistent with the public interest. This is of particular import in the instant matter where there are specific allegations involving inappropriate interactions with students and where the settlement provides for substantial sums of money to be paid to respondent, as well as a continuation of respondent's health benefits for up to a year. The Commissioner also observes that the Board has not provided any explanation as to why the

circumstances in this matter justify the Board's provision of a recommendation for respondent to enter a master's degree program nor how the public interest is served by such recommendation.

Secondly, the Commissioner notes that the proposed agreement does not indicate that respondent was advised of the Commissioner's duty, pursuant to ***N.J.A.C.*** 6:11-3.6, to refer tenure determinations to the State Board of Examiners for possible revocation of his certificate.

Moreover, it is observed that two unidentified individuals signed the proposed settlement on behalf of the Board. In that neither the file nor the Settlement Agreement contains a copy of the Board's resolution approving the proposed settlement, and the agreement is not signed by the Board attorney, who is petitioner's duly authorized representative in litigation, the Settlement Agreement must be rejected by the Commissioner.

Additionally, it appears that the terms of the settlement have already been effectuated through the Board's initial distribution to respondent of $21,000 on July 1, 2003, an additional $128,000 to be paid on a prorated basis commencing on or about August 1, 2003 for 24 consecutive months, and employer-paid health insurance for a period not to exceed 12 months from July 1, 2003 or until respondent is eligible to receive health benefits through a new employer or by being self-employed. Notwithstanding that the proposed settlement provides for respondent's repayment of these distributions should the Commissioner fail to approve the Settlement Agreement, the Commissioner reminds the Board that it has acted at its own peril, since settlement agreements of controverted matters are of ***no force and effect*** and ***may not be implemented*** absent the Commissioner's approval pursuant to ***N.J.A.C.*** 1:1-19.1.

Finally, the Commissioner is compelled to comment on Term #19 of the herein proposed Settlement Agreement. Although the parties may agree between themselves to keep the specific terms of a settlement agreement confidential, it does not in any way alter the fact that

the filing of tenure charges, tenure charge documents and any record of or determination related to same are a matter of public record. *See Williams v. The Board of Educ. of the Atlantic City Public Schools et al.,* 329 *N.J. Super.* 308 (App. Div. 2000). Moreover, pursuant to *N.J.A.C.* 1: 1-14.1 (a), records of all hearings shall be open for public inspection unless, for good cause shown, the A U orders the sealing of the record, or any part thereof. Furthermore, the Commissioner cautions the Board that any action it may take with respect to disclosure of information regarding this tenure matter must fully comport with the requirements of New Jersey's Open Public Records Act, *N.J.S.A.* 47:lA-1 *et seq.*

In conclusion, while the Commissioner does not preclude the possibility of settlement in this matter, he stresses that in order for him to meet his own obligation to the schools and children of this State, he must be assured that any settlement is consistent with appropriate standards for setting aside tenure matters as expressed in *Cardonick, supra.* Accordingly, the proposed settlement is rejected for the reasons expressed herein.

The Commissioner hereby remands this matter to the OAL for expansion of the record and revision of the Settlement Agreement, consistent with the concerns set forth above. If the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to hearing.*

COMMISSIONER OF EDUCATION

Date of Decision: 9/10/03

Date of Mailing: 9/11/03

• This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* lSA:6-27 ***et seq.*** and *N.J.A.C.* 6A:4-l.1 ***et seq.***

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/1542-03

N.W.O'H, on behalf of minor children, M.P.O'H. AND C.M.O'H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF DOVER, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

September 15,2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 11219-02

AGENCY DKT. NO. 276-9/02

N.W.O'H., o/b/o MINOR CHILDREN,

M.P.O'H. AND C.M.O'H.,

Petitioner,

v.

BOARD OF EDUCATION OF THE

TOWN OF DOVER, MORRIS COUNTY,

Respondent.

Robert J. Stickles, Esq., appearing for petitioner
(Klett, Rooney, Lieber & Schorling, attorneys)

Philip E. **Stern,** Esq., appearing for respondent
(Sills, Cummis, Radin, Tischman, Epstein & Gross, attorneys)

Record Closed: July 18, 2003 Decided: July 29, 2003

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

Petitioner N.W.O'H. requested a hearing on behalf of minor children, M.P.O'H. and C.M.O'H., challenging the Board of Education's residency determination in this matter. In accordance with 20 *U.S.C.A.* § 1415 and 34 *C.F.R.* § 300.500 *et seq.,* the

Commissioner of Education requested that an Administrative Law Judge conduct a hearing. This matter was transmitted to the Office of Administrative Law (OAL) from the Department of Education on December 31, 2002, for hearing as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

A hearing was scheduled for April 4, 2003 at the OAL, 33 Washington Street, Newark, New Jersey. During a telephone conference held on March 26, 2003, the parties requested that the hearing be adjourned to discuss settlement. After several discussions, they submitted the attached Settlement Agreement and Release, which sets forth the terms of the settlement.

The parties have agreed to a settlement and have prepared a Settlement Agreement and Release, which is attached and fully incorporated herein.

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

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

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

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

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

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

unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:148-10.

DA' *J–9, ;Jo7:; 3*

MARGARET M. HAYDEN, ALJ

Receipt Acknowledged:

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DEPARTMENT OF EDUCATION

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w.:EF ACTING DIPECTOR AND ADMSNISTfiATIVE LAW JUDGE

AUG 4 2003

DATE

OFFICE OF ADMINISTRATIVE LAW

jb

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release ("Agr e ent") madk. thij] ____ day of _J \I\ o ___, 2003, by and between the Dover Board of Education ("Board"), and Mr. N. W. O'Halloran, ("Mr. O'Halloran") on behalf of minor children, M.P. O'H., and C.M. O'H. ("the Children").

RECITALS

WHEREAS, the Board and Mr. O'Halloran have been involved in a litigation styled, KN.W. O'H. on behalf of minor children. M.P. O'H. and C.M. O'H v. Dover Board of Education, Docket Number EDUOS 11219-02N (hereinafter referred to as "the Litigation"); and

WHEREAS, the Board and Mr. O'Halloran desire to resolve amicably and in good faith all matters and issues arising out of the Litigation;

NOW, THEREFORE, in consideration of the foregoing and in consideration of their respective rights and obligations set forth herein and for other good and sufficient consideration, receipt of which is hereby acknowledged, the Board and Mr. O'Halloran agree as follows:

ARTICLE I

Release

1.1 Mr. O'Halloran's Release of the Board - For its obligations pursuant to this Agreement, Mr. O'Halloran hereby releases and discharges the Board, any and all of its former and current trustees, officers, employees, agents, contractors, representatives, predecessors, successors and assigns, as well as its heirs, executors and administrators, from liability on or for the Litigation styled, KN.W. O'H. on behalf of minor children, M.P. O'H. and C.M. O'H v. Dover Board of Education, Docket Number EDUOS l 1219-02N.

1.2 The Board's Release of Mr. O'Halloran -- For his obligations pursuant to this Agreement, the Board hereby releases and discharges Mr. O'Halloran, any and all of his agents, representatives, predecessors, successors and assigns, as well as his children, heirs, executors and administrators, from liability on or for the Litigation styled, KN.W. O'H., on behalf of minor children. M.P. O'H. and C.M. O'H v. Dover Board of Education, Docket Number EDUOS 11219-02N.

ARTICLE II

Terms of Settlement

2.1 Consideration - As consideration for Mr. O'Halloran's Release as set forth herein, the Board will allow the Children to attend Dover Public Schools for the remainder of the 2002-2003 school year. The Board waives any past or present tuition which may be due and owing resulting from the Children's attendance at the Dover Public Schools at any time through and including the 2002-2003 school year. In the event that Mr. O'Halloran moves to Dover such that he establishes residence in Dover, the Children will be entitled to a free public education in the Dover Public Schools. In the event that Mr. O'Halloran remains in his present residence, the Children will be enrolled in the Rockaway Public Schools for the 2003-2004 school year; provided, however, that shonld it develop that the residence is actually within the municipal boundary of Dover, the children will be entitled to a free, public education in the Dover Public Schools. In the event that Mr. O'Halloran moves to another location outside of Dover, and establishes residence in that location, the Children will be enrolled in that location's public schools. Mr. O'Halloran and the Board understand that the aforementioned consideration is all either party will be entitled to under this Agreement.

ARTICLE III

Miscellaneous

3.1. Entire Agreement - This Agreement sets forth the entire agreement between the parties with respect to the subject matter hereof and supersedes any and all prior agreements relating thereto. There are no other understandings or agreements between or among the parties with respect to the subject matter hereof, except to set forth herein, and as set forth in any other documents executed directly or in connection with this Agreement. No condition or provision of this Agreement may be modified, waived or revised in any way except in writing executed by all parties and referring specifically to this Agreement.

3.3. No Admissions - Nothing contained in this Agreement shall be construed to constitute an admission or acknowledgment by any party hereto of any wrongful or improper conduct, nor of any liability to any other party.

3.4 Binding Effect - This Agreement and all rights and duties set forth herein shall be binding upon and inure to the benefit of the parties hereto, as well as their respective successors and assigns.

3.5 Governing Law and Choice of Forum - This Agreement and its interpretation and performance shall be governed by the laws of the State of New Jersey, without giving effect to its conflicts of law rules.

3.6 Partial Invalidity- In the event any provision of this Agreement is held to be contrary to or invalid under the laws of any country, state, municipality or other jurisdiction, such illegality or invalidity shall not affect in any way any of the other provisions hereof, all of which shall continue in full force and effect.

3.7 Captions - The captions set forth in this Agreement are intended solely for the parties' convenience and ease of reference and are not intended to modify, limit, describe or affect in any way the scope, content or intent or this Agreement.

3.8 Signature in Counterpart - This Agreement may be executed simultaneously in counterparts, each of which shall be deemed to be an original, but all of which shall constitute one and the same instrument.

3.9 Authorization - The Board hereby represents and warrants that the undersigned officer of' the Board is fully authorized to execute this Agreement on the B,oard•s hehalf.

3.10 InyeltiaR.tjoos - Toe parties to this Agreement acknowledge and agree that they have entered into this Agreement and have executed it without duress or coercion, aa,d have ckme so \Vith the opportunity to consult coW1Sel. Each party further acknowledges and qrees that no other party has made representations, warranties. promises or qreeinents not set forth herein and no party relies in any way upon any wtlttllllty,-statement ·of fact or opW.nr, l.ifidcmai:uliiig; aiiclosure or n'on-disclosure not set forth herein in entering into t1'Js Agreenient and executin& it. no party h u been indnced in any way, except for the consideration, representations, warranties. atatementa and coven.anti recited herein, to enter into thls Agreement.

3.1 t Conm:w;tion and Enforcement - The terms o f this Agreement are the product o f neaotiations between the parties. and shall be construed without regard to any pre6Umption or other rule requiring construction against the party causing this Agreement to be drafted.

IN wrrNBSS WHBRBOF, the parties have executed this Agreement on the date above written.

DOVER. BOARD OP EDUCATION

adu/ ,President

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Mr. N.W. O'Hallornn

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OAL DKT. NO. EDU 11219-02
AGENCY DKT. NO. 2'76-9/02

N.W.O'H, on behalf of minor children, M.P.O'H. AND C.M.O'H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF DOVER, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner approves the settlement terms and adopts the settlement agreement as the final decision in this matter.

Accordingly, the settlement is adopted as the final decision and the matter is dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 9/15/03

Date of Mailing: 9/15/03

543-03

K.W. and W.B., on behalf of minor child, L.B., PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MILLSTONE, SOMERSET COUNTY, RESPONDENT.	:	DECISION

September 11, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 4177-02
AGENCY DKT. NO. 138-5/02

K.W. and W.B., O/B/O L.B.,
Petitioner,
v.
MILLSTONE BOROUGH BOARD OF EDUCATION,
Respondent.

Angela White Dalton, Esq., for petitioner, (Bowe & Fernicola, attorneys)

Bruce W. Padula, Esq., for respondent (Scarinci & Hollenbeck, attorneys)

Record Closed: July 21, 2003 Decided: July 22, 2003

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

This matter was transmitted to the Office of Administrative Law on June 12, 2002, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

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

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

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

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

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

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

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

July 22, 2003
DATE

ANTHONY T. BRUNO, ALJ

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

Mailed

ACTING DIRECTOR AND
CH/EF ADMINISTRATIVE LAW JUDGE

JUL 29 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

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SCARINCI & HOIJJ!Nl3B<X, LLC
1100 Valley BrcokA'ftttU.e
P.0. Box 790
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Tel: 201•392-8900
Att.ome)·s for Mlllstone Board o fEducation

K.W. .md. W.B ODb:.laali' of'tb.e U.OH.B.,	STATE OF NEW JERSEY OF.FJCP. OP ADMINISTRATIVE LAW
l'etlt:ionc:r.s,	O A l DOCKET Na,: EDU-4177-0.2
'!I!.	Dock.at No.: 138-5/02
MILLSTO'NEBOR.OUOHBOAIU>OP EDUCATION, Respondent.	STIPULATION 0:F OJSMISSAL M"D SE'ITLEMENT AGREEMENT

WBEREAS, on er about May 9, 2002., Petitio.neni filed a Pe:tit:.ion of Appeal with 'illl' C llioner of Sduoauon regar4ins Pctftk>11eis' i:esideccy qt:talifiem:iens for a free public education ifl the ndeat•o dbb:iot; a =

WHEREAS, on Ju.'"e 3> 200 Respolldent 6led it, Answer and widl the Commissioner; and

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NOW THEREFORE, the parties sfipulaw B1.ld agrc= as fclkrws:

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3. PQtitiorun qrc:o lo 'Withdraw I.,& from me sebooJs by Millstn11.t Borough 8 o u d of' on. and further agree not to s<lGk:m-admU:tanoe thereto.

DATED: 7/18/03

Angela White Dalton, Esq.
Attorney for Petitioners

Frank G. Chilson, Business Administrator
Millstone Borough Board of Education

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OALDKT. NO. EDU 4177-02
AGENCY DKT. NO. 138-5/02

K.W. and W.B., on behalf of minor child, L.B., PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MILLSTONE, SOMERSET COUNTY, RESPONDENT.	:	DECISION

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

Upon review, although the Commissioner has no objection to the terms of the settlement, he is compelled to reject it because the record includes no indication that the agreement was approved by the Board of Education as required by ***N.J.A.C.*** 6A:1-13.(d). In this regard, the Commissioner notes that the Department provided ample opportunity for such indication to be brought to the record prior to the Commissioner's decision in this matter, but the Board did not respond to the Department's request.

Accordingly, this matter is remanded to the Office of Administrative Law for such proceedings as are necessary to ensure compliance with ***N.J.A.C.*** 6A:1-13.(d).

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 9/11/02
Date of Mailing: 9/11/02

544-03

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

SYNOPSIS

Board of Education brought charges of excessive absenteeism and unbecoming conduct against tenured custodian.

ALJ found that the Board failed to prove charge of excessive absenteeism, finding, among other deficiencies, that the Board did not consider the reasons for and nature of respondent's absences and that it offered no proof of any adverse impact as a result of the absences. ALJ found the Board proved unbecoming conduct based on one instance of respondent's unauthorized absence from the worksite (not two, as charged) and several instances of respondent's failure to clock out at the end of his shift.

Commissioner adopted Initial Decision with modification. Commissioner concurred with ALJ's findings and conclusions as to tenure charges, but disagreed that a 30-day suspension was sufficient penalty for the charges proven. The Commissioner instead directed that respondent forfeit the salary already withheld from him pursuant to *N.J.S.A.* 18A:6-14.

September 15, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4579-02S

AGENCY REF. NO. 191-6/02

IN THE MATTER OF THE TENURE HEARING OF FREDDIE WILLIAMS, SCHOOL DISTRICT OF THE CITY OF TRENTON, MERCER COUNTY

Thomas W. Sumners, Jr., Esq., appearing for Petitioner (Sumners George, P.C., attorneys)

Sidney H. Lehmann, Esq., appearing for Respondent (Szaferman, Lakind, Blumstein, Blader, Lehmann & Goldshore, P.C., attorneys)

Record Closed: June 10, 2003[1] Decided: July 29, 2003

BEFORE **ISRAEL D. DUBIN**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On June 28, 2002, the School District of the City of Trenton, Mercer County, certified tenure charges against Freddie Williams, a tenured custodian, to the Commissioner of the State

[1] It would appear that the record should have been closed on April 28, 2003, upon receipt of appellant's post-hearing brief. However, there was some confusion over the finality of the Stipulation of Facts filed on January 23, 2003. Although filed as a joint exhibit, petitioner submitted a letter that same date objecting to the facts set forth in paragraphs 3 and 5, stating that "if there is a need to discuss the Stipulation further because Respondent does not agree with the changes set forth above, I am available for a telephone call." The undersigned anticipated that either appellant would respond to the letter or the parties would submit a revised Stipulation of Facts deleting those paragraphs. It was not until a telephone conference on June 6, 2003, that the parties indicated that with two exceptions, the Stipulation filed on January 23, 2003, was being admitted into evidence as the final version of that

Department of Education. Charge One alleged that respondent was guilty of unprofessional conduct due to excessive absenteeism, having been absent 46½ times between July 1, 2000 and June 30, 2001, and 47 times between July 1, 2001 and April 10, 2002. Charge Two alleged that respondent was guilty of insubordination for failing to sign out upon leaving the building on ten separate occasions and for an unauthorized absence from the work site. Respondent filed an answer to the tenure charges on July 8, 2002 and the Department of Education, Bureau of Controversies and Disputes, transmitted this matter to the Office of Administrative Law on July 18, 2002, as a contested case in accordance with *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

Pursuant to *N.J.S.A.* 52:14B-10.1, a prehearing conference should have been held by August 10, 2002, thirty days from the date the Department of Education deemed the file to be complete. For whatever reason, the Administrative Law Judge to whom this matter was initially assigned failed to schedule a prehearing conference until September 26, 2002, at which time he determined that a conflict prevented him from hearing the case. The matter was reassigned to this ALJ on September 30, 2002, and, pursuant to *N.J.A.C.* 1:1-13.1 and –13.2, a telephone prehearing conference was held on October 1, 2002.

At the time of the prehearing conference, the parties indicated that discovery was substantially complete. Therefore, the matter was scheduled for and commenced on October 10, 2002. Due to scheduling conflicts, the additional hearing dates of October 28 and 29, 2002, could not be honored and the matter was rescheduled for December 4, 2002, at which time the hearing was continued. The hearing concluded on January 6, 2003, and the record was closed on June 10, 2003.

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document. The parties agreed that paragraph 5, as amended by petitioner, was acceptable; and it would be "the court's call" to decide the facts in issue in paragraph 3. Consequently, the record was closed on that date.

FACTUAL DISCUSSION

Stipulated Facts

Some of the material facts are not in dispute and have been agreed upon in a Stipulation of Facts submitted on January 23, 2003. *N.J.A.C.* 1:1-15.11. That stipulation is reprinted below, *verbatim*:

1. Exhibits P-11, P-12, P-14 and P-15 introduced by the Petitioner, Trenton Board of Education, have been admitted into evidence as business records of the Trenton Board of Education. As such, they are not admitted to the accuracy (truth) of the matters contained within them, but rather as documents which reflect the record maintained by the Board with respect to Mr. Williams' attendance.
2. Exhibit P-15 sets forth certain notations with respect to the attendance of the Respondent, Freddie Williams, for the July 1, 2001 through June 30, 2002 school year. The parties have agreed and stipulated that the notation of C for October 31, 2001 which under the Board's codes indicates an illness in the immediate family, should be changed to a G indicating an absence due to a subpoena directed to Mr. Williams to appear in Court.
3. December 3 and December 12, 2001, which have the code symbol G entered, should be changed to a code symbol Z indicating an absence beyond the days for which Mr. Williams was entitled to paid time off. Employees are not paid for Z days because they are absences not covered by regulation. [Respondent is not paid for Z days because they are not excused absences covered by regulation.]
4. The absences set forth for February 4, 5, 6, 7, and 8, 2002 are inaccurately recorded as G days. They should be recorded as Z days as they were absences due to Mr. Williams' personal illness, which the Board maintains were in excess of the sick days for which he was entitled to compensation.
5. Rescinded.

6. In Charge 2 of the Statement of Tenure Charges the allegations of unauthorized absence from the work site are limited to only the allegations set forth in paragraph 7 with respect to January 4, 2002, referring to a failure to properly sign out for lunch and paragraph 10 with regard to an allegation the Respondent did not properly sign out when he was observed on the corner by the school speaking to an individual. None of the other dates referenced in Charge 2 related to an allegation of unauthorized absence from the work site.

Hearing Testimony and Evidence

Testimony of Judy M. Steele

Judy M. Steele has been employed by the Board for twenty-five years, the last six as Principal of the Gregory Elementary School. Ms. Steele testified that during the 2000-2001 and 2001-2002 school years, respondent was assigned to the second shift and worked from 2:00 p.m. to 9:30 p.m. Since the light cleaners left each night at 8:00 p.m., he worked alone until 9:30 p.m. At the end of his shift, he was expected to call the Central Dispatch office, set the alarm and lock up.

On September 15, 2000, acting upon information she'd received from his supervisor, Aida Lamboy, Ms. Steele sent respondent a memorandum concerning allegations that he had, on at least two occasions, left work before his 9:30 p.m. departure time and/or failed to sign out. Specifically, on September 8, 2000, he had called out at 9:12 p.m. but failed to sign out upon leaving the building. On Thursday, September 14, 2000, he had called out at 9:05 p.m., but signed out with a 9:30 p.m. departure time.

Although respondent denied these allegations during a scheduled 3:30 p.m. meeting in her office, Ms. Steele continued to receive reports that he was "coming and going at different times without signing in and out." In fact, the alleged misconduct persisted even after the Board switched from a manual reporting system to an electric time punch clock.

Testimony of Aida Hernandez Lamboy

As head custodian at the Gregory School, Aida Lamboy is charged with the responsibility of ensuring that the building is kept clean and in good condition. She supervises two custodians, one of whom works the 6:00 a.m. – 3:00 p.m. shift, and respondent, who works the 12:30 p.m. – 9:30 p.m. shift. She is also in charge of four light cleaners who work from 4:00 p.m. – 8:00 p.m.

Ms. Lamboy testified that she began reporting problems with respondent's attendance early in the 2000-2001 school year. These problems continued throughout the year and culminated with the Board sending respondent a Letter of Warning on June 15, 2001 (Exhibit P-2). The letter, which was the second such letter he had received that year, related to an incident that had taken place on June 12, 2001. On that date, respondent reported for work at 4:00 p.m., one-half hour later than his then-scheduled starting time, and left early, telling Ms. Lamboy that he "owed the district a couple of hours." Respondent's time card indicated that he punched out for the night at 11:00 p.m.

On January 7, 2002, Ms. Lamboy sent a memorandum (Exhibit P-3) to Everett Collins, the Board's Director of Facilities, concerning respondent's conduct the previous Friday, January 4, 2002. According to Ms. Lamboy, although he had not "clocked out" or called Central Dispatch to say he was leaving, respondent was not on the premises at 5:45 p.m. He returned approximately ten minutes later, explaining that he had "let another person out of the building and that's why [I] forgot to clock out." He added that he had then gone to a friend's house to get the date and time of a viewing. When asked why he had not done that during his lunch break, respondent replied that it was the time for his lunch break and he now "could clock in." At that point, Ms. Lamboy reminded him about a memo he had received concerning clocking out when leaving the building. Respondent replied, "I never leave the building for lunch."

Ms. Lamboy also advised Mr. Collins that there had been several occasions the previous month when respondent had neglected to clock out at the end of his shift. On each occasion, respondent's explanation was that he had forgotten. When she told respondent that she would be

reporting this misconduct to Mr. Collins, respondent asked her if she really had to do that. She replied in the affirmative, stating, "Yes, I have to[,] is my job to do so."

On March 4, 2002, Ms. Lamboy sent Mr. Collins a letter (Exhibit P-8) concerning respondent's time card for the week ending March 1, 2002. The only entry for February 27 was a "clock in" at 12:20 p.m. The time card (Exhibit P-9) also included the following handwritten notation: "I talk to Mr. Amata about me punching out." In her letter, Ms. Lamboy questioned respondent's explanation that he'd had trouble with the clock that day because no one else had reported having had any problems punching in or out.

Ms. Lamboy also reported that upon returning from lunch at 1:04 p.m. on February 28, 2002, she observed respondent speaking to a person in a van at the corner of Rutherford and Prospect Avenues. When she clocked in, she noticed that respondent had not clocked out.

Testimony of Everett O. Collins

Everett O. Collins has been the Director of Facilities for the Trenton Board of Education for the past five years. Among many other things, he is responsible for the district's custodians. It is in this capacity that he knows respondent and is familiar with his work history.

Mr. Collins testified that on March 14, 2001, Robert Richardson, the Coordinator of Custodial Services and Grounds, sent respondent a memorandum (Exhibit P-10) regarding "Leave Abuse/Absenteeism." In this memorandum, Mr. Richardson advised respondent that because he had abused his leave privileges, he had been placed on leave restriction. Consequently, vacation and personal leave would not be granted and sick leave would be approved only if respondent submitted a doctor's note the day following the absence. These restrictions were imposed for the remainder of the school year.

Mr. Richardson also advised respondent to accept the memorandum as a warning. In the event respondent did not report for work and failed to submit a doctor's note the following day, disciplinary action, including termination proceedings, would be initiated.

On November 6, 2001, of the following school year, Mr. Collins sent respondent a memorandum (Exhibit P-13) advising him that as of October 31, 2001, he had completely exhausted all of his days. Therefore, "[f]rom this day forward, any time off will be without pay."

One month later, on December 13, 2001, Mr. Collins sent a memorandum (Exhibit P-16) to Anita McLaurin, Payroll Supervisor, concerning respondent's excessive use of leave days. In this memorandum, Mr. Collins reported that respondent, who had exhausted all of his days, had not reported for work on December 3 and December 11, 2001. Consequently, respondent was to be placed on "non-pay status" for those absences.

On January 10, 2002, Mr. Collins sent a memorandum (Exhibit P-18) to Dr. Clarence Guthrie, Assistant Superintendent for Human Resources, concerning respondent's "problem" with signing in and out during the workday. Although his supervisor, Ms. Lamboy, had warned him about this, respondent had failed to correct his misconduct. Therefore, Mr. Collins recommended that respondent be suspended from work for three days without pay "in order to rectify this problem once and for all."

Finally, on March 5, 2002, Mr. Collins sent a memorandum (Exhibit P-20) to Fougere Aupont, Human Resources Manager, recommending that respondent be terminated. In this memorandum, Mr. Collins reported that

> Mr. Freddie Williams's behavior continues to be problematic. He has received numerous verbal warnings as well as memos regarding refusal to punch out when leaving the building, unexcused absences, failure to complete assigned duties etc. Mr. Williams has received both a three (3) day and a five (5) day suspension with the hopes that his behavior would improve to no avail. It is clear that Mr. Williams refuses to comply with the rules set forth by the administration and at this time I am recommending Mr. Williams (*sic*) employment be terminated.

Concerning respondent's alleged abuse of leave privileges, Mr. Collins testified that the collective bargaining agreement (Exhibit J-1) entitles custodians to take eighteen days of sick leave per year; three days of leave for illness in the immediate family; three days of leave for personal business or religious holidays; and, in the case of an employee such as respondent, who

has been employed by the Board for five years, twelve days of vacation time. With the exception of leave taken for personal business or religious holidays, unused days are cumulative.

The Monthly Summary for the 2000-2001 contract or school year (Exhibit P-12) indicated that respondent had accumulated and carried over from the 1999-2000 school year four unused vacation days, thirteen unused sick days, and one personal day. Pursuant to the Collective Bargaining Agreement, he received a new allotment of twelve vacation days for a total of sixteen such days and used eight, leaving a balance of eight days. He also received a new allotment of eighteen sick days for a total of thirty-one such days, used them all and did not have any remaining days to carry over. Finally, he received and used the new allotment of three personal days. Consequently, for the 2001-2002 school year, respondent was entitled to twenty vacation days, eighteen sick days, and three personal days.

Testimony of Freddie Williams

Freddie Williams has been employed by the Board as a custodian for five years. He was initially hired as a substitute custodian in 1997 and became a full-time assistant custodian on January 4, 1999. Originally assigned to the Holland Middle School, he has worked at the Gregory School since July 10, 2000.

As a member of the Trenton Custodians Association, the Collective Bargaining Agreement governs the amount of leave time to which he is entitled. Under this agreement, he is entitled to eighteen days of sick leave per year; three days of leave for illness in the immediate family; three days of leave for personal business or religious holidays; and twelve days of vacation time. With the exception of leave taken for personal business or religious holidays, unused days are cumulative.

Although the Yearly Summary for 2000-2001 (Exhibit P-11) indicates that he was out sick August 14-18, 2000, he was actually on vacation at that time. Consequently, the A's, which denote personal illness, should have been V's. Similarly, he should not have been docked for half a personal business day on August 22, 2000, because he had actually left early for treatment of alcoholism at Princeton House, Medical Center of Princeton, where he attended ninety

Alcoholics Anonymous meetings over ninety days. Therefore, he should have been marked as taking one-half an A day.

Respondent added that he had been in the Center's in-patient program from August 22, 2000, through September 1, 2000, and had provided Mr. Richardson with a note regarding his participation in the program. The Center's Discharge Summary Report (Exhibit R-1) verified that he had been admitted on August 23, 2000, and discharged August 28, 2000.

On February 7, 2001, respondent required treatment for a back injury suffered on January 31 of that year. He was treated at the Fischer Chiropractic Back & Neck Pain Center and cleared to return to work on February 12, 2001. The absences recorded on February 5-9, 2001, were all due to this injury.

Respondent acknowledged receiving Mr. Richardson's March 14, 2001 memorandum placing him on restricted leave. In April and May, he had to use sick leave to have all of his teeth extracted. His initial appointment was on April 2, 2001 and was followed by appointments on April 9, 2001 and May 21, 2001. The Eastern Dental Excuse Slip for April 9, 2001 (Exhibit R-3) indicated that he could return to work on April 11. The Excuse Slip dated May 21, 2001(Exhibit R-3) asked that he be excused from work May 21-23. Respondent stated that Ms. Lamboy, Mr. Collins and the Board were all provided with these notes.

Respondent asserted that during the 2000-2001 school year he did not take any sick time unless he was actually ill. Moreover, he always brought in a doctor's or dentist's note the first day he returned to work. For example, he had been trying to get his dental work done for a long time, going back to his days at the Holland Middle School. In April 2001, the time finally came to get this work done and he brought in the Excuse Slips from Eastern Dental following each appointment.

He was also physically unable to report for work July 9-13, 2001, due to a broken hand. Although the doctor did not want him to return to work until July 23, 2001, and even then only for light duty (Exhibit R-4), he came back after one week. A recurrence of the same injury caused

his orthopedist to recommend he remain out of work from October 1-12, 2001 (Exhibit R-5). Yet, he returned to work on October 4, 2001.

Although charged with Z days – absences not covered by regulations – for the week of February 4-8, 2002, respondent stated that he had been hospitalized with high blood pressure. In fact, he had called the Buildings & Grounds office the morning of February 4 to state that he would be reporting to work late and, upon being hospitalized, dispatched a friend to the office to advise Mr. Collins. He later supplied a doctor's note excusing his absences February 4-11. Nevertheless, Mr. Collins deemed his sending of a friend to the office an infraction of the call out procedure, which requires the employee himself to call out sick. Then, because he did not report for work or call out on February 5, 6, and 7, Mr. Collins recommended he be suspended without pay the week of February 11-15, 2002. He did not take any action to contest the suspension.

Similarly, although he was charged with a C day – illness in the immediate family – on October 12, 2001, respondent stated that the date was actually October 31, 2001, and he had been absent because he had to honor a subpoena. Respondent elaborated on this point in his answer to the tenure charges, explaining that his mother had been a murder victim and he had taken time off to meet with the assistant prosecutor who would be trying the case and then to attend the trial against his stepfather.

Concerning his alleged failure to comply with sign-in/sign out procedures, respondent denied that he failed to sign out upon leaving the building on September 8, 2000. He also stated that although he called out at 9:12 p.m. on September 14, 2000, he did not sign out until 9:30 p.m. because he remained in the building checking windows and doors before setting the alarm and exiting. He added that this procedure normally takes forty minutes.

Respondent also maintained that he had been on the grounds, even if not in the building, the evening of January 4, 2002. After letting the light cleaners out, he drove his car around to the rear of the building on Exton to lock the back gate. Since his cousin's house is on the corner of Exton and Stuyvesant Street, he stopped by to ask her for the time of her brother's funeral. He then returned to the building where he encountered Ms. Lamboy.

Respondent allowed that he had forgotten to sign out on February 27, 2002. As soon as he realized it he spoke to Mr. Amato, who suggested that he make a notation on his time card. He followed Mr. Amato's advice but inadvertently drew the line from the notation to a space for February 26 instead of February 27.

He also admitted taking five minutes to speak to a friend during a "quick smoke" on February 28, 2002. He did not sign out because he was unaware of any rule requiring him to do so during smoking breaks.

Respondent also stated that many of his failures to sign out were due to logistics. As he explained it, the time clock is located in the rear of the building, while the key pad for the alarm is located near the front office. Once he set the alarm, he did not have enough time to go to the rear of the building, sign out and exit.

DISCUSSION OF THE LAW

N.J.S.A. 18A:6-10 provides:

> No person shall be dismissed or reduced in compensation, (a) if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state, . . . except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this subarticle, by the commissioner, or a person appointed by him to act in his behalf, after a written charge or charges, of the cause or causes of complaint, shall have been preferred against such person, signed by the person or persons making the same, whom may or may not be a member or members of a board of education, and filed and proceeded upon as in this subarticle provided.

N.J.S.A. 18A:17-3, in turn, provides:

> Every public school janitor of a school district shall, unless he is appointed for a fixed term, hold his office, position or employment under tenure during good behavior and efficiency and shall not be dismissed or suspended or reduced in compensation, . . . except for neglect, misbehavior or other offense and only in the manner prescribed by [*N.J.S.A.* 18A:6-10].

Excessive Absenteeism

Excessive absenteeism may constitute sufficient grounds for the removal or suspension of a tenured employee. *Passaic Bd. of Ed. v. Viani*, 92 *N.J.A.R.*2d (EDU) 76. In fact, chronic or excessive absenteeism may warrant removal even when the sick leave is taken for legitimate medical or health reasons. *State-Operated School District of Jersey City v. Pellechio*, 92 *N.J.A.R.*2d (EDU) 269; *In the Matter of the Tenure Hearing of Marsden*, OAL Docket Number EDU 1188-84; *Kelsey v. Board of Education of the City of Trenton, Mercer County*, 1989 *SLD* 1622. Excessive absenteeism may also be found to constitute incapacity, unbecoming conduct, and other just cause for removal. *Ibid.*

The rationale underlying the principle that chronic or excessive absenteeism is conduct that warrants dismissal has, for the most part, been addressed in cases involving full-time teachers. For example, in *Trenton Bd. of Ed. v. Williamson*, OAL Docket No. 7335-85 (April 14, 1986), Administrative Law Judge Bruce Campbell held that "there is no question that repeated and excessive absenteeism of regular teachers poses a threat to the integrity of the educational process." Similarly, in *In the Matter of the Tenure Hearing of Reilly*, 1977 *S.L.D.* 403, the Commissioner found that "[f]requent absences of teachers from regular classroom activity disrupt the continuity of the instructional process."

A custodian is not held to the same attendance requirements as a teacher. *Passaic Bd. of Ed. v. Viani, supra*, 92 *N.J.A.R.*2d 76. Nevertheless, a school custodian holds a position of trust and responsibility requiring high standards of dependability. *In the Matter of the Tenure Hearing of Joseph McDougall*, 1974 *S.L.D.* 170. Regular attendance is essential because repeated absences may make it difficult to keep the building clean and possibly jeopardize the health and safety of the students and staff members of the school. *State-Operated School District of Paterson v. Watson*, 93 *N.J.A.R.*2d (EDU) 362.

The point at which absenteeism is so chronic as to warrant dismissal falls within the prerogative and discretionary authority of the local board of education, subject to review pursuant to the Commissioner's general authority to hear and determine controversies and disputes arising

under the school laws. *Ibid*; *In the Matter of the Tenure Hearing of Sheets*, 1980 *S.L.D.* 1536, *rev'g* 1979 *S.L.D.* 790. Among other things, the Commissioner has conditioned dismissal upon a demonstration by the board that it has attempted to correct the pattern of absenteeism and that such efforts failed to elicit any change. *In the Matter of the Tenure Hearing of Marsden, supra*, OAL Docket Number EDU 1188-84. Consequently, the nature of any warnings given to an employee and any corrective action taken by the board, as well as the reasons for the absences, are relevant to the questions of whether discipline should be imposed. *Passaic Bd. of Ed. v. Viani, supra*, 92 *N.J.A.R.*2d 76. There must also be a showing of the harm the custodial employee's absences have had on the provision of a thorough and efficient education. *Ibid.*

The number of leave days to which a custodial employee of the Trenton Board of Education is entitled derives from the Agreement between the Trenton School Custodians Association and the Trenton Board of Education (Exhibit J-1). Pursuant to this Agreement, respondent was entitled to take eighteen days of sick leave per year; three days of leave for illness in the immediate family; three days of leave for personal business or religious holidays; and, in the case of an employee such as respondent who has been employed by the Board for five years, twelve days of vacation time. With the exception of leave taken for personal business or religious holidays, unused days are cumulative. Personal business or religious days not used may only be added to accumulated sick leave for calculation of retirement benefits. They may not be accumulated for any other purpose.

At the end of the 1999-2000 school year, his first as a full-time custodian, respondent had thirteen unused sick days, four unused vacation days and one unused personal day. Starting July 1, 2000, respondent received a credit of three family illness days, three personal days, eighteen sick days and twelve vacation days for the 2000-2001 school year. Therefore, the Board's records indicated that he had available to him a total of fifty-four paid leave days; eighteen carried over from 1999-2000 and thirty-six credited for the following year.[2]

[2] The plain language of Article IX, Section E, of the Agreement between the Custodians Association and the Board would appear to prohibit employees from accumulating unused personal business days or religious holidays for use in the following year. In what may have been a bookkeeping error, the Board credited respondent with the unused personal day from the 1999-2000 school year, giving him a total of four for 2000-2001. The error must have been caught, because after respondent used three personal days in 2000-2001, the end-of-year monthly summary for the 2001-2002 school year did not credit him with an unused day and showed a zero balance in the personal day column.

During the course of the 2000-2001 school year, respondent used all thirty-one of his allotted sick days. Seven of these days were taken after he had received the March 14, 2001 memorandum from Robert Richardson placing him on leave restriction. Respondent substantially complied with the requirements of this memo and, with but one exception, the sick days taken after March 14, 2001 were all excused.

According to the 2000-2001 Yearly Summary (Exhibit P-11), respondent called out sick on April 2-3 and 9, 2001, as well as May 14-15 and 21-22 of that year. The excuse slips obtained from Eastern Dental (Exhibit R-3) asked that he be excused on April 2, April 9-11 and May 21-23. Therefore, the absence on April 3 was unexcused. Yet, when he could have remained home with excused absences on April 10 and 11, he reported for work. Then, although the dentist excused him from work May 21-23, he inexplicably used a vacation day instead of a sick day on May 23.

Overall, respondent's testimony and documentary evidence disclosed excuses for slightly more than half of the thirty-one sick days taken in 2000-2001 as follows:

- The Medical Center's Discharge Summary (Exhibit R-1) accounted for his absences on August 23, 24 and 25, 2000. Discharged on August 28, respondent did not use another sick day, but took a vacation day instead. He added that although he had been recorded as out sick on August 14-18, 2000, he was actually on vacation those five days. While this assertion cannot be verified on the record before me, given the number of other disputed entries in the Board's Yearly Summaries, it is not inconceivable. Therefore, the eight sick days he took that month may be considered excused.
- The Fischer Chiropractic Back & Neck Pain Center's certificate (Exhibit R-2) excused his absences for February 7, 8 and 9, 2001. According to respondent, all of his absences that week were due to the same back injury. Since it may be that he was hurt on February 5 and could not get in to see the doctor until February 7, his absences the week of February 5-9 may be considered excused.

Therefore, respondent should have had a total of fifty-three and not fifty-four leave days available to him in 2001-2002.

- Eastern Dental Center's Excuse Slips (Exhibit R-3) explained his absences on April 2 and 9, as well as May 21-22, 2001, for a total of four days.

Therefore, although the Board asserts that respondent only submitted documentation for eleven of the thirty-one days, and respondent argues that there was documentation to cover twenty-three of those days, it would appear that the actual number is closer to seventeen, the midpoint between the parties' totals.

The Board has made much of the fact that respondent took seven sick days after he received Mr. Richardson's March 14, 2001 memo placing him on restricted leave. As respondent correctly points out, the memo did not prohibit him from taking any additional sick leave. Rather, it put him on notice that if he was absent again and failed to provide a doctor's certificate, disciplinary action, including termination proceedings, might begin. Yet, when respondent used sick days on April 3 and May 14-15 and did not provide doctor's notes, the Board did not take any corrective or punitive action, such as withholding his increment or imposing a suspension. Instead, it focused on respondent's overall number of sick days, added it to the days he took in 2001-2002, and initiated the present tenure proceedings.

Be that as it may, the fact remains and I **FIND** that respondent did not exceed the number of sick days he was contractually entitled to take during the 2000-2001 school year. In fact, even with the Board's unexplained withholding of one day's pay in July 2000 for an unspecified reason, and one-half day's pay in June 2001 for an unauthorized personal illness, the sick day column in the Monthly Summary (Exhibit P-12) had a zero and not a negative balance. Given the fact that all of his other absences were vacation or personal days respondent was entitled to under the Agreement, respondent's absenteeism in 2000-2001was not technically excessive.

However, that does not necessarily mean that his absenteeism in 2000-2001 could not form the basis for the Board's initiation of tenure charges and ultimate decision to terminate his employment. *Smith v. Board of Education of the City of Trenton*, OAL Docket No. EDU 5255-88; *Bas Zion Kelsey v. Board of Education of the City of Trenton, Mercer County*, 1989 *SLD* 1638. As the Commissioner of Education stated in *Kelsey*:

> Initially, it is stressed that absences, even legitimate ones which do not exceed statutory or contractual entitlements, may be the basis for increment withholding, notwithstanding the fact that a teacher's performance may be good, or even excellent, when he or she is present in the classroom. . . . What a board of education is required to show, however, is that there was consideration of (1) the particular circumstances of the absences and not merely the number of absences . . .; (2) the impact that the absences had on the continuity of instruction during the period of time the absences occurred, not merely after the fact; and (3) that there be some warning given to the employee that his or her superiors were dissatisfied with the pattern of absences. (Citations omitted)

Although respondent may not have submitted doctors' and dentists' notes covering all of the sick days he used, those he did submit certainly made the Board aware of his medical and dental problems. However, there is no evidence to suggest that the Board actually considered them. If anything, it would appear that the Board was focused exclusively on the number and not the nature of those problems. By way of example, in his March 14, 2001, memorandum to respondent (Exhibit P-10), Mr. Richardson states that the Board extends leave privileges to employees "when there is a legitimate need." In the very next sentence he goes on to state that "abuse of leave privileges is another matter" and proceeds to place him on leave restriction. The unmistakable implication is that most if not all of respondent's leave days were taken for other than legitimate purposes. It is almost as if the doctors' notes were accepted as simply verifying that respondent had been absent on a particular day. There is nothing in the record disclosing consideration of "the particular circumstances of the absences and not merely the number of absences." *Ibid.*

Similarly, the record does not contain any evidence illustrating "the impact that the absences had on the continuity of instruction during the period of time the absences occurred." *Ibid.* Neither Ms. Steele, Ms. Lamboy, nor Mr. Collins testified that respondent's numerous absences had a deleterious impact on the budget, scheduling, or morale, much less resulted in dirty or unsanitary conditions. In fact, the only mention of dirty conditions was in Mr. Collins' June 15, 2001 Letter of Warning (Exhibit P-2), and even there it was in the context of respondent having left the building for a period of time without punching his time card.

On the facts presented, I **CANNOT FIND** that respondent's absences during the 2000-2001 school year were excessive, improper, or deleterious to the overall delivery of educational services. However, those absences remain in play because they may also be viewed in conjunction with his absences in the 2001-2002 school year. As the Hon. Joseph Lavery, ALJ, held in *Smith v. Board of Education of the City of Trenton*, *supra*, OAL Docket No. EDU 5255-88:

> Past conduct over a reasonably relevant period of time may be considered, where it establishes a pattern which has continued into the school year in which the action to withhold the increment is taken. Where conduct not warranting board action to withhold salary increments in a single year continues in subsequent years, and a cumulative effect of the pattern imposes a deleterious impact on the delivery of educational services, the board may withhold future increments because of this continuing pattern.

Id. at p. 7, *citing Borrelli v. Bd. of Education, Borough of Rutherford*, State Board decision, July 3, 1985, at 5-6. Therefore, following an examination of respondent's absences during the 2001-2002 school year, it will be necessary to determine whether the absences in 2000-2001 and 2001-2002, when viewed together, establish a pattern of chronic behavior.

When the new school year began on July 1, 2002, respondent had available for his use eighteen days of sick leave, three days of leave for family illness, three personal days, and twenty days of vacation leave. How respondent may have used those days remains unclear because the Board's records are somewhat inconsistent. For example, the monthly summary (Exhibit P-14) indicates that by the end of October respondent had exhausted his eighteen days of sick leave, three days of leave for family illness and three personal days. However, the daily summary (Exhibit P-15) indicates that he had only taken sixteen days of sick leave, one day of leave for family illness and one personal day. Much more confusing is the fact that the same daily summary, printed out seven months before Exhibit P-15 and attached to the Statement of Tenure Charges, discloses that respondent had in fact exhausted his eighteen days of sick leave, three days of leave for family illness, and three personal days.[3]

[3] In his post-hearing brief, respondent attempts to amplify the inconsistencies in the Board's records by drawing comparisons to the Absence Record for 2001-2002 (Exhibit J-2). In so doing he has presumably forgotten that it was at his insistence that this exhibit was admitted into evidence on the condition that only the letter codes at the bottom

Similarly, Exhibit P-15 charged respondent with unauthorized absences on December 3 and 12, 2001, and February 4-8 and 11-15, 2002, for a total of twelve such absences. Yet, the version of P-15 attached to the Statement of Tenure Charges lists those same days as absences necessitated by his having been subpoenaed to appear in court or by virtue of his being a party in a court action. Respondent was not a party in the case and he introduced into evidence but one subpoena (Exhibit R-6) that covered an absence on October 31, 2001. Article IX, paragraph F, of Collective Bargaining Agreement provides that only absences necessitated by subpoena shall not result in a deduction of salary. Therefore, had those February dates been court related, eleven of these twelve absences still would have been unauthorized and more properly designated as "Z" days.

The Stipulation of Facts clears up half of this inconsistency. Pursuant to paragraph 4, the absences set forth for February 4-8, 2002 were inaccurately recorded as G days. Instead, they should have been recorded as Z days since they were absences due to Mr. Williams' personal illness, which the Board maintains were in excess of the number of sick days to which he was contractually entitled. However, it is the remaining five Z days covering February 11-15, that are much more problematic.

By memorandum dated February 7, 2002, Mr. Collins advised respondent that he was recommending respondent be suspended for a period of five days commencing February 11, 2002. According to Mr. Collins, the recommendation was being made as a result of respondent's violation of the call out procedure on February 4, 2002, and subsequent failure to report for work on February 5, 6 and 7.[4] Respondent did not contest the suspension and therefore did not report for work the week of February 11-15, 2002.

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of the document were to be considered. The actual letter entries on any given date were to be ignored. As it happens, Exhibit J-2 would have supported the version of P-15 attached to the Statement of Tenure Charges.

[4] There is no dispute that respondent also failed to report for work on February 8, 2002. Had Mr. Collins waited one more day, he most assuredly would have added that absence to the list of dates on which respondent had failed to report for work. Therefore, rather than consider it a separate infraction worthy of discipline in its own right, in the interests of fairness I am instead considering the five-day suspension as having been based upon respondent's failure to report for work the week of February 4-8, 2002.

Although the Board suspended and ordered respondent not to report for work, it nevertheless proceeded to charge him with five Z days for that period of time. It is difficult to understand how these five days could have been "absence[s] not covered by regulations" when they were the product of a suspension imposed in accordance with regulations. But even more incomprehensible is the Board's subsequent decision to include these five days of suspension in the Statement of Tenure Charges. *See* Charge One, paragraph 3.[5] The Board cannot on one hand order respondent not to report for work and then, on the other, charge him with unauthorized absences after he followed that order. Therefore, insofar as the charge of excessive absenteeism for the 2001-2002 school year is concerned, I **FIND** that respondent's absences of February 11-15 should not be considered and must be removed from those upon which the Board relies.

It is equally troubling that the Board has included the absences of February 4-8 in the Statement of Tenure Charges. The suspension of February 11-15 was expressly imposed as punishment for these unauthorized absences.[6] To allow the Board to include the same absences among those upon which it is seeking respondent's termination would be to punish him twice for the same offense. I therefore further **FIND** that the absences of February 4-8 also should not be considered and must be removed from those upon which the Board relies.

When the 2001-2002 school year began, respondent had available for his use eighteen days of sick leave, three days of leave for family illness and three personal days. As of October 31, 2001, he had exhausted all twenty-four of those days. Thereafter, he was charged with two absences in December and the aforementioned ten absences in February. After adding in the eleven vacation days he used, the Board charges that respondent was absent from work on forty-seven occasions. However, having found that the February absences ought not be considered, the total must be adjusted down to thirty-seven. Moreover, since the number of vacation days respondent has taken in any given year has never been an issue and should not factor into this

[5] "After exhausting all of his leave days for the 2001-2002 period, Respondent was again absent for two (2) days in December 2001 and ten (10) days in February 2002."

[6] There is little doubt that February 8, 2002, would have been included but for the fact Mr. Collins drafted his memo on Thursday, February 7 instead of waiting to see if respondent reported for work the following day.

equation, the net number of absences should be twenty-six, two over the allotment of twenty-four,[7] and I so **FIND**.

Insofar as the actual sick days are concerned, there is once again nothing in the record disclosing that the Board considered "the particular circumstances of the absences and not merely the number of absences." *Kelsey v. Board of Education of the City of Trenton, Mercer County, supra*, 1989 *SLD* 1638. The Board could not dispute that respondent was physically unable to report for work July 9-13, 2001, due to a broken hand. It had been provided with the July 12, 2001, letter from Mercer-Bucks Orthopaedics and was aware that the doctor did not want him to return to work until July 23, 2001, and even then only for light duty. It must also have been aware that he came back after one week. A recurrence of the same injury caused his orthopedist to recommend that he remain out of work from October 1-12, 2001. Yet, he returned to work on October 4, 2001. The nature of his injuries and the fact that he prematurely returned to work on two occasions seems not to have mattered.

Additionally, as was the case with his absences in 2000-2001, the record is bereft any evidence illustrating the impact that the absences may have had on the school during the period of time the absences occurred. *Ibid.* As stated earlier, neither Ms. Steele, Ms. Lamboy, nor Mr. Collins testified that respondent's absences caused scheduling problems or had a negative impact on morale, much less resulted in dirty or unsanitary conditions. Once again, it would appear that the Board was preoccupied with the number of absences, not the adverse impact, if any, they may have had.

On the facts presented, I **FIND** that respondent's absences during the 2001-2002 school year were, technically, excessive. However, I **CANNOT FIND** that they were necessarily illegitimate or deleterious to the overall delivery of educational services.

[7] Respondent carried a balance of eight vacation days over to the 2001-2002 school year. When added to the twelve additional days he automatically received, he had a total of twenty such leave days. Had he used them for his absences on December 3 and 12, 2001, a charge of excessive absenteeism would have been more difficult to sustain, particularly when there was no evidence establishing that the absences had a deleterious impact on the delivery of educational services.

In *Smith v. Board of Education of the City of Trenton, supra*, OAL Docket No. EDU 5255-88, Judge Lavery held that misconduct continuing from one year to the next, such that it established a pattern, warranted board action even though the misconduct would not necessarily have warranted board action in a single year. However, in order for the action to be sustained, the board first had to establish that "a cumulative effect of the pattern imposes a deleterious impact on the delivery of educational services." Having already found that the record is bereft of any evidence establishing that respondent's absences had any impact, much less a deleterious one, on the delivery of educational services in 2000-2001 and 2001-2002, I **FIND** that the issue of whether or not the continuing conduct over the course of these two years constituted a pattern warranting termination is now moot.

Unbecoming Conduct

The remaining charges against respondent, alleging unauthorized absence from the worksite and failure to follow established procedures for signing out, fall under the general heading of unbecoming conduct. While there is no single definition of the term, unbecoming conduct on the part of public employees may include excessive, violent, or other intemperate behavior that is not in accord with propriety, modesty, good taste or manners, or behavior that is otherwise unsuitable, indecorous, or improper under the circumstances. It may consist of conduct that is disrespectful to one's supervisors, discourteous to one's fellow employees and disruptive of governmental operations. A finding of unbecoming conduct does not require that any specific rule or regulation has been violated, but may be based primarily on a violation of an implicit standard of good behavior. *In re Emmons*, 63 *N.J. Super.* 136, 140 (App. Div. 1960); *Newark v. Massey*, 93 *N.J. Super.* 317, 323 (App. Div. 1967).

In the field of education, our Supreme Court has held that the touchstone of the charge is a teacher's fitness to discharge the duties and functions of the office or position. *Laba v. Newark Board of Education*, 23 *N.J.* 364, 384 (1957), *See also, In re Tenure Hearing of Grossman*, 127 *N.J. Super.*13, 28-29 (App. Div. 1974), *certif. denied*, 65 *N.J.* 292 (1974). A significant number of cases have found certain types of specific behavior to be unbecoming conduct as well. For example, in *In re Fulcomer*, 93 *N.J. Super.* 404 (App. Div. 1967), the use of physical force by a teacher to maintain discipline was held to constitute unbecoming conduct. Similarly, in *Matter of*

the Tenure Hearing of Cowan, 224 *N.J. Super.* 737, 741 (App. Div. 1988), a teacher with an uncontrollable temper who verbally and physically abused students was found to have engaged in unbecoming conduct.

Unbecoming conduct may be found where there has been a series of incidents indicating a pattern of behavior, or a single sufficiently flagrant incident. *Redcay v. State Board of Education*, 130 *N.J.L.* 369 (Sup. Ct. 1943), *aff'd o.b.* 131 *N.J.L.* 326 (E. & A 1944). In *Redcay*, a school principal was found guilty of the charges of inefficiency, incapacity, insubordination, lack of cooperation, unfitness and conduct generally unbecoming a principal. In so finding, the court stated:

> 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 might also be shown by many incidents. Fitness may be shown either way.
> [130 *N.J.L.* at 371.]

Unbecoming Conduct – Unauthorized Absence from Worksite

The Board alleges that although he had not "clocked out" or called Central Dispatch to say he was leaving, respondent was not on the school grounds at 5:45 p.m. the evening of January 4, 2002. He returned approximately ten minutes later and, upon being confronted by his supervisor, Aida Lamboy, explained that he had "let another person out of the building and that's why [I] forgot to clock out." He added that he had then gone to a friend's house to get the date and time of a viewing. When asked why he had not done that during his lunch break, respondent replied that it was the time for his lunch break and he now "could clock in." At that point, Ms. Lamboy reminded him about a memo he had received concerning clocking out when leaving the building. Incongruously, respondent replied, "I never leave the building for lunch."

Respondent testified that although he was not in the building, he had been on the grounds that night. At the time in question, he had let the light cleaners out and driven his car around to the rear of the building on Exton to lock the back gate. Since his cousin's house is on the corner of Exton and Stuyvesant Street, he stopped by to ask her for the time of her brother's funeral. He then returned to the building where he encountered Ms. Lamboy.

One factor to consider in determining which party's version of an incident has the "reasonable probability of truth" is that the "interest, motive, biases or prejudice of a witness may affect his credibility and justify [the trier of fact], whose providence it is to pass upon the credibility of an interested witness, in disbelieving his testimony." *State v Salimone*, 19 *N.J. Super.* 600, 608 (App. Div. 1952). More importantly, in so far as this matter is concerned, "[a] trier of fact may reject testimony because it is inherently incredible, or because it is overborne by other testimony." *Congleton v Pura-Tex Stone Corp.*, 53 *N.J. Super.* 282, 287 (App. Div. 1958).

Careful comparison of Ms. Lamboy's and respondent's respective versions of the incident discloses that they are actually quite similar and tend to support one another. To the extent they differ, it is in the number, and to a certain extent, the nature of the details provided. Each version tends to fill in the blanks left by the other and the two may be read together as one unified narrative. However, there is an old saying that "the devil is in the details," and a close reading of the details provided by respondent more than suggests that, even without addressing Ms. Lamboy's testimony, his version of the incident is incredible.

Initially, respondent stated that at the time in question, 5:45 p.m., he had let the light cleaners out and driven his car around to the rear of the building on Exton to lock the back gate. However, the principal, Ms. Steele, testified that the light cleaners leave each night at 8:00 p.m. Moreover, Ms. Lamboy stated that when she could not find respondent in the building she had asked "one of the ladies," *i.e.* one of the light cleaners,[8] if she knew where he had gone. Had respondent actually let the light cleaners out, there would not have been anyone left for Ms. Lamboy to question concerning his whereabouts.

One must also question why he drove his car around to the rear of the building on Exton to lock the back gate. Certainly, he could have accessed the gate just as easily by exiting the building and walking through the lot. It is conceivable that it may have been because his car had been parked on the street and he wanted to move it to the lot for the balance of the evening. But it is just as plausible that he had decided to run a quick errand and did not believe he or his car

[8] Ms. Lamboy testified that in addition to two custodians, she supervises four light cleaners who work from 4:00 p.m. to 8:00 p.m.

would be missed. In fact, had Ms. Lamboy not returned to retrieve her paycheck at that particular time, his absence would have gone unnoticed.

Finally, respondent testified that although he was not in the building, he had been on the grounds. However, it is respondent's own words that belie that statement. By his own admission, he stopped by his cousin's house, which is located on the corner of Exton and Stuyvesant Street, to ask her for the time of her brother's funeral. In fact, this statement is consistent with the one he gave to Ms. Lamboy that evening. No matter how proximate to the school it may have been, the cousin's house was not *on* the grounds.

In his closing brief, respondent asserts that the testimony, as well as Exhibit P-3, establishes that this incident took place during his lunch break, a period during which he is entitled to leave the grounds. Therefore, the most he can be charged with is a failure to sign out. However, respondent appears to be stretching the record. Among other things, respondent did not testify that he had visited his cousin's house during his lunch break. Moreover, a careful reading of Exhibit P-3 discloses that it was not respondent, but Ms. Lamboy, who first mentioned lunch when she asked him why he had not gone to his cousin's house during his lunch break. Although he replied, "this is my lunch time," when reminded about the policy of clocking out for lunch he stated, "I never leave the building for lunch," failing to recognize the inherent contradiction in those two statements. Therefore, on the facts presented, I **FIND** that respondent was absent from the worksite without authorization.

The Board also alleges and Ms. Lamboy testified that on February 28, 2002 at 1:04 p.m., she observed respondent speaking to a person in a van at the corner of Rutherford and Prospect Avenues. When she clocked in, she noticed that respondent had not clocked out. For his part, respondent admitted taking five minutes to speak to a friend during a "quick smoke" on February 28, 2002. He did not sign out because he was unaware of any rule requiring him to do so during smoking breaks.

It is notable that the Board does not dispute respondent's statement that he was on a smoking break. Although Ms. Lamboy testified that she was returning from her lunch break at that time, she did not state that respondent was or should have been on his. Nor did the board

offer any testimonial or documentary evidence concerning the length of "smoking" breaks or the procedure that should be followed in taking them. Examination of the time cards in evidence discloses two sign in and two sign out lines for each day worked in any given week. From that, one might reasonably infer that an employee was only required to clock in at the beginning of the shift, clock out for lunch, clock back in at the conclusion of lunch, and clock out at the end of the shift. Consequently, the fact that respondent did not clock out does not, as the Board would suggest, mean that he improperly failed to follow clocking out procedures and I so **FIND**.

More importantly, the evidence presented does not lead to an inescapable conclusion that respondent was absent from the grounds without authorization. Assuming that a custodian is not required to clock out for a smoking break, it is not unreasonable to assume that such a policy anticipates that the break will be brief and the custodian will remain on the grounds and available if needed. Here, there is nothing to suggest that when respondent's friend pulled over at the corner of Rutherford and Prospect Avenues and respondent walked out to greet him it was anything but spontaneous. Common sense also suggests that if respondent and his friend had a need to discuss something important at length and could only get together during his shift, respondent would not have arranged to do so during an extended smoking break in broad daylight right in front of the school.

Significantly, the Board did not offer any evidence that respondent's break was for a period of time longer than it takes to smoke a cigarette. It appears to have taken a rather rigid stance that any departure from the grounds without first signing out, no matter how long the duration, is by definition an unauthorized absence. Taken to an illogical extreme, a custodian who spontaneously left the grounds to assist a pedestrian or remove a safety hazard from the sidewalk would be guilty of an unauthorized absence. Therefore, in the absence of a specific policy concerning smoking breaks, I **FIND** that respondent's absence was of such a short duration and so *de minimis* that it does not constitute an unauthorized absence.

Unbecoming Conduct – Failure to Sign Out

The final charges against respondent relate to his alleged failure to clock out on September 20-21, 2001; November 14 and 16, 2001; December 10-12 and 20-21, 2001; and

February 27, 2002. In support of these charges the Board introduced time cards that disclose the following information:

- The time card for the week ending September 21, 2001, Exhibit P-4, shows that on September 20, respondent clocked in at 2:34 p.m., but failed to clock out at the end of his shift. The same is true for September 21, when respondent clocked in at 2:42 p.m. but failed to clock out.
- The time card for the week ending November 16, 2001, Exhibit P-5, illustrates that on November 14, respondent clocked in at 2:22 p.m., but failed to clock out at the end of his shift. However, the same cannot be said of November 16, when respondent clearly clocked out at 9:52 p.m.
- The time card for the week ending December 14, 2001, Exhibit P-6, illustrates that on December 10, respondent clocked in at 2:26 p.m. and clocked out at 10:09 p.m. However, respondent failed to clock out on December 12 after clocking in at 2:12 p.m. Curiously, the time card also indicates that respondent did not clock in or out on December 11, suggesting that he was absent on that date. An examination of Exhibit P-15 disclosed that respondent was recorded as present on that date but absent on December 12. Since the time card indicates that he was, in fact, present on December 12, his absence on December 11 must have been incorrectly recorded as December 12 in Exhibit P-15.
- The time card for the week ending December 21, 2001, Exhibit P-7, reveals that on December 20, respondent clocked in at 2:03 p.m., but failed to clock out at the end of his shift. The same is true of December 21, when respondent failed to clock out after clocking in at 1:08 p.m.
- The time card for the week ending March 1, 2002, Exhibit P-9, reveals that on February 27, respondent clocked in at 12:20 p.m., but did not clock out at the end of his shift. There is, however, a handwritten note stating, "I talk[ed] to Mr. Amata about me punching out." The arrow from the note is drawn to a space for February 26, but was clearly intended for February 27 because respondent did, in fact, clock out on the 26th.

Consequently, it would appear that respondent failed to clock out at the end of his shift on at least six, and possibly seven, separate occasions.

The primary date in controversy is that of February 27, 2002. In her March 4, 2002 letter to Mr. Collins, Exhibit P-8, Ms. Lamboy directed his attention to the time card for that date and asked him to "read what he wrote for the 27th of Feb. Freddie told me he had problems with the time clock. But how come nobody else had problems with it."

During his testimony, respondent did not mention anything about having had a problem with the clock. Rather, he admitted that he had forgotten to sign out on that date. As soon as he realized it he spoke to Mr. Amato, who suggested that he make a notation on his time card. He followed Mr. Amato's advice but inadvertently drew the line from the notation to a space for February 26 instead of February 27. However, he did not insert the approximate time he ended his shift.

Unfortunately, neither party called Mr. Amato as a witness. Consequently, we do not know when respondent called Mr. Amato and received his advice to annotate the time card. In all probability it was sometime before March 1, 2002, the last work day on the card. By the same token, we do not know whether Ms. Lamboy or Mr. Collins attempted to contact Mr. Amato in order to determine whether respondent actually called him and, if so, what he said.

Respondent has proffered two alternative excuses for his failure to clock out. As he advised Ms. Lamboy and then stated during cross-examination, he had problems with the clock that evening. However, he also testified on direct that he simply forgot. The two are mutually exclusive and the former is implausible due to the fact that no other employees reported any problems that day. Moreover, he clocked in earlier that day and the following day without any difficulty. That being the case, I will take his second explanation – that he simply forgot – as the truth. Consequently, whether or not he actually called Mr. Amata, the fact remains that respondent failed to clock out on February 27, 2002, and I so **FIND**.

Respondent also testified that many of his failures to sign out were simply a matter of logistics. As he explained it, the time clock is located in the rear of the building, while the key pad for the alarm is located near the front office. Once he sets the alarm, he does not have enough time to go to the rear of the building, sign out and exit. Yet, however problematic the building layout may have been, it is indisputable that respondent was able to call out, set the alarm and

clock out, in whatever order, on countless other evenings during the course of his employment. Therefore, respondent's failures to clock out on September 20-21, November 14, and December 12, 20 and 21, 2001 were due to a lack of effort or forgetfulness, and I so **FIND**.

Nevertheless, respondent argues that his failures to clock out cannot form the basis for a tenure proceeding because the Board does not have a specific rule or regulation requiring an employee to punch in or punch out. More specifically, he cannot be charged with a violation of a rule if he does not have knowledge that such a rule exists. In support of this argument respondent cites but one case, *Grossman v. State Health Benefits Commission*, 92 *N.J.A.R.* 2d 35 (1991), in which Administrative Law Judge Daniel B. McKeown held that an individual could not be penalized for failing to comply with a rule when the appointing authority did not provide him with notice of the rule.

Respondent's reliance on *Grossman* is misplaced. In that case a health insurance provider had denied a claim for reimbursement of prescription drug expenses because the claimant had failed to file his claim within ninety days of the end of the calendar year in which the expenses were incurred. The health insurance had been in his late wife's name and the eighty-one-year-old claimant was unaware of the rule because he had not been provided with a manual explaining the procedure for filing a claim, even after he decided to continue the coverage in his own right.

Upon reviewing the manual, ALJ McKeown found that the very rule upon which the provider relied clearly acknowledged that it might not be reasonably possible to file claims within the ninety-day time period but that such claims would still be accepted if proof of loss was furnished as soon as reasonably possible. He further found that since the claimant had suffered from depression following the death of his wife of fifty-one years and the receipts had long been packed in a box in anticipation of a move to Florida, it had not been reasonably possible for him to file the claim any sooner. Consequently, Judge McKeown ordered the provider to reimburse the prescription drug expenses.

Unlike *Grossman*, this case does not involve a lack of knowledge of an existing rule that by its own terms may be relaxed when compliance is not reasonably possible. That there may not have been a written policy is of no moment. The many verbal and written admonitions

respondent received more than adequately placed him on notice that he was required to clock out at the end of his shift. The fact that he did so on all but a handful of occasions establishes that he knew what was expected of him. Moreover, in a matter such as this, a finding of unbecoming conduct does not require that any specific rule or regulation has been violated, but may be based primarily on a violation of an implicit standard of good behavior. *In re Emmons*, *supra*, 63 *N.J. Super.* at 140; *Newark v. Massey*, *supra*, 93 *N.J. Super.* at 323.

Given my findings that respondent is not guilty of excessive absenteeism; but is guilty of unbecoming conduct for an unauthorized absence on one occasion and failing to comply with the clocking out procedure on seven occasions, I **FIND** and **CONCLUDE** that the termination of respondent's tenure rights and his removal as a custodian is not an appropriate remedy. Under the circumstances, the imposition of a period of suspension is the appropriate penalty that should be imposed. The reason for a suspension is to remind respondent of his obligation and responsibility to follow the rules necessary for the overall delivery of educational services. Consequently, on the facts presented, I **FIND** and **CONCLUDE** that the imposition of a thirty-day suspension is the appropriate penalty to be imposed in this matter.

DECISION AND ORDER

Based upon the foregoing findings of fact and conclusions of law, it is **ORDERED** that respondent's tenure rights be and are hereby **RESTORED**. It is further **ORDERED** that based upon these findings of guilty to the tenure charges of unbecoming conduct, respondent be and is hereby **SUSPENDED** for a period of thirty days. And it is further **ORDERED** that respondent be **AWARDED** back pay, related benefits and seniority in an amount that reflects the imposition of a thirty-day suspension.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does

not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

July 29, 2003 — DATE

ISRAEL D. DUBIN, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

7/31/2003

DATE

Mailed to Parties:

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE,

AUG - 6 2003

DATE

OFFICE OF ADMINISTRATIVE LAW

IDD/mamf

EXHIBITS

For Petitioner:

P-1 Memorandum dated September 15, 2000

P-2 Memorandum dated June 15, 2000

P-3 Memorandum dated January 7, 2002

P-4 Time Cards for weeks ending September 14, 2001 and September 21, 2001

P-5 Time Card for week ending November 16, 2001

P-6 Time Cards for weeks ending December 14, 2001 and December 28, 2001

P-7 Time Card for week ending December 21, 2001

P-8 Letter dated March 4, 2002

P-9 Time Card for week ending March 1, 2002

P-10 Memorandum dated March 14, 2001

P-11 Yearly Attendance Summary, 2000-2001

P-12 Monthly Attendance Summary, 2000-2001

P-13 Memorandum dated November 6, 2001

P-14 Monthly Attendance Summary, 2001-2002

P-15 Yearly Attendance Summary, 2001-2002

P-16 Memorandum dated December 13, 2001

P-17 [Not moved into evidence]

P-18 Memorandum dated January 10, 2002

P-19 [Not moved into evidence]

For Respondent:

R-1 Medical Center at Princeton Discharge Summary Report

R-2 Doctor's Note from Fischer Chiropractic Back & Neck Pain Center

R-3 Dentist's Notes from Eastern Dental

R-4 Doctor's Note from Mercer-Bucks Orthopaedics, P.C.

R-5 Doctor's Note from [illegible]

R-6 Subpoena for October 31, 2001

R-7 Doctor's Note from Harold J. Brown, M.D.

R-8 Memorandum dated February 7, 2002

Joint Exhibits:

J-1 Agreement between Trenton School Custodians Association and the Trenton Board of Education

J-2 Memorandum dated November 6, 2001 with Absence Record attached (admitted limited to use of code at bottom of Absence Record only)

WITNESSES

For Petitioner:

Judy M. Steele

Aida Hernandez Lamboy

Everett O. Collins

For Respondent:

Freddie Williams

OAL DKT. NO. EDU 4579-02
AGENCY DKT. NO. 191-6/02

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

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Pursuant to *N.J.A.C.* 1:1-18.4, exceptions to the Initial Decision were filed by the Board of Education (Board), as were reply and cross-exceptions by respondent.[1]

In its exceptions, the Board urges the Commissioner to reject the Initial Decision and find instead that respondent's absences as set forth by the Administrative Law Judge (ALJ) do, in fact, constitute excessive absenteeism, since respondent has exhibited a continuing pattern of absenteeism despite being placed on notice about his attendance. The Board further urges that dismissal from tenured employment is the appropriate penalty for the instances of unbecoming conduct found by the ALJ, or at the very least, a 120-day loss of salary as was imposed in *In the Matter of the Tenure Hearing of Ralph McCullough, School District of the City of Trenton, Mercer County,* decided by the Commissioner on September 6, 2002 and affirmed by the State Board of

[1] See note 2 below.

Education on April 2, 2003. In reply, respondent urges adoption of the Initial Decision with respect to the charge of excessive absenteeism, but contends that the ALJ erred in finding respondent guilty of unbecoming conduct and imposing a 30-day suspension as a result.[2]

Initially, the Commissioner concurs with the ALJ, for the reasons carefully enumerated in the Initial Decision, that under all the circumstances of this matter, the Board has not met its burden of proving its charge of excessive absenteeism. Additionally, finding no basis to disagree with the credibility determinations of the ALJ or with his analysis of respondent's actions, the Commissioner further concurs that respondent is guilty of unbecoming conduct for one instance of unauthorized absence from the worksite (not two, as charged) and several instances of failure to clock out at the end of his work shift.

The Commissioner does not agree, however, that the appropriate penalty for respondent's unbecoming conduct as proven on the present record is a 30-day suspension. While there is no question that the charges proven in this matter do not rise to the level of warranting respondent's dismissal from tenured employment, they *do* warrant a penalty sufficiently severe to discourage the cavalier attitude evident in respondent's testimony with respect to basic employee responsibilities of remaining on premises when on duty and appropriately signing or clocking out at the end of a work shift. The Commissioner finds a 30-day suspension insufficient for this purpose, and he

[2] The Commissioner here notes that respondent's submission, filed within the time period for reply exceptions as extended at respondent's request, is substantially in the nature of primary exceptions, not reply or cross-exceptions as purported. However, to the extent that respondent's submission does not constitute a reply to the Board's exceptions, the arguments raised therein substantially reiterate those of respondent's post-hearing brief, which both the ALJ and the Commissioner have fully considered.

directs instead that respondent forfeit the salary already withheld from him pursuant to *N.J.S.A.* 18A:6-14.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 9/15/03

Date of Mailing: 9/16/03

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

546-03

M.F., on behalf of minor children, K.F. and K.F.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF ATLANTIC HIGHLANDS, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning parent challenged the Board's residency determination that her children were not domiciled in the District.

In light of the record and the testimony of witnesses, the ALJ found that the District established proof that petitioner was a resident and domiciliary of Sea Bright not Atlantic Highlands. The ALJ ordered the children removed from the Atlantic Highlands School District. The ALJ did not make any calculation with respect to unpaid tuition amounts since the Board made no claim for tuition.

The Commissioner adopted the Initial Decision with modification. Based on the record and the credibility assessments of the ALJ, the Commissioner concurred with the ALJ that petitioner failed to establish that she was a domiciliary of Atlantic Highlands so as to entitle her children to a free public education in that District. The Commissioner, however, rejected the ALJ's apparent belief that, absent the filing of a counterclaim for tuition, the Board is not entitled to collect such compensation for the period of the children's ineligible attendance in its schools. The Commissioner determined that tuition was clearly identified as a relief sought in the Board's Answer. Thus, the Commissioner remanded the matter to OAL solely for such further proceedings as may be needed in order to determine the amount of tuition due the Board for the period of ineligible attendance.

September 22, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 2566-03

AGENCY DKT. NO. 99-3/03

M.F., ON BEHALF OF MINOR CHILDREN, K.F. AND K.F.,

Petitioners,

v.

BOARD OF EDUCATION OF THE BOROUGH OF ATLANTIC HIGHLANDS, MONMOUTH COUNTY,

Respondent.

M.F., petitioner, *pro se*

R. Armen McOmber, Esq., for respondent (McOmber & McOmber, attorneys)

Record Closed: July 1, 2003 Decided: August 7, 2003

BEFORE **JOSEPH F. MARTONE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In this matter, petitioner challenges respondent Board of Education's determination as to residency. The matter was transmitted to the Office of Administrative Law (OAL) on May 5,

2003, for hearing as a contested case. The hearing took place on July 1, 2003, and at the conclusion of the hearing, the record closed.

FACTUAL DISCUSSION

The following is intended to summarize the testimony and evidence, which I found to be relevant to the issues in this matter.

It is undisputed that on February 25, 2003, the Board of Education of the Borough of Atlantic Highlands held a hearing at which petitioner was present. Following that hearing, the Board adopted a resolution setting forth its findings and conclusions. In particular, it concluded that M.F., the parent of K.F. and K.F., and M.F.'s children, are not domiciled within the Borough of Atlantic Highlands, and it ordered that they be removed from the school. Petitioner filed a petition of appeal with the Commissioner of Education on April 2, 2003, in which she asserts that the decision of the Board is incorrect.

It is also undisputed that K.F. and K.F. attended the Atlantic Highlands Elementary School operated by respondent Board from January 2003 through the end of the school year in June 2003. By letter dated February 12, 2003, the Board Secretary notified M.F. of the intention of the Board to have a hearing on February 25, 2003, in order to determine whether the parent and children were domiciled within the Borough.

At the hearing before the OAL, the first witness to testify for respondent was Timothy R. Haase. He is an employee of respondent school district and has been the Assistant Principal for two years. Prior to that, he was a Child Study Team Director, and he also served for 12 years as a teacher. He knows both of M.F.'s children. He explained that the Atlantic Highlands Elementary School is a small school with an enrollment of 300 children. As a result, he knows all of the children on a personal basis.

As part of his duties, Mr. Haase investigated assertions that the children were no longer living in Atlantic Highlands, but were living in Sea Bright. Mr. Haase testified that he knows of at least two school district employees and one mother of a student who stated that M.F. was no

longer living in Atlantic Highlands but was living in Sea Bright. However, he did not identify these individuals.

Mr. Haase testified that he decided to make observations of the premises located on East Highland Avenue, Atlantic Highlands, where the children allegedly resided with M.F. He observed this address on February 5, 6, 10 and 25, 2003, by parking his car across from the entrance to the residence from 7:50 a.m. until 8:30 a.m. or 8:35 a.m., and he just watched to see if the children exited the residence to go to school. He explained that school starts at 8:35 a.m. He never saw the children or M.F. leave this residence on any of the four occasions he observed it. However, the children arrived at the school at 8:35 a.m. on the first three mornings, and at 8:25 a.m. on the fourth morning.

Mr. Haase also testified that he conversed with Kimberly Littlefield, a teacher in the school district. He asked her to make an observation of a home in Sea Bright because he knew she drove to work in that vicinity. He also had information that this was where the children were living at that time. On February 10, and 25, 2003, Ms. Littlefield observed the children leaving the Sea Bright home.

Mr. Haase testified that the Board of Education sent all correspondence to both addresses. He identified a certified mail envelope (R-1) which was addressed to M.F. at the Atlantic Highlands address. This letter was stamped as Unclaimed, and written on the face of the envelope by the postal authorities was the notation: "Fwd to __ New Street, Sea Bright, New Jersey 07760."

On cross-examination, Mr. Haase testified that Ms. Littlefield observed the Sea Bright address on February 10 and 25, 2003, and that she would be testifying in this matter. He also admitted that neither the Atlantic Highlands residence not the Sea Bright residence was observed after February 25, 2003.

Kimberly Littlefield testified that she has been employed as a schoolteacher by the Atlantic Highlands Board of Education for 31 years. She knows both K.F. and K.F. She was requested by Mr. Haase to observe the premises located on New Street in Sea Bright, New

Jersey. The request was made of her because she lives in Long Branch and drives by the Sea Bright address.

On February 10, 2003, Ms. Littlefield observed the Sea Bright address from 7:30 a.m. to 8:30 a.m. On February 25, 2003, she observed the Sea Bright residence from 7:30 a.m. until 8:10 to 8:20 a.m. She explained that school starts at Atlantic Highlands Elementary School at 8:25 a.m. On both of these occasions, she saw K.F., K.F., and M.F. leave the house, get into the car, and drive to school. She also saw both of the children later than day in school. She explained that on February 10, 2003, she observed M.F. drive the children to school. On February 25, 2003, she observed W.M. drive the children to school.

The final witness called by respondent school district was Doris T. Muller. Ms. Muller testified that she is a process server and investigator and has been engaged as such for well over 25 years. She was retained by the attorney for respondent the day before the hearing to serve an order. She was instructed to go to __ New Street in Sea Bright, New Jersey to serve the order. If no one was there, she was then to go to the Atlantic Highlands address.

Ms. Muller testified that when she arrived at the 22 New Street address in Sea Bright, K.F. answered the door and said, "I am K____." She also spoke to the other child. They stated to her that their mother worked in Red Bank in a mortgage company. Another woman came to the door who only spoke Spanish. She then asked the first child what grade he was in, and he said, "I'm going into fourth grade and I go to school in Atlantic Highlands." She then left the order with the adult who was present.

M.F. testified in this matter. She stated that she had been living with W.M. at his home on East Highland Avenue, Atlantic Highlands. On or about January 15, 2003, she had to leave these premises and she took an apartment on New Avenue in Sea Bright temporarily and remained there until the beginning of February 2003. She indicated that she now no longer lives in Sea Bright, but has moved back to Atlantic Highlands, and her aunt now lives in the Sea Bright apartment. She provided copies of envelopes mailed to her by the school district to the Atlantic Highlands address (P-1 and P-2), as well as copies of Verizon Wireless Bills sent to her at the Atlantic Highlands address (P-3, P-4 and P-5).

M.F. explained that it was necessary for her to leave W.M.'s home for a short period of time, but that they have since cleared up their problems. She claimed to have moved back to Atlantic Highlands shortly after moving to Sea Bright, and that her aunt has taken over the lease on the Sea Bright apartment.

M.F. admitted that her children answered the door to the Sea Bright apartment when the process server came the day before the hearing. She explained that her aunt was babysitting the children while she was work. She admitted that the children were with the aunt in Sea Bright during the hearing of this matter. However, their whole house is set up in Atlantic Highlands.

M.F. testified that the school district is pursuing this matter as a vendetta because of school vandalism committed by her son.

On cross-examination, M.F. admitted that her name is on the lease for the Sea Bright apartment. She signed the lease on January 15, 2003, and she admitted that it is a one-year lease and the lease term is from January 2003 through January 2004. Her aunt, L.S., who is now babysitting, has taken over the lease on that apartment, and pays rent of $1,100 for a two-bedroom apartment. She also states that the phone in the apartment is in her aunt's name. Her aunt is not employed, and she is using her savings and social security in order to pay the rent.

W.M. testified that he is the owner and occupant of the premises located on East Highland Avenue, Atlantic Highlands. He admitted that there was a stressful situation between M.F. and him, and M.F. was told to leave his house by DYFS. He explained that M.F. had been calling DYFS and complaining about the situation in his house and that the DYFS caseworker called M.F.'s bluff and ordered her to leave. However, at the end of February or the beginning of March 2003, M.F. and her children moved back to Atlantic Highlands, and they now live with W.M. at the East Highland Avenue address in Atlantic Highlands. He indicated that DYFS took action to instruct M.F. to move out of his home on January 9, 2003, but DYFS never officially ordered them out. M.F. and the children moved back right after the school district's last observation at the end of February 2003. W.M. indicated that he is a retired former police officer.

W.M. identified an Atlantic Highlands Police Department investigation report of an incident which occurred on January 9, 2003, involving him and M.F. (P-6). This report contains allegations by M.F. concerning an incident that took place several nights prior to that date. The report indicates that W.M. and M.F. got into an argument and that he was physically and verbally abusive to her. W.M. was advised by DYFS that M.F.'s children could no longer reside at his house and would be moved temporarily to another location until her apartment was ready. M.F. stated several times to the investigating officer that she was going to try and get a temporary restraining order against W.M. after she moved to her new apartment. The officer reported that it is apparent that M.F. will not be returning to live in Atlantic Highlands again. She stated to both DYFS and to the investigating officer that she was moving to Sea Bright.

LEGAL DISCUSSION AND ANALYSIS

Pursuant to *N.J.S.A.* 18A:38-1, free public education shall be provided to any person over five and under twenty years of age who is domiciled within the school district. In general, domicile is the place of a person's abode where he or she has the present intent of remaining and to which, if absent, he or she intends to return. *Mercadante v. City of Paterson,* 111 *N.J. Super. 35,* 39 (Ch. Div. 1970), affd, *58 N.J.* 112 (1971).

The terms "residence" and "domicile" are not synonymous; a person may have several residences or places of abode, but only one domicile at a time. See, *Collins v. Yancy, supra,* at 520,521*; see* also *State v. Benny, supra,* at 251.

> In a strict legal sense, the domicile of a person is the place where he has his true, fixed, permanent home and principal establishment, and to which whenever he is absent, he has the intention of returning, and from which he has no present intention of moving. *(Matter of Unanue, supra,* at 374, citing *Kurilla v. Roth,* 132 *N.J.L.* 213, 215, 38 *A.2d* 862 (Sup. Ct. 1944))

See also, *Mercadante v. The City of Paterson, supra,* at 39, aff'd 58 *N.J.* 112 (1971).) Thus, the domicile is what one regards as a true and permanent home. *In re Jaffe, supra,* at 90, 91.

The courts have recognized that a person may have multiple residences, but only one domicile, *State v. Benny,* 20 *N.J.* 238, 251 (1955); *In re Jaffe,* 74 *N.J.* 86, 90-91 (1977); *Lea v. Lea,* 18 *N.J.* 1, (1955). In the *Mercadante* case, the court stated that the following factors are important in determining the domicile of a person:

> . . . the physical characteristics of each [place], the time spent and the things done in each place, the other persons found there, the person's mental attitude towards each place, and whether there is or is not an intention, when absent, to return.
>
> [111 *N.J. Super.* at 39-40]

The Court in *In the Matter of Unanue,* 255 *N.J. Super.* 362, 376 (Law Div. 1991), stated that "a choice of domicile by a person, irrespective of his motive, will be honored by the court, provided there are sufficient objective indicia, by way of proofs, supporting the actual existence of that domicile." In general, the courts have recognized that intent is a decisive factor in establishing domicile, *State v. Benny, supra,* 20 *N.J.* 238; *Unanue, supra,* 225 *N.J. Super.* 362, *Collins v. Yancey,* 55 *N.J. Super.* 514 (Law Div. 1959). In *Fort Lee Board of Education v. Kintos,* 92 *N.J.A.R.2d* (EDU) 96, 103, the Commissioner recognized that the determining factor in deciding a family domicile is a matter of intent. The Commissioner stated:

> Establishing a domicile involves an act of volition. "A person has the right to choose his own domicile, and his motive in doing so is immaterial." *Lyon v. Glaser,* 60 *NJ.* 259, 264, 288 *A.2d* 12 (1972). In accordance with this principle, it has been held that one does not relinquish his domicile by having another residence based on reasons of health, society, business or employment. * * * .
>
> [Matter of Unanue, 255 N.J. Super. 362, 375 (1991)]

My decision turns on the element of intent in accordance with *Fort Lee Board of Education v. Kintos, supra,* affd State Board April 13, 1994. The concepts of home and domicile embody both a subjective and objective relationship to a physical residence. *Matter of Unanue, supra,* at 375.

In the present matter, M.F. and W.M. testified that sometime after February 25, 2003, M.F. no longer resides in Sea Bright with her children, but that she has moved back to W.M.'s residence in Atlantic Highlands. In support of this position, M.F. relies on objective evidence in the form of letters addressed to her by the school district in April and May 2003 (P-1 and P-2). She also relies on Verizon wireless phone bills for February, March and April 2003 (P-3, P-4 and P-5).

The school district discounts the letters sent to the address in Atlantic Highlands and provided testimony that letters were sent to both the Atlantic Highlands and the Sea Bright addresses. In addition, it argues that a bill for a wireless phone does not establish a place of residence, but simply shows where the bill was sent.

The objective evidence relied upon by the school district are the observations made by Assistant Principal Haase on February 5, 6, 10 and 25, 2003, establishing that on those dates, petitioner and her children were not living at the Atlantic Highlands address, but were living in Sea Bright. In addition, they relied upon the objective observations by Ms. Littlefield on February 10 and 25, 2003, when petitioner and her children were seen leaving the Sea Bright residence in order to travel to school.

Respondent also relies upon a certified mail envelope addressed to M.F. and mailed on May 13, 2003, addressed to the Atlantic Highland residence (R-1). The notations on this envelope are that it is unclaimed, and it contains the forwarding address to the premises located in Sea Bright. Finally, respondent relies upon objective evidence in the form of the testimony of a process server who observed the children at the Sea Bright premises on the day prior to the scheduled hearing in this matter.

I also find to be of significance are statements made by petitioner on January 9, 2003, to both the investigating officer and DYFS (P-6) that she could no longer live in Atlantic Highlands, that she was leaving to move into her new apartment in Sea Bright and that she would not be returning to Atlantic Highlands.

I **FIND** that the proofs relied upon by the school district in this matter have established

that petitioner herein is a resident and domiciliary of Sea Bright, New Jersey. I **FIND** that petitioner has not established with her proofs that her intent is to reside in Atlantic Highlands. Therefore, I **CONCLUDE** that the actions of respondent in determining that K.F. and K.F., as well as M.F., are not residents and domiciliaries of Atlantic Highlands is correct, and the order of the Atlantic Highlands Board of Education requiring that the children be removed from the Atlantic Highlands school district should be **AFFIRMED.**

I note that since respondent has made no claim for tuition, that I am making no calculation with respect to unpaid tuition amounts.

DECISION AND ORDER

Based on the foregoing, it is hereby **ORDERED** that respondent's determination that petitioner and her children are residents and domiciliaries of Sea Bright, New Jersey, and not of Atlantic Highlands, New Jersey, is hereby **AFFIRMED**, and petitioner's appeal is hereby **DISMISSED.**

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

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

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

August 7, 2003
DATE

JOSEPH F. MARTONE, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

8/7/03
DATE

M. Kathleen Duncan /CS

Mailed to Parties:

AUG 13 2003

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

mph

APPENDIX

LIST OF WITNESSES:

For petitioner:

M.F.

W.M.

For respondent:

Timothy R. Haase

Kimberly Littlefield

Doris T. Muller

LIST OF EXHIBITS:

For petitioner:

P-1 Envelope addressed to petitioner from respondent, postmarked April 9, 2003

P-2 Envelope addressed to petitioner from respondent, postmarked May 15, 2003

P-3 Verizon Wireless Bill, for February 2003

P-4 Verizon Wireless Bill for March 2003

P-5 Verizon Wireless Bill for April 2003

P-6 Police Department of Atlantic Highland's Investigation Report, dated January 9, 2003

For respondent:

R-1 Certified Mail envelope addressed to M.F., unclaimed with forwarding address

OAL DKT. NO. EDU 2566-03
AGENCY DKT. NO. 99-3/03

M.F., on behalf of minor children, K.F. and K.F.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF ATLANTIC HIGHLANDS, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The Board's exceptions were timely filed pursuant to *N.J.A.C.* 1:1-18.4. Petitioner requested and was granted an extension of time within which to file primary exceptions and replies to the exceptions filed by the Board.[1] Such submission, filed on petitioner's behalf by James J. McGuire, Jr., Esq., was received in accordance with the extended timeframe.

The Board excepts to the Administrative Law Judge (ALJ) declining to assess tuition in this matter notwithstanding his finding that petitioner and her children were not domiciled in Atlantic Highlands during the period at issue herein. It urges that the ALJ's reasoning in this regard, *i.e.*, "that '....since respondent has made no claim for tuition ...I am making no calculation with respect to unpaid tuition amounts[,]' Initial Decision at Page 9" (Board's Exceptions at 1 and 2), is clearly erroneous. The Board points out that Page 2 of its Answer to the petition in this matter specifically requested "that the Commissioner of Education

[1] Petitioner, who was previously *pro se*, stated that she wished to secure the services of her attorney to make the filing.

*** award respondent tuition pursuant to *N.J.S.A.* 18A:38-1(b)(1)***." (*Id.* at 2) The Board attaches to its exceptions a Certification of its Board Secretary/School Business Administrator detailing the amount of tuition to which it claims to be entitled and urges that the Commissioner modify the decision of the ALJ to award it such amount.

Petitioner's exceptions contest the validity of the ALJ's factual findings and credibility assessments in reaching his conclusion that she and her children were not domiciled in Atlantic Highlands. She contends that, because domicile, by definition, involves not only the place where an individual resides but also the place that he or she has the "intent" of returning to permanently, in any judgment with respect to petitioner's "intent," her testimony should receive the greatest consideration.

Upon careful and independent review of the record in this matter, and based on the credibility assessments of the ALJ, *N.J.S.A.* 52:14B-10(c), the Commissioner finds no basis to disturb the conclusion of the ALJ that petitioner has failed to establish that she is a domiciliary of Atlantic Highlands so as to entitle her minor children, K.F. and K.F. to a free public education in that District. In so finding, the Commissioner stresses that challenges to the factual findings rendered by an ALJ require the objecting party to provide the Commissioner with relevant portions of the transcript of the hearing in order to permit him to assess the merits of those exceptions. *In re Morrison*, 216 *N.J. Super.* 143, 157-158 (App. Div. 1987). Transcripts were not filed in this matter.

The Commissioner, however, rejects the ALJ's apparent belief that, absent the filing of a counterclaim for tuition, the Board is not entitled to collect such compensation for the period of K.F. and K.F.'s ineligible attendance in its schools. *See Z.A., on behalf of minor children, A.K. and J.K. v. Board of Education of the Village of Ridgewood, Bergen County,*

decided by the Commissioner July 23, 2003. *Also see N.J.S.A.* 18A:38-1, *N.J.A.C.* 6A:3-8.1(d), *N.J.A.C.* 6A:28-2.10(b). Rather, tuition is clearly identified as a relief sought in the Board's Answer and the Commissioner finds and concludes that, petitioner having failed to prevail on her appeal, the Board is entitled to collect such tuition in this matter. Inasmuch as the record before the Commissioner is devoid of any information which would form a basis for a calculation in this regard,[2] a remand to the OAL is required for additional fact finding as is necessary to determine the amount of tuition due, pursuant to *N.J.A.C.* 6A:28-2.10.

Accordingly, the Initial Decision of the OAL is adopted, as modified above, for the reasons expressed therein. This matter is hereby remanded to the OAL solely for such further proceedings as may be needed in order to determine the amount of tuition due the Board for the period of the ineligible attendance of petitioner's children in the District's schools.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 9|22|03

Date of Mailing: 9|22|03

[2] It is noted that the Board's Certification, submitted for the first time with its exceptions, is violative of *N.J.A.C.* 1:1-18.4(c) and cannot be considered herein.

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

549-03

IN THE MATTER OF THOMAS KEELEN, :

KEANSBURG BOARD OF EDUCATION, :

MONMOUTH COUNTY. :

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

A vendor employee alleged respondent former Board member violated *N.J.S.A.* 18A:12-24(b) and (e) of the School Ethics Act for attempting to use his official position to secure an unwarranted advantage for himself and for the solicitation of a political contribution.

The ALJ determined that complainant's allegations were proven by a preponderance of competent and credible evidence. The ALJ transmitted the case back to the School Ethics Commission to determine whether respondent's conduct constituted a violation of the Act and to make a recommendation relative to sanction.

After considering the nature of the charges, the Commission found respondent blatantly disregarded N.J.S.A. 18A:12-24(b) and (e) of the Act and his conduct warranted removal from the Board. Since respondent is no longer on the Board, the Commission recommended a penalty of censure.

Upon review of the record, the Commissioner, whose decision was restricted solely to a review of the Commission's recommended penalty, concurred with the Commission's recommendation and, thus, ordered respondent censured as a school official found to have violated the School Ethics Act.

September 22, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EEC 8784-01
AGENCY DKT. NO. C06-01

IN THE MATTER OF CHARGES OF
VIOLATION OF THE SCHOOL ETHICS ACT
BY THOMAS KEELEN

Kimberly Lake Franklin, Deputy Attorney General, for complainant School Ethics Commission, Department of Education (Peter C. Harvey, Acting Attorney General of New Jersey, attorney)

David Corrigan, Esq., for respondent Thomas Keelen

Record Closed: March 3, 2003 Decided: March 27, 2003

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

STATEMENT OF THE CASE

An employee of a vendor with the Borough of Keansburg Board of Education (BOE) alleges that respondent Thomas Keelen, while president of the BOE, solicited a contribution to his election campaign for election to the Borough's governing body (council) with the implication that the contribution would affect the possibility of the vendor's future contracts with the BOE. On this basis, the respondent is charged with violation of the School Ethics Act.

N.J.S.A. 18A:12-21 to -34. A school official who violates the Act is subject to sanctions, including reprimand, censure, suspension or removal. N.J.S.A. 18A:12-29(c); N.J.A.C. 6A:28-1.16. The respondent denies the allegations and submits that the charge should be dismissed.

PROCEDURAL HISTORY

On February 14, 2001, William J. Noe, an employee of Aramark, a BOE vendor, filed a complaint with the School Ethics Commission. N.J.S.A. 18A:12-27; N.J.A.C. 6A:28-1.8. By letter dated February 16, 2001, the Commission's executive director notified the respondent that he had an opportunity to file a written response to the complaint. On April 20, 2001, respondent filed his response. R-1; N.J.S.A. 18A:12-29(b); N.J.A.C. 6A:28-1.10, -11. By letter dated August 20, 2001, the Commission notified the respondent that during its June 26, 2001, meeting it had found probable cause to credit the complainant's allegations and probable cause to believe that he (respondent) had violated the Act. N.J.S.A. 18A:12-29(b); N.J.A.C. 6A:28-1.12, -1.13, -1.14. The Commission transmitted the contested case to the Office of Administrative Law (OAL), where it was filed on December 10, 2001. N.J.S.A. 18A:12-29(b); N.J.S.A. 52:14B-2(b); N.J.A.C. 6A:28-1.14. By letter dated April 25, 2002, the respondent's attorney substituted for respondent's prior attorney and entered his appearance. On April 29, July 24 and September 23, 2002, conferences were held, but the case could not be settled. On January 30, 2003, the case was heard in the OAL, Trenton. On the record closed date, the last of the parties' written closings was received in the OAL.

The incident on which this case is based gave rise to two other cases the Commission transmitted to the OAL: In re Charges of Violation of the School Ethics Act by Judith Ferraro, OAL Dkt. No. EEC 8783-01, and In re Charges of Violation of the School Ethics Act by Hugh Gallagher, OAL Dkt. No. EEC 8785-01. Respondents Ferraro, Gallagher and Keelen were notified that they should appear for an April 29, 2002, in-person conference. However, respondents Ferraro and Gallagher failed to appear and I received no message explaining their absence or providing good cause for their failure to appear. By letter dated April 29, 2002, I notified them that, by May 10, 2002, they should file with me written explanations showing good cause for their failure to appear; that, if they did not do so, I would assume that they did not wish

to defend the charges; and that the Commission could enter final decisions imposing sanctions, etc., against them. Neither of those respondents filed such an explanation, so the OAL's clerk transmitted the cases back to the Commission.

FINDINGS OF FACT

In 1999 and 2000 respondent was president of the BOE; Aramark was a BOE vendor, responsible for maintenance of the BOE's buildings and grounds, and its contract with the BOE was subject to renewal every year; and Mr. Noe was the Aramark employee responsible for the maintenance of the BOE's buildings and grounds.

The BOE election was scheduled to be held in April 2000 and the election for the Borough's governing body (council) was scheduled to be held in May 2000.

Ms. Ferraro and Mr. Gallagher were members of the BOE and candidates for reelection in the April 2000 BOE election. The respondent's BOE term was to end in May 2000, and he was not a candidate for reelection to the BOE; he was a candidate in the May 2000 council election. The respondent's commercial building on the Borough's Main Street housed the headquarters for his, Ms. Ferraro's and Mr. Gallagher's campaigns and all were seeking contributions for their campaigns. N.J.S.A. 18A:12-23, "political organization."

Mr. Noe testified credibly that, on Saturday, April 29, 2000, he checked the BOE's schools' buildings and grounds to confirm that Aramark's personnel were performing properly. Thereafter, he and his young son were walking on Keansburg's Main Street when he observed the respondent, Ms. Ferraro, Mr. Gallagher, and BOE members Dolores Bartram and William Manoes by the respondent's building and they signaled him to enter the building. The respondent testified that he observed Mr. Noe and that (only) he stepped out of his building to signal Mr. Noe in. In any event, Mr. Noe and his son entered the building, where the respondent, Ms. Ferraro, Mr. Gallagher, Ms. Bartram and Mr. Manoes were present. Mr. Noe testified that respondent, in a jesting manner, stated, "We've got you now!"

Mr. Noe also testified as follows: In the campaign headquarters, all of the above-named persons except the respondent sat down. The respondent stated that they had put together a "list" of vendors with dollar amounts they figured the vendors could afford, and said, "We penciled you in for $1,000." The respondent stated that he wanted a contribution and, in a stern tone, stated, "Frankly, I expect it and I don't care how you get it." Knowing that the respondent and his running mates were candidates and wanted contributions to their campaigns, he (Mr. Noe) had already discussed the matter with an Aramark superior and, consistent with that discussion, he replied that Aramark would contribute, but to both parties in the election. However, the respondent replied, "We really don't want you to give to both parties. That would work against us. . . . You know, Billy, let's face it. These things are remembered come contract time." The respondent and he repeated the substance of this exchange and the respondent then stated, "We'll remember this" and "Let's face it, everybody remembers who supported them and who didn't."

On cross-examination, Mr. Noe testified that the date of the above-described conversation in the campaign headquarters was probably, maybe absolutely, April 29, 2000. He also testified as follows: He probably asked the respondent who his running mates were in the council election. The respondent's statements distressed him, especially because they were made in the presence of his son, and, on the Monday after the weekend, he reported what had occurred to Scott Donegan, his Aramark superior. Mr. Donegan advised him to speak to the police, but several of the above-named persons had ties to the Borough police, e.g., Ms. Bartram worked for the Borough police and Ms. Ferraro's son was a Borough police officer who was married to the respondent's daughter. In an attempt to obtain proof of what he took to be a threat to his job, after April 29, 2000, he recorded telephone conversations with Ms. Ferraro and Mr. Gallagher. Eventually, he contacted the Monmouth County Prosecutor's Office, the Attorney General's Office, and the Commission.

The respondent testified as follows: The BOE's (April 2000) election had already occurred by the time of the above-described conversation in the campaign headquarters and, at that time, he had no expectation that, after his BOE term ended (in May 2000), he would serve again on the BOE. When he stated to Mr. Noe that he had "penciled Aramark in for $1,000," he may have mentioned other vendors, but there was no discussion of the BOE and he did not state anything about future contracts with the BOE. After the above-described conversation,

Ms. Ferraro reported to him that Mr. Noe called her and stated that Aramark would contribute to the campaign, but that it would contribute to both sides, and, given those terms, he (the respondent) refused the contribution. Aramark made no contribution, but he had "no hard feelings" about no contribution being made.

During the BOE's May 2, 2000, organizational meeting, the respondent, as president of the BOE, presided until Mr. Gallagher, nominated by Ms. Ferraro, became the BOE president. Mr. Gallagher then presided over the meeting, during which a BOE vice president was elected, professional appointments were made, etc. P-1.

The respondent was unsuccessful in his run for council, and in October 2000 he was appointed to complete the term of a BOE member who resigned.

In December 2000, while Mr. Noe was away on vacation, a snowstorm struck the Borough; Aramark's personnel failed to adequately remove the snow; and parents and others complained. In January 2001, Mr. Noe was called to the BOE's school administration offices for the BOE's Buildings and Grounds Committee's meeting to review snow removal procedures. The respondent, Ms. Ferraro, Mr. Gallagher, and Mr. Manoes (still BOE members), BOE superintendent Barbara Trzeszkowski, and BOE business administrator Barbara Pieszcynski were present and told the respondent that they were unhappy with Aramark's snow removal. Mr. Noe agreed that Aramark had performed poorly and the Committee reprimanded him.

On February 14, 2001 (as noted in the procedural history), Mr. Noe filed his complaint with the Commission.

In June 2001 Mr. Noe ended his employment with Aramark.

In 2001 the BOE again contracted with Aramark.

Mr. Noe, who now resides in Virginia, returned to New Jersey for the hearing.

Balancing all of the competent and credible evidence and considering the demeanor of the witnesses, Mr. Noe's testimony was credible. And to summarize, as Mr. Noe testified, the respondent, while president of the BOE, i.e., a "school official" subject to the Act, stated to Mr. Noe, "We've got you now!"; stated that he expected a $1,000 contribution from Mr. Noe's employer, a BOE vendor whose contract was subject to yearly renewal; and stated, "These things are remembered come contract time." N.J.S.A. 18A:12-23. The respondent solicited the contribution for the purpose of influencing him in the discharge of his duties. Although the respondent's BOE term ended in May 2000, when he made the solicitation he was politically tied to BOE members who would remain on the BOE after that time and, therefore, he appeared to be in a position to influence them in the exercise of their official duties related to contracting. Further, the respondent himself returned to the BOE in October 2000.

CONCLUSIONS OF LAW

In the Act, the Legislature found and declared:

> a. In our representative form of government it is essential that the conduct of members of local boards of education and local school administrators hold the respect and confidence of the people. These board members and administrators must avoid conduct which is in violation of their public trust or which creates a justifiable impression among the public that such trust is being violated.
>
> b. To ensure and preserve public confidence, school board members and local school administrators should have the benefit of specific standards to guide their conduct and of some disciplinary mechanism to ensure the uniform maintenance of those standards among them.
>
> [N.J.S.A. 18A:12-22.]

A local school district board of education member (among other persons) is a "school official" under the Act. N.J.S.A. 18A:12-23.

N.J.S.A. 18A:12-24 states, in pertinent part:

> b. No school official shall use or attempt to use his official position to secure unwarranted privileges, advantages or employment for himself, members of his immediate family or others;
>
> . . . .
>
> e. No school official, or member of his immediate family, or business organization in which he has an interest, shall solicit or accept any gift, favor, loan, political contribution, service, promise of future employment, or other thing of value based upon an understanding that the gift, favor, loan, contribution, service, promise, or other thing of value was given or offered for the purpose of influencing him, directly or indirectly, in the discharge of his official duties. This provision shall not apply to the solicitation or acceptance of contributions to the campaign of an announced candidate for elective public office, if the school official has no knowledge or reason to believe that the campaign contribution, if accepted, was given with the intent to influence the school official in the discharge of his official duties.
>
> [Emphasis added.]

A school official who violates the Act is subject to sanctions, including reprimand, censure, suspension or removal. N.J.S.A. 18A:12-29(c); N.J.A.C. 6A:28-1.16.

Consistent with the findings of fact, the complainant's allegations have been proven by the preponderance (greater weight) of the competent and credible evidence. N.J.S.A. 52:14B-10(c). There is good cause for the Commission to determine whether the respondent's conduct constituted a violation of the Act and make a recommendation relative to sanction. N.J.S.A. 18A:12-29(c); N.J.A.C. 6A:28-1.15.

ORDER

I **ORDER** the clerk of the OAL to transmit this contested case back to the Commission. The Commission may make a finding and recommendation consistent with N.J.S.A. 18A:12-29, -30; N.J.A.C. 6A:28-1.15.

I hereby **FILE** my initial decision with the **SCHOOL ETHICS COMMISSION**. Pursuant to N.J.S.A. 18A:12-29, the School Ethics Commission has jurisdiction to determine whether a violation of the School Ethics Act occurred. If it concludes that the conduct constitutes a violation of the School Ethics Act, it shall recommend an appropriate penalty to the Commissioner of Education. The Commissioner of Education shall issue the final decision in this matter.

The recommendations of this decision as to whether the conduct constitutes a violation of the School Ethics Act may be adopted, modified or rejected by the **SCHOOL ETHICS COMMISSION**. If the School Ethics Commission does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision.

If the School Ethics Commission determines that a violation has occurred, it shall issue a written decision recommending to the Commissioner of Education an appropriate penalty and shall forward the record, including this recommended decision and its decision, to the Commissioner of Education. The Commissioner of Education may subsequently render a final decision as to the appropriate penalty. If the Commissioner of Education does not render a final decision within forty-five (45) days of its receipt of this initial decision, and unless such time period is otherwise extended, the recommended decision of the School Ethics Commission shall become the final decision.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **SCHOOL ETHICS COMMISSION, DEPARTMENT OF EDUCATION, P.O. Box 500, Trenton, NJ 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 27, 2003
DATE

JOHN R. TASSINI, ALJ
Receipt Acknowledged:

DATE

SCHOOL ETHICS COMMISSION
Mailed to Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

EXHIBITS

For Complainant:

P-1 Minutes of the BOE's May 2, 2000, meeting

For Respondent:

R-1 Affidavit of Thomas Keelen

WITNESSES

For Complainant:

William J. Noe

For Respondent:

Thomas Keelen

	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
IN THE MATTER OF THOMAS KEELEN,	:	
	:	**Docket No.: C06-01**
KEANSBURG BOARD OF EDUCATION MONMOUTH COUNTY	:	**DECISION**

The School Ethics Commission, having reviewed the Initial Decision of the Office of Administrative Law, dated March 27, 2003, determined at its June 24, 2003 public meeting to accept the Initial Decision of the Administrative Law Judge.

The Commission has found that the respondent blatantly disregarded the School Ethics Act, N.J.S.A. 18A:12-21 et seq., by soliciting a contribution to his election campaign for the Keansburg Borough Council, implying that the contribution would affect the possibility of the vendor's future contracts with the Board. The Commission concludes that respondent's conduct constitutes an attempt to use his official position to secure an unwarranted advantage for himself in violation of N.J.S.A. 18A:12-24(b) and the solicitation of a political contribution for the purpose of influencing him directly or indirectly in the discharge of his official duties in violation of N.J.S.A. 18A:12-24(e).

Regarding the penalty, the Commission would have recommended that the Commissioner of Education remove respondent from his position on the Keansburg Board of Education (Board). However, since respondent is no longer a member of the Board, the highest penalty that the Commission can impose is a censure. The Commission therefore recommends that the Commissioner of Education impose a penalty of censure in this matter.

This decision, having been adopted by the Commission, shall now be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction only, pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, the respondent may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Paul C. Garbarini, Chairman

Resolution Adopting Decision – C06-01

Whereas, the School Ethics Commission has considered the pleadings filed by the parties and the documents submitted in support thereof; and

Whereas, the Commission found probable cause to credit the allegations that Thomas Keelen violated N.J.S.A. 18A:12-24(b) and (e) of the School Ethics Act; and

Whereas, the matter was brought before Administrative Law Judge John R. Tassini and the allegations were proven by the preponderance of the competent and credible evidence; and

Whereas, the Commission now finds that respondent violated N.J.S.A. 18A:12-24(b) and (e) of the School Ethics Act and believes that the penalty of removal would have been the appropriate sanction, but may not impose removal since Mr. Keelen is no longer a member of the Board; and

Whereas, since the highest penalty that may be imposed in this matter is censure, the Commission finds that censure is the appropriate sanction;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter finding Thomas Keelen in violation of the Act and recommending that the Commissioner of Education impose a penalty of censure.

Paul C. Garbarini, Chairman

I hereby certify that the School
Ethics Commission adopted this decision
at its public meeting on June 24, 2003.

Lisa James-Beavers
Executive Director

AGENCY DKT. NO. 289-8/03

IN THE MATTER OF THOMAS KEELEN,	:	COMMISSIONER OF EDUCATION
KEANSBURG BOARD OF EDUCATION,	:	DECISION
MONMOUTH COUNTY.	:	

The record of this matter and the decision of the School Ethics Commission ("Commission"), finding that Thomas Keelen, former member of the Keansburg Board of Education, violated *N.J.S.A.* 18A:12-24(b) and (e) of the School Ethics Act, and recommending a penalty of censure have been reviewed. Upon issuance of the decision of the Commission, respondent was provided 13 days from the mailing date of the decision to file written comments on the recommended penalty for the Commissioner's consideration. Respondent submitted no comments.

Initially, it must be emphasized that, pursuant to *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6A:3-9.1, the determination of the Commission as to violation of the School Ethics Act is **not reviewable by the Commissioner** herein. Only the Commission may determine whether a violation of the School Ethics Act occurred. The Commissioner's jurisdiction is limited to reviewing the sanction to be imposed based upon a finding of a violation by the Commission. Therefore, this decision is restricted solely to a review of the Commission's recommended penalty.

Upon a thorough review of the record, the Commissioner concurs with the Commission that the appropriate sanction for respondent's flagrant violations of attempting to use his official position to secure an unwarranted advantage for himself and the solicitation of a

political contribution for the purpose of influencing him directly or indirectly in the discharge of his official duties would have been removal. However, since respondent is no longer a member of the Board, the Commissioner agrees that censure is the appropriate penalty for respondent in this matter. In so ruling, the Commissioner is satisfied from the record before him that, in recommending a penalty for the violations it found, the Commission fully considered the nature of the offenses and weighed the effects of aggravating and mitigating circumstances. Therefore, the Commission's recommended penalty in this matter will not be disturbed.

Accordingly, IT IS hereby ORDERED that Thomas Keelen be censured as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 9/22/03

Date of Mailing: 9/23/03

* This decision, as the Commissioner's final determination regarding penalty in this matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

558-03

BOARD OF EDUCATION OF THE TOWN OF PHILLIPSBURG, WARREN COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning "Abbott" Board of Education claimed the Department was required to provide full State funding for its 2003-04 early childhood education program. The Department had provided Early Childhood Program Aid (ECPA) and Preschool Expansion Aid (PSEA) in accordance with prescribed formulas, but the district contended that additional State monies were required to fully fund the difference between the total of these aids and the approved preschool budget.

The ALJ concluded that the Department correctly calculated the district's ECPA and PSEA, but that this did not end the inquiry. The ALJ concluded that Court, Department and legislative pronouncements, taken together, require that the district's preschool plan be funded entirely by the State, subject to legislative appropriations.

The Commissioner concurred that ECPA and PSEA were correctly calculated, but rejected the conclusion that full State funding of preschool program was required regardless of other funds available in the district budget. The Commissioner held that the State's obligation is to ensure that sufficient funds are available to fully support the district's approved early childhood education plan, with additional State aid to be provided where formula aids and local resources are together inadequate for this purpose. Petition was dismissed.

September 25, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION –
SUMMARY DECISION
OAL DKT. NO. EDU 3423-03
AGENCY DKT. NO. 104-3/03

BOARD OF EDUCATION OF THE TOWN OF PHILLIPSBURG,
Petitioner,
v.
NEW JERSEY DEPARTMENT OF EDUCATION,
Respondent.

Richard E. Shapiro, Esq., for petitioner

Michael C. Walters, Deputy Attorney General, for respondent
(Peter C. Harvey, Acting Attorney General of New Jersey, attorney)

Record Closed: May 19, 2003 Decided: May 21, 2003

BEFORE **KEN R. SPRINGER**, ALJ:

Statement of the Case

This is an appeal by an Abbott school district from the adequacy of state aid granted to fund its early childhood plan for the 2003-2004 fiscal year ("FY 2004"). Petitioner Phillipsburg Board of Education ("Board" or "Phillipsburg") contends that it is entitled to full state funding of its approved preschool program. Phillipsburg seeks an additional $835,034 of state aid required for full state funding of its approved preschool program.

Basically, the New Jersey Department of Education ("Department") denies that the state is legally obligated to provide full funding for Phillipsburg's preschool program. Instead, the Department maintains that preschool funding for Abbott districts may be derived from a combination of sources including, where applicable, local tax share. The Department seeks dismissal of the complaint on two grounds: first, that the amount of Preschool Expansion Aid ("PSEA") awarded to Phillipsburg was correctly calculated in accordance with the relevant statutory provisions; and, second, that this appeal is premature because the Department has not yet determined whether Phillipsburg will receive additional state aid that could be used to support its preschool program.

For the reasons that follow, the state is obligated to fully fund the preschool programs in the Abbott school districts and the Commissioner should seek sufficient appropriations from the Legislature to implement Phillipsburg's approved preschool plan for FY 2004.

Procedural History

On February 14, 2003, the Department approved Phillipsburg's preschool program plan for FY 2004 at a total cost of $3,540,720. By notice dated February 26, 2003, the Department advised Phillipsburg that its estimated PSEA for that year had been determined to be $961,775. (Later, on March 17, 2003, the Department revised these figures upwards by $50,000 to total costs of $3,590,720 and PSEA of $1,011,775).

Phillipsburg filed a verified petition of appeal to the Commissioner of Education ("Commissioner") on March 27, 2003, challenging the adequacy of state funding for its FY 2004 preschool program. Subsequently, on April 4, 2003, the Commissioner transmitted the matter to the Office of Administrative Law ("OAL") for hearing as a contested case.

Both parties filed cross-motions for summary decision, together with supporting briefs, on May 13, 2003. They filed reply briefs, including a certification from Phillipsburg's business administrator/board secretary, on May 16, 2003. In addition, on May 19, 2003, the parties filed a joint stipulation of facts and consented to the admission of joint exhibits.

The OAL heard oral argument on May 19, 2003, on which date the record closed.

Findings of Fact

All of the material facts are stipulated. From the pleadings, joint stipulation and representations of counsel at oral argument, **I FIND** the following facts:

Phillipsburg School District is an Abbott District as defined by *N.J.S.A.* 18A:7F-3 and *N.J.A.C.* 6A:24-1.2. Under New Jersey Supreme Court decisions and Department regulations, the Board has certain programmatic, budgeting and supervisory responsibilities for a preschool program for all eligible three and four year olds residing in the district. Initially, the Department had approved a total budget of $3,393,741 for Phillipsburg to implement its FY 2004 Abbott preschool program. As a result of a prior appeal and settlement negotiations, the Department increased the total approved budget to $3,590,720. Whatever the ultimate source of funding, the parties agree that Phillipsburg has demonstrated a need for $3,590,720 to operate its 2003-2004 preschool program.

Utilizing a statutory formula, the Department calculated Phillipsburg's Early Childhood Program Aid ("ECPA") for FY 2004 to be $1,743,911. Phillipsburg accepts the correctness of this calculation. Additionally, Phillipsburg is eligible for Preschool Expansion Aid ("PSEA"), which the Department calculates as the difference between the total budget for the FY 2004 approved plan and the FY 2002 approved plan. In the 2001-2002 FY, the total budget for Philipsburg's approved preschool plan was

$2,578,945. Consequently, the Department performed the following computation to obtain an initial PSEA of $1,011,775 for Phillipsburg in FY 2004.

FY 2004 Approved Plan	$3,590,720
FY 2001 Approved Plan	-2,578,945
Initial PSEA	$1,011,775

Since total costs of $3,590,720 were approved for FY 2004 and promised state aid comes to $2,755,686, Phillipsburg seeks additional state aid of $835,034. It does not matter to Phillipsburg whether such aid is designated as ECPA, PSEA or something else, so long as the state share fully covers Phillipsburg's approved preschool budget.

Presently, the Department has not yet approved Phillipsburg's school budget for FY 2004 or ascertained whether Phillipsburg might receive "Additional Abbott v. Burke State Aid". According to the Deputy Attorney General, the Department expects to complete its review of Phillipsburg's school budget and allocate any additional state money by May 31, 2003.

Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that the Department should arrange for full state funding of Phillipsburg's approved preschool program for FY 2004.

During oral argument, the Department framed the issue very narrowly in terms of whether it correctly calculated the amount of Phillipsburg's PSEA for FY 2004. State regulations contemplate that Abbott districts will increase the participation of eligible three and four-year old children in preschool programs over a three-year period. Accordingly, the Department set goals of achieving 70% participation in the 2001-2002 school year, 80% participation in the 2002-2003 school year and 90% participation in the 2003-2004 school year and each school year beyond. *N.J.A.C.* 6A:24-3.3(b)(1). To effectuate such anticipated growth, the Legislature appropriated "Preschool Expansion

Aid" to cover increased costs from year to year. In the Governor's Budget Message for FY 2004, this legislative intent is clearly articulated:

> The amount appropriated hereinabove as Abbott Preschool Expansion Aid is for the purpose of funding *the increase in the approved budgeted costs from 2001-2002 to 2003-2004* for the projected expansion of preschool programs in "Abbott districts." Payments of Abbott Preschool Expansion Aid shall be based on documented expansion of the preschool program. (Emphasis Added). (at D120).
> http://www.nj.gov/treasury/omb/publications/04budget/pdf/34.pdf

Guided by the highlighted language, the Department correctly calculated the amount of Phillipsburg's PSEA as equivalent to "the increase in approved budgeted costs from 2001-2002 to 2003-2004." Nearly identical language, except for the years involved, was contained in the Appropriations Act enacted into law for FY 2003. *L.* 2002, *c.* 38.

That conclusion, however, does not end the inquiry. As noted, Phillipsburg does not care how the aid is categorized, as long as it originates from state funds. Phillipsburg argues that the case law, the Legislature's understanding of the constitutional mandate and the Department's own interpretation of its responsibilities all support the proposition that the state must fully fund preschool programs in Abbott districts.

New Jersey's highest court recognizes "that pre-school for three- and four-year olds will have a significant and substantial positive impact on academic achievement in both early and later school years." *Abbott v. Burke*, 153 *N.J.* 480, 506 (1998) ("*Abbott V*"). Recently, the Supreme Court reiterated that high-quality preschool programs for children in Abbott districts "are a critical component of the whole school reform effort." *Abbott v. Burke*, 163 *N.J.* 95, 120 (2000) (*Abbott VI*). Underlying the Commissioner's plan for early childhood programs "is the clear commitment that if there is a need for additional funds, the needed funds will be provided or secured." *Abbott V*, at 518. Phillipsburg asserts that this commitment to provide funding must be viewed in the context of earlier decisions emphasizing the existence of municipal overburden and the

inadequacies of the local tax base. *See, e.g., Abbott v. Burke*, 119 *N.J.* 287, 355-357 (1990) (*Abbott II*); *Abbott v. Burke*, 100 *N.J.* 269, 292-293 (1985) (*Abbott I*). Nonetheless, in *Abbott V*, the State Supreme Court stopped short of declaring a constitutional mandate for preschool education programs. Rather, the Court interpreted the statutory language as evincing "a clear indication that the Legislature understood and endorsed the strong empirical link between early education and later educational achievement." *Abbott V,* at 507.

Language in the Governor's Budget Message for FY 2004, the very document on which the Department relied, reflects continuing legislative concern that the Abbott districts receive full state funding for their preschool programs. Thus, the Governor's proposed budget envisions that:

> The amount appropriated hereinabove for Additional Abbot v. Burke State Aid will provide additional resources to "Abbott districts" *to meet the State's obligation to fully fund parity and the approved early childhood operational plans.* The remaining funds appropriated will be used for the award of discretionary funding to Abbott districts to maintain the programs, services and positions from the prior year that the commissioner determines are essential to the provision of a thorough and efficient education in those districts. (Emphasis Added). (at D-120).

Two important points are readily apparent from this passage. First, the state acknowledges its responsibility to provide *full funding* for early childhood programs and dedicates "Additional Abbott v. Burke State Aid" for that specific purpose. Second, any "remaining funds" may be used for "discretionary" awards for other items deemed by the Commissioner to be "essential" for a thorough and efficient education. Read together, these provisions strongly imply that state reimbursement for the full cost of childhood programs is nondiscretionary.

Significantly, the Governor's Budget Message for FY 2004 does not impose any preconditions on receipt by Abbott districts of additional state aid for preschool programs. In contrast, the Governor's Budget Message requires that, before establishing any "discretionary" funding, the Commissioner "shall determine whether some or all of the additional funds sought can be achieved by reallocating non-

instructional expenditures, increasing the local property tax levy or achieving economies and efficiencies in the delivery of services and programs." (at D-120).

Public pronouncements of the Department have consistently adopted the same approach. As recently as February 6, 2003, a top official of the Department wrote to the Abbott districts that, "The state will meet its obligation to fully fund parity and preschool programs for Abbott districts." Last year, the Department reassured Abbott districts on March 18, 2002 that sufficient state funds would be available "to fully support the district's approved preschool plan." None of these policy statements gave any suggestion that the Department would look to local funding to defray the cost of preschool programs.

Finally, the Department contends that the issues are not ripe for determination and that action on the appeal should be deferred until a determination has been made on additional state aid. Phillipsburg responds that the issue of full state funding is clearly drawn and that it is entitled to immediate relief. Appeals involving school budgets in Abbott districts are of high priority and receive expedited consideration. Since the facts are undisputed and the parties have had adequate opportunity to brief the legal issues, no good reason exists to delay resolution of this dispute.

Order

It is **ORDERED** that summary decision be granted in favor of Phillipsburg.

And it is further **ORDERED** that the Department fully fund Phillipsburg's preschool program for FY 2004, subject to sufficient legislative appropriation.

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

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

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

May 21, 2003
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

May 23 2003
DATE

M. Kathleen Duncan (for)
DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

MAY 27 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

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APPENDIX
List of Exhibits

No.	Description
J-1	Copy of memorandum to Abbott Chief School Administrators and Business Administrators from Richard Rosenberg, Assistant Commissioner, dated March 18, 2002
J-2	Copy of memorandum to All Abbott Superintendents and All Abbott Business Administrators from Gordon MacInnes, Assistant Commissioner and Richard Rosenberg, Assistant Commissioner, dated March 18, 2002
J-3	Copy of letter to H. Gordon Pethick, Chief School Administrator, from Ellen Freede, Ph.D. and Gordon MacInnes, Assistant Commissioner, dated January 6, 2003
J-4	Copy of memorandum to Abbott School Districts from Richard Rosenberg, Assistant Commissioner, dated January 15, 2003
J-5	Copy of memorandum to Chief School Administrators and Board Secretaries/School Business Administrators from Richard Rosenberg, Assistant Commissioner, dated February 6, 2003
J-6	Copy of memorandum to Phillipsburg School District from Richard Rosenberg, Assistant Commissioner, dated February 26, 2003

OAL DKT. NO. EDU 3423-03
AGENCY DKT. NO. 104-3/03

BOARD OF EDUCATION OF THE TOWN OF PHILLIPSBURG, WARREN COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Exceptions were filed by the Department of Education (Department), as were replies by the Board of Education (Board), in accordance with the provisions of *N.J.A.C.* 1:1-18.4 and extensions duly requested and granted. Following enactment of the FY '04 Appropriations Act, a supplemental submission was made by the Department, to which the Board, in turn, replied.

In its exceptions, the Department urges the Commissioner to limit his adoption of the Initial Decision to finding that the Department correctly calculated the amount of the Board's Preschool Expansion Aid (PSEA) for the 2003-04 fiscal year, and to reject Administrative Law Judge (ALJ) Springer's addressing of broader issues in a matter pled solely as an appeal of the Department's February 26, 2003 PSEA determination. The Department contends, as it did in its Letter Brief in Reply to the Board's Motion for Summary Decision at 1-2 and 4, that the February 26 determination under appeal was confined to the issue of PSEA and "neither calculates nor advises [the

Board] of the amount of Additional *Abbott v. Burke* State aid that it will receive" so that any assertion by the Board regarding such aid is "entirely inappropriate" in the present proceeding. Instead, the Department argues, the Board's entitlement to Additional *Abbott v. Burke* State aid was the subject of a May 30, 2003 Department determination which the Board appealed on June 5, 2003 in accordance with the expedited schedule established by the Supreme Court on May 21, 2003, so that consideration of additional aid in the current context is misplaced. (Department's Exceptions at 1-3, quotation at 2)

The Department further contends that the ALJ erred in interpreting the Governor's Budget Message for FY '04, on which he relied in concluding that the Board's approved Early Childhood Plan must be fully funded with State aid, that is, with a combination of Early Childhood Program Aid, PSEA and Additional *Abbott v. Burke* Aid. Instead, the Department urges, the pertinent language should be read as "requiring the Department to *ensure that there are sufficient funds in [the Board's] budget* to support the approved Early Childhood Plan," with such funds deriving from both State aids and the local tax share where available. (Department's Exceptions at 4-6, quotation at 5-6, emphasis supplied) The Department argues:

> In *Abbott v. Burke*, 153 *N.J.* 480 (1998), the Supreme Court opined, "the Commissioner may, before seeking new appropriations, first determine whether funds within an existing school budget are sufficient to meet a school's request for a demonstrably needed supplemental program." *Id.* at 518. The Court further opined, "[u]nderlying the Commissioner's proposal for whole-school reform, early childhood programs and supplemental programs, is the clear commitment that *if there is a need for additional funds*, the needed funds will be provided or secured." *Ibid.* (emphasis added).
>
> The above-quoted language demonstrates that the Supreme Court intended for the Commissioner to ensure that the early childhood programs are fully funded, however, the Commissioner could first determine whether funds within an existing school budget are sufficient to meet a school's request for such programs. Because local tax levy is included [in] the budget, the

> Commissioner can consider those funds as well as other revenue supporting the budget when determining the amount of Additional *Abbott v. Burke* State aid, if any, that a district needs.
>
> (Department's Exceptions at 5)

The Department buttresses its position with the language of the FY '04 Appropriations Act, adopted by the Legislature and signed by the Governor as *P.L.* 2003, *c.*122, contrasting that language with the earlier Governor's Budget Message as cited in the Initial Decision at 6.[1] The Department urges:

> Notably, the Governor's Budget Message for FY04 provided: "The amount appropriated hereinabove for Additional *Abbott v. Burke* State Aid will provide additional resources to 'Abbott districts' to meet the State's obligation to fully fund parity and *the approved early childhood operational plans*." (Emphasis added). The FY04 Appropriations Act provides: "The amount appropriated hereinabove for Additional Abbott v. Burke State Aid will provide additional resources to 'Abbott districts' to meet the State's obligation to fully fund parity *and approved 'Abbott' preschool expansion*." *L.* 2003, *c.* 122.
>
> ***
>
> Here, the Legislature revised the language contained in the Governor's Budget Message to clarify that, contrary to Judge Springer's interpretation, the Department is not required to ensure that Phillipsburg's approved Early Childhood Plan is fully funded with State aid such as Additional *Abbott v. Burke* State aid. By purposefully deleting the words "early childhood operational plans" from the Governor's Budget Message and replacing those words in the FY04 Act with "'Abbott' preschool expansion," the FY04 Act unequivocally demonstrates that, while the Department must ensure that Phillipsburg's "approved 'Abbott' expansion" is fully funded with State aid, the Department is not required to ensure that Phillipsburg's approved "early childhood operational plan" is fully funded with State aid. Moreover, this revision is consistent with the method, established in the FY04 Act, by which Preschool Expansion Aid is calculated. "funding the increase in the approved budgeted costs from 2001-2002 to 2003-2004 for the projected expansion of preschool programs in "Abbott districts." *L.* 2003, *c.* 122.
>
> (Department's Supplemental Submission at 2-3)

In reply to the Department's threshold objections, the Board counters that the ALJ did *not* address issues outside the scope of the pleadings, since the Petition of

[1] The Department added this argument in the post-exceptions submission noted at page 10 above.

Appeal not only challenged the amount of PSEA awarded the Board, but also the Department's failure to fully fund the Board's approved preschool program.[2] (Board's Reply Exceptions at 2-4) The Board further objects to the Department's protestation over the scope of the ALJ's ruling, noting that the Department itself raised the issue of full funding by arguing, in its initial brief in support of a motion for summary decision, that " 'as a matter of law,' while the State must ensure that Phillipsburg's preschool program is fully funded, there is not a concomitant obligation that such funding be provided by the State," and that the Department "sought summary decision based on the claim that there was no State obligation to fully fund the DOE-approved preschool program with State funds; the [Department] cannot now be heard to complain that the ALJ ruled adversely to the [Department] on the very 'matter of law' asserted by the [Department]." (*Id.* at 4-5, quoting Department's Letter Brief of May 13, 2003 at 8) Neither, the Board alleges, can the Department claim that the Initial Decision wrongly addresses yet-to-be-determined Additional *Abbott v. Burke* Aid; this claim "disingenuously misconstrues" the Initial Decision, which did *not* find that the Board was owed Additional *Abbott v. Burke* Aid, but rather concluded that the State had an obligation, to be met however the State deemed fit, to provide full State funding for approved preschool programs, subject to legislative appropriations. (*Id.* at 5-6, quotation at 6) The Board urges that deferral of the question of full State funding makes no sense as a matter of public interest, since the question will only recur later if not resolved here, where it has already been fully briefed and considered. (*Id.* at 6-7)

[2] The Board points to its claim for relief, and also to ¶¶ 4, 7, 11, 13, 14, 18 and 20 of the Verified Petition, noting that while PSEA is mentioned, "the gist of these claims is that the State must fully fund the DOE-approved preschool program with State funds." (Board's Reply Exceptions at 3-4, quotation at 3)

In reply to the Department's further exceptions, the Board references its arguments made before, and adopted by, the ALJ, and offers the additional argument that the Supreme Court's decision in *Abbott V, supra,* nowhere intimates that preschool programs should or could be funded in part by local tax share; indeed, the Board avers, the Court's decision was based on the recommendations of the Honorable Michael King, P.J.A.D., sitting as the remand court, and, while the Court disagreed with Judge King regarding full-day preschool, it "did not take issue with his conclusion that preschool would be funded by ECPA, T&E, parity funds and the incremental State funding needed to fully fund the preschool program." (Board's Reply Exceptions at 7-9, quotation at 8-9) Finally, the Board offers the Office of Legislative Services' analysis of the Department's FY '03 budget, explaining the purpose of PSEA as a new line item funding the increase in costs between 2001-02 and 2002-03 for programs which had been, "[u]p until this time***funded through a combination of Early Childhood Program Aid and Additional *Abbott v. Burke* Aid." This excerpt, the Board opines, "reflects the Legislature's clear understanding that prior to the 2001-02 school year, the State had fully funded preschool with State funds and that PSEA was to ensure full state funding for any increase in 2002-03 over 2001-02. Thus, when the FY '04 Appropriations Act provides that PSEA in 2003-04 is to fund the difference between the 2002-03 program and the 2003-04 program, the evident legislative intent is to continue the full State funding in effect prior to the 2001-02 school year -- and extended into the 2002-03 school year by PSEA -- into the 2003-04 school year." (*Id.* at 9-10, quotation at 10)

Moreover, the Board counters, the Department errs in claiming that the language of the Appropriations Act as finally adopted by the Legislature supports its

position, since the Initial Decision does not, as the Department alleges, rely exclusively on the earlier Governor's Budget Message, but rather places that message in the context of continuing expressions of legislative concern, the *Abbott* decisions, and the Department's repeated public pronouncements. (Board's Supplemental Submission at 1-2) Additionally,

> [t]he FY ['04] Appropriations Act still links the Additional *Abbott v. Burke* State Aid to the "State's obligation" to fully fund parity and approved Abbott preschool expansion. Significantly, the language is not limited to the formula for funding approved preschool expansion *aid*, but rather to the funding of preschool expansion. Moreover, the FY Appropriations Act does not define what the Legislature meant by the State's obligation so the Commissioner must "employ extrinsic aids, such as legislative intent or prior precedent, to interpret the language at issue." *In re Passaic County Util. Auth.*, 164 *N.J.* 270, 300 (2000) (citation omitted). (*Id.* at 3)

Thus, the Board concludes, "properly construed under governing legal principles," the FY '04 Appropriations Act not only fails to support the Department's position, but actually "reinforces the correctness" of the Initial Decision. (*Id.* at 4)

Upon his own review and consideration, the Commissioner initially concurs with the ALJ and the Board that the issue to be decided in this matter is not limited strictly to the question of whether the Department correctly calculated the amount of PSEA due the district for 2003-04. Notwithstanding that the Petition of Appeal was, in fact, pled largely in terms of PSEA as claimed by the Department, the Commissioner finds it in the best interest of both the parties in this matter and Abbott districts generally to decide the broader question squarely underlying the Board's specific allegations, that is, the question of whether Court, legislative and Department pronouncements, alone or in combination, require that the entire cost of approved Abbott preschool programs be funded, dollar for dollar, exclusively by the State.

The ALJ answered this question in the affirmative, based on legislative intent as expressed through the Governor's FY '04 Budget Message, read in light of 1) Court language recognizing preschool as a critical component of Abbott reform efforts although not a constitutional mandate and acknowledging the statutory endorsement of the link between preschool and later educational achievement; 2) prior enactments reflecting the Legislature's concern with fully funded early childhood education in Abbott districts; and 3) Department pronouncements expressing clear commitment to full funding of preschool programs.

The Commissioner, however, cannot concur with the ALJ's analysis. With respect to the requirements of the Court, nowhere in the *Abbott* decisions is there a suggestion, let alone a directive, that approved Abbott preschool programs must be funded *exclusively* by the State. On exception, the Board argues implicit endorsement of its position by the Court's silence in response to Judge King's statement that preschool would be funded by ECPA, T&E, parity funds and "the incremental State funding needed to fully fund the preschool program," with no mention of local revenues. (Board's Reply Exceptions at 8-9) Similarly, based on the Board's earlier arguments, the ALJ cites to the Court's concern with municipal overburden and Abbott districts' inadequate tax bases and to its language referencing the State's "clear commitment that if there is a need for additional funds, the needed funds will be provided or secured." (Initial Decision at 5) These statements, however, do not even on their face require State funding regardless of need. Rather, they provide for the State to ensure, with additional aid if necessary, that sufficient funds are available to the district to fully fund its preschool program, that is, to ensure that any gap remaining after receipt of statutory formula aids will be addressed by

the State *to the extent that need exists* because funds otherwise available to the district are insufficient to fully support the approved program. This reading is consonant not only with the Court's actual language and concern with local taxation capabilities, but also with its overall recognition that, while adequate funding is critical to achievement of a thorough and efficient system of public education in Abbott districts, such funding is a shared responsibility between the State and the local district.

Taken within the proper framework, then, the proffered Department pronouncements regarding "full funding" of Abbott preschool programs cannot be viewed as promises or expectations of dollar-for-dollar State funding regardless of resources available in the local district budget. Rather, they must be understood as reflections of the Department's commitment, and recognition of its obligation, to provide or secure additional State funds to the full degree necessary to support approved programs where local budgetary resources, including formula aids, local levies and monies realized through economies, efficiencies and reallocations, are found inadequate for this purpose. Indeed, this is the only interpretation consistent with sound educational policy, which must recognize *both* the critical importance of ensuring that approved Abbott preschool programs are supported by sufficient funds *and* the necessity to allocate State and local resources as efficiently and effectively as possible in meeting the shared responsibility for education in Abbott districts.

Finally, the Commissioner cannot ignore that the Legislature has now spoken definitively on the question posed by this appeal. Even granting, *arguendo*, that prior Legislatures provided for full State funding of Abbott district early childhood operational plans during the first years of their development, and that the Governor's

Budget Message for FY '04 appeared to continue that pattern, the current Legislature has acted deliberately and decisively to clarify that its intent for the FY '04 budget year is to provide additional funding for *only* those costs directly associated with approved program expansion, not for the entire early childhood operational plan. In that regard, it is noted that there is no question, nor does the Board except to the ALJ's conclusion, that the Department correctly calculated the district's PSEA in accordance with the prescribed legislative formula.

Accordingly, for the reasons set forth above, the Initial Decision of the Office of Administrative Law is rejected except insofar as it concludes that the Department correctly calculated petitioner's ECPA and PSEA for 2003-04. The Petition of Appeal, therefore, is dismissed in its entirety.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 9/25/03

Date of Mailing: 9/26/03

[3] Pursuant to P.L. 2003, c. 122, "*Abbott*" determinations are final agency actions appealable directly to the Appellate Division of the New Jersey Superior Court.

559-03

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

SYNOPSIS

Petitioning "Abbott" Board of Education claimed the Department was required to provide full State funding for its 2003-04 early childhood education program. The Department had provided Early Childhood Program Aid (ECPA) and Preschool Expansion Aid (PSEA) in accordance with prescribed formulas, but the district contended that additional State monies were required to fully fund the difference between the total of these aids and the approved preschool budget.

The ALJ concluded that the Department correctly calculated the district's ECPA and PSEA, but that this did not end the inquiry. The ALJ concluded that Court, Department and legislative pronouncements, taken together, require that the district's preschool plan be funded entirely by the State, subject to legislative appropriations.

The Commissioner concurred that ECPA and PSEA were correctly calculated, but rejected the conclusion that full State funding of preschool program was required regardless of other funds available in the district budget. The Commissioner held that the State's obligation is to ensure that sufficient funds are available to fully support the district's approved early childhood education plan, with additional State aid to be provided where formula aids and local resources are together inadequate for this purpose. Petition was dismissed.

September 25, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 2202-03

AGENCY DKT. NO. 107-3/03

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

Petitioner,

v.

NEW JERSEY STATE
DEPARTMENT OF EDUCATION,

Respondent.

Richard E. Shapiro, Esq., for petitioner

Michael C. Walters, Deputy Attorney General, for respondent (Peter C. Harvey, Attorney General of New Jersey, attorney)

Record Closed: June 9, 2003 Decided: July 2, 2003

BEFORE **JOSEPH F. MARTONE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This is an appeal by the Neptune Township School District, which is an *Abbott* school district, challenging the adequacy of State aid granted to fund its early childhood plan for the 2004 fiscal year (FY 2004). Neptune filed a verified petition of appeal with the Commissioner of Education (Commissioner) on March 27, 2003, and on April 9, 2003, the matter was transmitted

the matter to the Office of Administrative Law (OAL) for hearing as a contested case. The Department filed an answer to the petition on April 23, 2003.

Petitioner's Board of Education (Board or Neptune) contends that it is entitled to full state funding of its approved preschool program. Neptune seeks an additional $3,768,176 of State aid which it contends is required for full State funding of its approved preschool program.

The New Jersey Department of Education (Department) denies that the State is legally obligated to provide full funding for Neptune's preschool program. Instead, the Department takes the position that preschool funding for *Abbott* districts may be derived from a combination of sources including, where applicable, local tax share. The Department seeks dismissal of the complaint on two grounds: first, that the amount of Preschool Expansion Aid (PSEA) awarded to Neptune was correctly calculated in accordance with the relevant statutory provisions; and, second, that this appeal is premature because the Department has not yet determined whether Neptune will receive additional state aid that could be used to support its preschool program.

The matter was assigned to me on or about May 6, 2003. A telephone conference was scheduled for May 22, 2003 and a hearing was scheduled to commence on June 6, 2003.

On and after May 27, 2003, after consultation with the attorneys, it was learned that the Honorable Ken R. Springer, ALJ had issued an initial decision in a matter entitled *Board of Education of the Town of Phillipsburg v. New Jersey Department of Education*, OAL Dkt. No. EDU 3423-03, Agency Dkt. No. 104-3/03, decided May 21, 2003. In that case, the identical legal issue based on similar facts was addressed by Judge Springer. I indicated to the attorneys that I had reviewed Judge Springer's initial decision and that my impression was that I agreed with his legal conclusion. The attorneys agreed to proceed in this matter by stipulating the essential facts and by relying upon their legal arguments in prior similar cases. I could then reach a conclusion without the necessity for an evidentiary hearing. Based on this agreement, the attorneys supplied me with an agreed upon statement of figures (J-1) and their prior submissions which have been marked in evidence (P-1 through P-4, R-1 through R-5). Upon receiving the written submissions, the record in this matter closed on June 9, 2003.

FACTUAL DISCUSSION

All of the material facts in this matter are either stipulated or undisputed. From the pleadings and the representations of counsel, **I FIND** the following facts:

The Neptune Township School District is an *Abbott* District as defined by *N.J.S.A.* 18A:7F-3 and *N.J.A.C.* 6A:24-1.2. Under New Jersey Supreme Court decisions and Department regulations, the school district has certain programmatic, budgeting and supervisory responsibilities for a preschool program for all eligible three- and four-year-olds residing in the district.

It has been stipulated and agreed by and between the parties that the Department has approved Neptune's Early Childhood Plan for the 2003-2004 school year in the amount of $5,967,430. Also, for the 2003-2004 school year, the Department's initial award to Neptune of PSEA was $114,545 and Neptune's Early Childhood Program Aid (ECPA) was $2,084,709. Accordingly, the approved amount of Neptune's 2003-2004 Early Childhood Plan exceeds the aggregate of Neptune's ECPA and PSEA by $3,768,176.

Utilizing a statutory formula, the Department calculated Neptune's ECPA for FY 2004 to be $2,084,709. There has been no challenge to the correctness of this calculation. Additionally, Neptune is eligible for PSEA, which the Department calculates as the difference between the total budget for the FY 2004 approved plan and the FY 2002 approved plan. In the 2001-2002 FY, the total budget for Neptune's approved preschool plan was $5,852,885. Consequently, the Department performed the following computation to obtain an initial PSEA of $114,545 for Neptune in FY 2004.

FY 2004 Approved Plan	$5,967,430
FY 2001 Approved Plan	-5,852,885
Initial PSEA	$ 114,545

Since total costs of $5,967,430 were approved for FY 2004 and promised state aid comes to $2,199,254 Neptune seeks additional state aid of $3,768,176. It does not matter to Neptune

whether such aid is designated as ECPA, PSEA or something else, so long as the State share fully covers Neptune's approved preschool budget.

LEGAL DISCUSSION

In this matter, it is undisputed that the Department has approved a total budget of $5,967,430 for Neptune to implement its FY 2004 *Abbott* preschool program. Whatever the ultimate source of funding, Neptune has demonstrated a need for $5,967,430 to operate its 2003-2004 preschool program. Based on the foregoing facts and the applicable law, and giving full credit to Judge Springer for his well-reasoned decision in *Board of Education of the Town of Phillipsburg v. New Jersey Department of Education*, OAL Dkt. No. EDU 3423-03, Agency Dkt. No. 104-3/03, (decided May 21, 2003), I have also concluded that the Department is obligated to fully fund the preschool programs in the *Abbott* school districts. Therefore, the Commissioner should seek sufficient appropriations from the Legislature to implement Neptune's approved Early Childhood Program for FY 2004.

As stated by Judge Springer in the *Phillipsburg* case, State regulations contemplate that *Abbott* districts will increase the participation of eligible three- and four-year- old children in preschool programs over a three-year period. Accordingly, the Department set goals of achieving 70% participation in the 2001-2002 school year, 80% participation in the 2002-2003 school year and 90% participation in the 2003-2004 school year and each school year beyond. *N.J.A.*C. 6A:24-3.3(b)(1). To effectuate such anticipated growth, the Legislature appropriated "Preschool Expansion Aid" to cover increased costs from year to year. In the Governor's Budget Message for FY 2004, this legislative intent is clearly articulated:

> The amount appropriated hereinabove as *Abbott* Preschool Expansion Aid is for the purpose of funding *the increase in the approved budgeted costs from 2001-2002 to 2003-2004* for the projected expansion of preschool programs in "*Abbott* districts." Payments of *Abbott* Preschool Expansion Aid shall be based on documented expansion of the preschool program. (Emphasis Added). (at D120).
>
> *http://www.nj.gov/treasury/omb/publications/04budget/pdf/34.pdf*

Guided by the highlighted language, the Department correctly calculated the amount of Neptune's PSEA as equivalent to "the increase in approved budgeted costs from 2001-2002 to 2003-2004." Nearly identical language, except for the years involved, was contained in the Appropriations Act enacted into law for FY 2003. *L.* 2002, *c.* 38.

That conclusion, however, does not end the inquiry. As noted, Neptune does not care how the aid is categorized, as long as it originates from state funds. Neptune argues that the case law, the Legislature's understanding of the constitutional mandate and the Department's own interpretation of its responsibilities all support the proposition that the State must fully fund preschool programs in *Abbott* districts.

New Jersey's highest court recognizes "that pre-school for three- and four-year olds will have a significant and substantial positive impact on academic achievement in both early and later school years." *Abbott v. Burke*, 153 *N.J.* 480, 506 (1998) (*Abbott V*). Recently, the Supreme Court reiterated that high-quality preschool programs for children in *Abbott* districts "are a critical component of the whole school reform effort." *Abbott v. Burke*, 163 *N.J.* 95, 120 (2000) (*Abbott VI*). Underlying the Commissioner's plan for early childhood programs "is the clear commitment that if there is a need for additional funds, the needed funds will be provided or secured." *Abbott V*, at 518. This commitment to provide funding must be viewed in the context of earlier decisions emphasizing the existence of municipal overburden and the inadequacies of the local tax base. *See, e.g., Abbott v. Burke*, 119 *N.J.* 287, 355-357 (1990) (*Abbott II*); *Abbott v. Burke*, 100 *N.J.* 269, 292-293 (1985) (*Abbott I*). In *Abbott V*, the State Supreme Court stopped short of declaring a constitutional mandate for preschool education programs. Rather, the Court interpreted the statutory language as evincing "a clear indication that the Legislature understood and endorsed the strong empirical link between early education and later educational achievement." *Abbott V,* at 507.

Language in the Governor's Budget Message for FY 2004 reflects continuing legislative concern that *Abbott* districts receive full state funding for their preschool programs. Thus, the Governor's proposed budget envisions that:

> The amount appropriated hereinabove for Additional Abbot v. Burke State Aid will provide additional resources to "*Abbott* districts" *to meet the State's obligation to fully fund parity and the approved early childhood operational plans.* The remaining funds appropriated will be used for the award of discretionary funding to *Abbott* districts to maintain the programs, services and positions from the prior year that the commissioner determines are essential to the provision of a thorough and efficient education in those districts. (Emphasis Added). (at D-120).

Two important points are readily apparent from this passage. First, the State acknowledges its responsibility to provide *full funding* for early childhood programs and dedicates "Additional *Abbott v. Burke* State Aid" for that specific purpose. Second, any "remaining funds" may be used for "discretionary" awards for other items deemed by the Commissioner to be "essential" for a thorough and efficient education. Read together, these provisions strongly imply that State reimbursement for the full cost of early childhood programs is nondiscretionary.

Significantly, the Governor's Budget Message for FY 2004 does not impose any preconditions on receipt by *Abbott* districts of additional state aid for preschool programs. In contrast, the Governor's Budget Message requires that, before establishing any "discretionary" funding, the Commissioner "shall determine whether some or all of the additional funds sought can be achieved by reallocating non-instructional expenditures, increasing the local property tax levy or achieving economies and efficiencies in the delivery of services and programs." (at D-120).

Public pronouncements of the Department have consistently adopted the same approach. As recently as February 6, 2003, a top official of the Department wrote to the *Abbott* districts that, "The state will meet its obligation to fully fund parity and preschool programs for *Abbott* districts." Last year, the Department reassured *Abbott* districts on March 18, 2002, that sufficient State funds would be available "to fully support the district's approved preschool plan." None of these policy statements gave any suggestion that the Department would look to local funding to defray the cost of preschool programs.

Finally, the Department contends that the issues are not ripe for determination and that action on the appeal should be deferred until a determination has been made on additional state aid. The school district's response is that the issue of full state funding is clearly drawn and that it is entitled to immediate relief. Appeals involving school budgets in *Abbott* districts are of high priority and receive expedited consideration. Since the facts are undisputed and the parties have had adequate opportunity to brief the legal issues, no good reason exists to delay resolution of this dispute.

DECISION AND ORDER

It is **ORDERED** that summary decision be granted in favor of petitioner Board of Education of the Township of Neptune. It is further **ORDERED** that the Department fully fund the Neptune Township School District early childhood program for FY 2004, subject to sufficient legislative appropriation.

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

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

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

July 2, 2003
DATE

JOSEPH F. MARTONE, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

July 2 2003 lam
DATE

Mailed to Parties:

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

JUL 8 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

/lam

APPENDIX:

LIST OF EXHIBITS:

Joint exhibits:

J-1 Letter of Michael Walters, Deputy Attorney General, dated June 5, 2003, setting forth the agreed upon figures applicable herein

For petitioner:

P-1 Letter brief dated May 14, 2003, in *Board of Education of the Town of Phillipsburg v. New Jersey Dept. of Education*, OAL Dkt. No. EDU 3423-03

P-2 Letter brief dated May 16, 2003, in *Board of Education of the Town of Phillipsburg v. New Jersey Dept. of Education*, OAL Dkt. No. EDU 3423-03

P-3 Letter brief dated May 22, 2003 in *Board of Education of the Township of Pemberton v. New Jersey Department of Education*, OAL Dkt. No. EDU 2203-03

P-4 Letter brief dated June 1, 2003 in *Board of Education of the Township of Pemberton v. New Jersey Department of Education*, OAL Dkt. No. EDU 2203-03

For respondent:

R-1 Letter brief dated May 13, 2003, in *Board of Education of the Town of Phillipsburg v. New Jersey Dept. of Education*, OAL Dkt. No. EDU 3423-03

R-2 Reply letter brief dated May 16, 2003 in *Board of Education of the Town of Phillipsburg v. New Jersey Dept. of Education*, OAL Dkt. No. EDU 3423-03

R-3 Letter brief and supporting certification dated May 27, 2003 in *Board of Education of the Town of Phillipsburg v. New Jersey Department of Education*, OAL Dkt. No. EDU 3423-03

R-4 Letter brief dated May 26, 2003 in *Board of Education of the Township of Pemberton v. New Jersey Department of Education*, OAL Dkt. No. EDU 2203-03

R-4 Certification of Yut'Se O. Thomas in *Board of Education of the Township of Pemberton v. New Jersey Department of Education*, OAL Dkt. No. EDU 2203-03

OAL DKT. NO. EDU 2202-03
AGENCY DKT. NO. 107-3/03

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

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Exceptions were filed by the Department of Education (Department), as were replies by the Board of Education (Board), in accordance with the provisions of *N.J.A.C.* 1:1-18.4.

In its exceptions, the Department urges the Commissioner to limit his adoption of the Initial Decision to finding that the Department correctly calculated the amount of the Board's Preschool Expansion Aid (PSEA) for the 2003-04 fiscal year, and to reject Administrative Law Judge (ALJ) Martone's addressing of broader issues in a matter pled solely as an appeal of the Department's February 26, 2003 PSEA determination. The Department contends that the February 26 determination under appeal was confined to the issue of PSEA and "neither calculates nor advises [the Board] of the amount of Additional *Abbott v. Burke* State aid that it will receive" so that any assertion by the Board regarding such aid is "entirely inappropriate" in the present proceeding. (Department's Exceptions at 1-3, quotation at 2-3)

The Department further contends that the ALJ erred in relying on the Governor's Budget Message for FY '04 in concluding that the Board's approved Early Childhood Plan must be fully funded with State aid, since the FY '04 Appropriations Act, adopted by the Legislature and signed by the Governor as *P.L.* 2003, *c.*122, expressly revised the earlier Governor's Budget Message language as cited in the Initial Decision. The Department urges:

> Notably, the Governor's Budget Message for FY04 provided: "The amount appropriated hereinabove for Additional *Abbott v. Burke* State Aid will provide additional resources to 'Abbott districts' to meet the State's obligation to fully fund parity and *the approved early childhood operational plans*." (Emphasis added). The FY04 Appropriations Act provides: "The amount appropriated hereinabove for Additional Abbott v. Burke State Aid will provide additional resources to 'Abbott districts' to meet the State's obligation to fully fund parity *and approved 'Abbott' preschool expansion*." *L.* 2003, *c.* 122.
>
> ***
>
> Here, the Legislature revised the language contained in the Governor's Budget Message to clarify that, contrary to Judge Martone's interpretation, the Department is not required to ensure that Neptune's approved Early Childhood Plan is fully funded with State aid. By purposefully deleting the words "early childhood operational plans" from the Governor's Budget Message and replacing those words in the FY04 Act with "'Abbott' preschool expansion," the FY04 Act unequivocally demonstrates that, while the Department must ensure that Neptune's "approved 'Abbott' expansion" is fully funded with State aid, the Department is not required to ensure that Neptune's approved "early childhood operational plan" is fully funded with State aid. Moreover, this revision is consistent with the method, established in the FY04 Act, by which Preschool Expansion Aid is calculated: "funding the increase in the approved budgeted costs from 2001-2002 to 2003-2004 for the projected expansion of preschool programs in "Abbott districts." *L.* 2003, *c.* 122. (Department's Exceptions at 4-5)

This interpretation, the Department avers, is consistent with the Court's language concerning Additional *Abbott v. Burke* Aid. The Department argues:

> In *Abbott v. Burke*, 153 *N.J.* 480 (1998), the Supreme Court opined, "the Commissioner may, before seeking new appropriations, first determine whether funds within an existing school budget are sufficient to meet a school's request for a demonstrably needed supplemental program." *Id.* at 518. The Court further opined, "[u]nderlying the Commissioner's proposal for whole-school reform, early childhood programs and supplemental programs, is the clear commitment that *if there is a need for additional funds*, the needed funds will be provided or secured." *Ibid.* (emphasis added).
>
> The above-quoted language demonstrates that the Supreme Court intended for the Commissioner to ensure that the early childhood programs are fully funded, however, the Commissioner could first determine whether funds within an existing school budget are sufficient to meet a school's request for such programs. Because local tax levy is included [in] the budget, the Commissioner can consider those funds as well as other revenue supporting the budget when determining the amount of Additional *Abbott v. Burke* State aid, if any, that a district needs. (*Id.* at 5-6)

In reply, the Board counters that the ALJ did *not* address issues outside the scope of the pleadings, since the Petition of Appeal not only challenged the amount of PSEA awarded the Board, but also the Department's failure to fully fund the Board's approved preschool program.[1] (Board's Reply Exceptions at 2-4) The Board further objects to the Department's protestation over the scope of the ALJ's ruling, noting that the Department itself raised the issue of full funding by arguing, in its initial brief in support of a motion for summary decision, that "'as a matter of law,' while the State must ensure that Neptune's preschool program is fully funded, there is not a concomitant obligation that such funding be provided by the State," and that the Department "sought summary decision based on the claim that there was no State obligation to fully fund the DOE-approved preschool program with State funds; the [Department] cannot now be heard to complain that the ALJ ruled adversely to the [Department] on the very 'matter of

[1] The Board points to its claim for relief, and also to ¶¶ 4, 7, 11, 13, 14, 18 and 20 of the Verified Petition, noting that while PSEA is mentioned, "the gravamen of [these] claims is that the State must fully fund the DOE-approved preschool program with State funds." (Board's Reply Exceptions at 3-4, quotation at 3)

law' asserted by the [Department]." (*Id.* at 4-5, quoting Department's *Phillipsburg*[2] Letter Brief of May 13, 2003 at 8) Neither, the Board alleges, can the Department claim that the Initial Decision wrongly addresses yet-to-be-determined Additional *Abbott v. Burke* Aid; this claim "disingenuously misconstrues" the Initial Decision, which did *not* find that the Board was owed Additional *Abbott v. Burke* Aid, but rather concluded that the State had an obligation, to be met however the State deemed fit, to provide full State funding for approved preschool programs, subject to legislative appropriations. (*Id.* at 5-6, quotation at 6) The Board urges that deferral of the question of full State funding makes no sense as a matter of public interest, since the question will only recur later if not resolved here, where it has already been fully briefed and considered. (*Id.* at 6-7)

The Board next proffers that the Supreme Court's decision in *Abbott V, supra,* nowhere intimates that preschool programs should or could be funded in part by local tax share; indeed, the Board avers, the Court's decision was based on the recommendations of the Honorable Michael King, P.J.A.D., sitting as the remand court, and, while the Court disagreed with Judge King regarding full-day preschool, it "did not take issue with his conclusion that preschool would be funded by ECPA, T&E, parity funds and the incremental State funding needed to fully fund the preschool program." (Board's Reply Exceptions at 7-10, quotation at 8) Finally, the Board offers the Office of Legislative Services' analysis of the Department's FY '03 budget, explaining the purpose of PSEA as a new line item funding the increase in costs between 2001-02 and 2002-03 for programs which had been, "[u]p until this time***funded through a

[2] As noted in the Initial Decision at 2, the parties in this matter agreed to incorporate and rely upon submissions and arguments made in the matter of *Board of Education of the Town of Phillipsburg, Warren County, v. New Jersey State Department of Education*, OAL Dkt. No. EDU 3423-03, Agency Dkt. No. 104-3/03. As indicated below, that matter was decided by the Commissioner on September 25, 2003.

combination of Early Childhood Program Aid and Additional *Abbott v. Burke* Aid." This excerpt, the Board opines, "reflects the Legislature's clear understanding that prior to the 2001-02 school year, the State had fully funded preschool with State funds and that PSEA was to ensure full state funding for any increase in 2002-03 over 2001-02. Thus, when the FY 04 Appropriations Act provides that PSEA in 2003-04 is to fund the difference between the 2002-03 program and the 2003-04 program, the evident legislative intent is to continue the full State funding in effect prior to the 2001-02 school year -- and extended into the 2002-03 school year by PSEA -- into the 2003-04 school year." (*Id.* at 9-10, quotation at 9-10)

Finally, the Board contends that the Department errs in claiming that the language of the Appropriations Act as ultimately adopted by the Legislature supports its position. According to the Board, the Initial Decision does not, as the Department alleges, rely exclusively on the earlier Governor's Budget Message, but rather places that message in the context of continuing expressions of legislative concern, the *Abbott* decisions, and the Department's repeated public pronouncements. (*Id.* at 10-11) Additionally,

> [t]he FY ['04] Appropriations Act still links the Additional *Abbott v. Burke* State Aid to the "State's obligation" to fully fund parity and approved Abbott preschool expansion. Significantly, the language is not limited to the formula for funding approved preschool expansion *aid*, but rather to the funding of preschool expansion. Moreover, the FY Appropriations Act does not define what the Legislature meant by the State's obligation so the Commissioner must "employ extrinsic aids, such as legislative intent or prior precedent, to interpret the language at issue." *In re Passaic County Util. Auth.*, 164 *N.J.* 270, 300 (2000) (citation omitted). (*Id.* at 11-12)

Thus, the Board concludes, "properly construed under governing legal principles," the FY '04 Appropriations Act not only fails to support the Department's position, but actually "reinforces the correctness" of the Initial Decision. (*Id.* at 12)

Upon his own review and consideration, as he did in the matter of *Board of Education of the Town of Phillipsburg, Warren County, v. New Jersey State Department of Education*, decided on September 25, 2003, subsequent to issuance of the Initial Decision herein, the Commissioner first concurs with the ALJ and the Board that the instant matter is not limited strictly to the question of whether the Department correctly calculated the amount of PSEA due the district for 2003-04. Notwithstanding that the Petition of Appeal was, in fact, pled largely in terms of PSEA as claimed by the Department, the Commissioner finds it in the best interest of both the parties in this matter and Abbott districts generally to decide the broader question squarely underlying the Board's specific allegations, that is, the question of whether Court, legislative and Department pronouncements, alone or in combination, require that the entire cost of approved Abbott preschool programs be funded, dollar for dollar, exclusively by the State.

The ALJ, concurring with the Initial Decision in *Phillipsburg*, *supra,* answered this question in the affirmative based on legislative intent as expressed through the Governor's FY '04 Budget Message, read in light of 1) Court language recognizing preschool as a critical component of Abbott reform efforts although not a constitutional mandate and acknowledging the statutory endorsement of the link between preschool and later educational achievement; 2) prior enactments reflecting the Legislature's concern

with fully funded early childhood education in Abbott districts; and 3) Department pronouncements expressing clear commitment to full funding of preschool programs.

The Commissioner, however, does not concur with the *Phillipsburg* analysis. With respect to the requirements of the Court, nowhere in the *Abbott* decisions is there a suggestion, let alone a directive, that approved Abbott preschool programs must be funded *exclusively* by the State. On exception, the Board argues implicit endorsement of its position by the Court's silence in response to Judge King's statement that preschool would be funded by ECPA, T&E, parity funds and "the incremental State funding needed to fully fund the preschool program," with no mention of local revenues. (Board's Reply Exceptions at 8-9) Similarly, based on the Board's earlier arguments, the ALJ cites to the Court's concern with municipal overburden and Abbott districts' inadequate tax bases and to its language referencing the State's "clear commitment that if there is a need for additional funds, the needed funds will be provided or secured." (Initial Decision at 5) These statements, however, do not even on their face require State funding regardless of need. Rather, they provide for the State to ensure, with additional aid if necessary, that sufficient funds are available to the district to fully fund its preschool program, that is, to ensure that any gap remaining after receipt of statutory formula aids will be addressed by the State *to the extent that need exists* because funds otherwise available to the district are insufficient to fully support the approved program. This reading is consonant not only with the Court's actual language and concern with local taxation capabilities, but also with its overall recognition that, while adequate funding is critical to achievement of a thorough and efficient system of public education in Abbott districts, such funding is a shared responsibility between the State and the local district.

Taken within the proper framework, then, as in *Phillipsburg,* the proffered Department pronouncements regarding "full funding" of Abbott preschool programs cannot be viewed as promises or expectations of dollar-for-dollar State funding regardless of resources available in the local district budget. Rather, they must be understood as reflections of the Department's commitment, and recognition of its obligation, to provide or secure additional State funds to the full degree necessary to support approved programs where local budgetary resources, including formula aids, local levies and monies realized through economies, efficiencies and reallocations, are found inadequate for this purpose. Indeed, this is the only interpretation consistent with sound educational policy, which must recognize *both* the critical importance of ensuring that approved Abbott preschool programs are supported by sufficient funds *and* the necessity to allocate State and local resources as efficiently and effectively as possible in meeting the shared responsibility for education in Abbott districts.

Finally, as in *Phillipsburg*, the Commissioner cannot ignore that the Legislature has now spoken definitively on the question posed by this appeal. Even granting, *arguendo*, that prior Legislatures provided for full State funding of Abbott district early childhood operational plans during the first years of their development, and that the Governor's Budget Message for FY '04 appeared to continue that pattern, the current Legislature has acted deliberately and decisively to clarify that its intent for the FY '04 budget year is to provide additional funding for *only* those costs directly associated with approved program expansion, not for the entire early childhood operational plan. In that regard, it is noted that there is no question, nor does the Board

except to the ALJ's conclusion, that the Department correctly calculated the district's PSEA in accordance with the prescribed legislative formula.

Accordingly, for the reasons set forth above, the Initial Decision of the Office of Administrative Law is rejected except insofar as it concludes that the Department correctly calculated petitioner's ECPA and PSEA for 2003-04. The Petition of Appeal, therefore, is dismissed in its entirety.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 9/25/03

Date of Mailing: 9/26/03

[3] Pursuant to P.L. 2003, c. 122, "*Abbott*" determinations are final agency actions appealable directly to the Appellate Division of the New Jersey Superior Court.

560-03

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

SYNOPSIS

Petitioning "Abbott" Board of Education claimed the Department was required to provide full State funding for its 2003-04 early childhood education program. The Department had provided Early Childhood Program Aid (ECPA) and Preschool Expansion Aid (PSEA) in accordance with prescribed formulas, but the district contended that additional State monies were required to fully fund the difference between the total of these aids and the approved preschool budget.

The ALJ concluded that the Department correctly calculated the district's ECPA and PSEA, but that this did not end the inquiry. The ALJ concluded that Court, Department and legislative pronouncements, taken together, require that the district's preschool plan be funded entirely by the State, subject to legislative appropriations.

The Commissioner concurred that ECPA and PSEA were correctly calculated, but rejected the conclusion that full State funding of preschool program was required regardless of other funds available in the district budget. The Commissioner held that the State's obligation is to ensure that sufficient funds are available to fully support the district's approved early childhood education plan, with additional State monies to be provided where formula aids and local resources are together inadequate for this purpose. Petition was dismissed.

September 25, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2203-03
AGENCY DKT. NO. 106-3/03

BOARD OF EDUCATION OF THE TOWNSHIP OF PEMBERTON,

Petitioner,
v.

NEW JERSEY DEPARTMENT OF EDUCATION,

Respondent.

Richard E. Shapiro, Esq., for petitioner

Kathleen Asher, Deputy Attorney General, for respondent, (Peter C. Harvey, Attorney General of New Jersey, attorney)

Record Closed: June 19, 2003 Decided: July 30, 2003

BEFORE **ISRAEL D. DUBIN**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This is an appeal by the Pemberton Township School District, which is an *Abbott* school district, contesting the adequacy of the State preschool expansion aid granted to fund its early childhood plan for the 2003-2004 fiscal year ("FY 2004"). Pemberton filed a verified petition of appeal with the Commissioner or Education on March 27, 2003, and the matter was transmitted to the Office of Administrative Law on April 9, 2003, for hearing as a contested case. The State Department of Education filed an answer to the petition on April 10, 2003.

Pemberton contends that it is entitled to full state funding of its approved preschool program. Therefore, it seeks an additional $424,569 of State Aid for its approved preschool program.

The New Jersey Department of Education denies that the State is legally obligated to provide full funding for Pemberton's preschool program. Instead, the Department maintains that preschool funding for *Abbott* districts may be derived from a combination of sources including, where applicable, local tax share. The Department seeks dismissal of the complaint on two grounds: first, that the amount of Preschool Expansion Aid (PSEA) awarded to Pemberton was correctly calculated in accordance with the relevant statutory provisions; and, second, that this appeal is premature because the Department has not yet determined whether Pemberton will receive additional state aid that could be used to support its preschool program.

This matter was assigned to me on April 14, 2003. A prehearing conference was scheduled for and held on May 2, 2003 and at that time the parties agreed to conduct the plenary hearing on June 3, 2003. However, on or about May 27, 2003, it was learned that the Honorable Ken R. Springer, ALJ, had issued an initial decision in a matter entitled *Board of Education of the Town of Phillipsburg v. New Jersey Department of Education*, OAL Docket No. EDU 3423-03, Agency Reference No. 104-3/03, on May 21, 2003. In that matter, Judge Springer addressed the identical legal issues and facts substantially similar to those presented here.

After careful consideration of Judge Springer's Initial Decision, I contacted and advised the parties that I had read the decision and preliminarily determined that I agreed with his legal conclusion. Following a brief discussion, the attorneys agreed to proceed in this matter by stipulating the essential facts and relying upon the legal arguments already advanced in their prehearing briefs. This agreement obviated the necessity of an evidentiary hearing and, upon receiving a joint statement of figures (Exhibit J-1), the record closed on June 19, 2003.

FACTUAL DISCUSSION

All of the material facts are either stipulated or undisputed. From the pleadings, joint stipulation and representations of counsel, **I FIND** the following facts:

The Pemberton School District is an *Abbott* District as defined by *N.J.S.A.* 18A:7F-3 and *N.J.A.C.* 6A:24-1.2. Under New Jersey Supreme Court decisions and Department regulations, the District has certain programmatic, budgeting and supervisory responsibilities for a preschool program for all eligible three and four year olds residing in the district. The Department has approved a total budget of $5,452,305 for Pemberton to implement its FY 2004 Abbott preschool program.

Utilizing a statutory formula, the Department calculated Pemberton's ECPA for FY 2004 to be $2,858,058. Pemberton accepts the correctness of this calculation. Additionally, Pemberton is eligible for Preschool Expansion Aid, which the Department calculates as the difference between the total budget for the FY 2004 approved plan and the FY 2002 approved plan. In the 2001-2002 FY, the total budget for Pemberton's approved preschool plan was $3,282,627. Consequently, the Department performed the following computation to obtain an initial PSEA of $2,169,678 for Pemberton in FY 2004:

FY 2004 Approved Plan	$5,452,305
FY 2001 Approved Plan	-3,282,627
Initial PSEA	2,169,678

Since total costs of $5,452,305 were approved for FY 2004 and promised state aid comes to $5,027,736, Pemberton seeks additional state aid of $454,569. It does not matter to Pemberton whether such aid is designated as ECPA, PSEA or something else, so long as the state share fully covers Pemberton's approved preschool budget.

LEGAL DISCUSSION

It is undisputed that the Department has approved a total budget of $5,452,305 for Pemberton to implement its FY 2004 *Abbott* preschool program. Whatever the ultimate source of funding, Pemberton has demonstrated a need for $5,452,305 to operate its 2003-2004 preschool program. Based upon these facts, applicable law, and Judge Springer's well-reasoned decision in *Board of Education of the Town of Phillipsburg v. New Jersey Department of Education, supra*, OAL Docket No. EDU 3423-03, I **CONCLUDE** that the Department is obligated to fully fund the preschool programs in this *Abbott* school district. Therefore, the Commissioner should seek sufficient appropriations from the Legislature to implement Pemberton's approved Early Childhood Program for FY 2004.

As Judge Springer stated, State regulations contemplate that *Abbott* districts will increase the participation of eligible three- and four-year old children in preschool programs over a three-year period. Accordingly, the Department set goals of achieving 70% participation in the 2001-2002 school year, 80% participation in the 2002-2003 school year and 90% participation in the 2003-2004 school year and each school year beyond. *N.J.A.*C. 6A:24-3.3(b)(1). To effectuate such anticipated growth, the Legislature appropriated "Preschool Expansion Aid" to cover increased costs from year to year. In the Governor's Budget Message for FY 2004, this legislative intent is clearly articulated:

> The amount appropriated hereinabove as Abbott Preschool Expansion Aid is for the purpose of funding *the increase in the approved budgeted costs from 2001-2002 to 2003-2004* for the projected expansion of preschool programs in "Abbott districts." Payments of Abbott Preschool Expansion Aid shall be based on documented expansion of the preschool program. (Emphasis Added). (at D120). http://www.nj.gov/treasury/omb/publications/04budget/pdf/34.pdf

Guided by the highlighted language, the Department correctly calculated the amount of Pemberton's PSEA as equivalent to "the increase in approved budgeted costs from 2001-2002 to 2003-2004." Nearly identical language, except for the years involved, was contained in the Appropriations Act enacted into law for FY 2003. *L.* 2002, *c.* 38.

That conclusion, however, does not end the inquiry. As noted, Pemberton does not care how the aid is categorized, as long as it originates from state funds. Pemberton argues that the case law, the Legislature's understanding of the constitutional mandate and the Department's own interpretation of its responsibilities all support the proposition that the state must fully fund preschool programs in *Abbott* districts.

New Jersey's highest court recognizes "that pre-school for three- and four-year olds will have a significant and substantial positive impact on academic achievement in both early and later school years." *Abbott v. Burke*, 153 *N.J.* 480, 506 (1998) (*Abbott V*). Recently, the Supreme Court reiterated that high-quality preschool programs for children in Abbott districts "are a critical component of the whole school reform effort." *Abbott v. Burke*, 163 *N.J.* 95, 120 (2000) (*Abbott VI*). Underlying the Commissioner's plan for early childhood programs "is the clear commitment that if there is a need for additional funds, the needed funds will be provided or secured." *Abbott V*, at 518. This commitment to provide funding must be viewed in the context of earlier decisions emphasizing the existence of municipal overburden and the inadequacies of the local tax base. *See, e.g., Abbott v. Burke*, 119 *N.J.* 287, 355-357 (1990) (*Abbott II*); *Abbott v. Burke*, 100 *N.J.* 269, 292-293 (1985) (*Abbott I*). Nonetheless, in *Abbott V*, the State Supreme Court stopped short of declaring a constitutional mandate for preschool education programs. Rather, the Court interpreted the statutory language as evincing "a clear indication that the Legislature understood and endorsed the strong empirical link between early education and later educational achievement." *Abbott V,* at 507.

Language in the Governor's Budget Message for FY 2004, the very document on which the Department relied, reflects continuing legislative concern that the *Abbott* districts receive full state funding for their preschool programs. Thus, the Governor's proposed budget envisions that:

> The amount appropriated hereinabove for Additional Abbot v. Burke State Aid will provide additional resources to "Abbott districts" *to meet the State's obligation to fully fund parity and the approved early childhood operational plans.* The remaining funds appropriated will be used for the award of discretionary funding to Abbott districts to maintain the programs, services and positions from the prior year that the

> commissioner determines are essential to the provision of a thorough and efficient education in those districts. (Emphasis Added). (at D-120).

Two important points are readily apparent from this passage. First, the state acknowledges its responsibility to provide *full funding* for early childhood programs and dedicates "Additional Abbott v. Burke State Aid" for that specific purpose. Second, any "remaining funds" may be used for "discretionary" awards for other items deemed by the Commissioner to be "essential" for a thorough and efficient education. Read together, these provisions strongly imply that state reimbursement for the full cost of childhood programs is nondiscretionary.

Significantly, the Governor's Budget Message for FY 2004 does not impose any preconditions on receipt by *Abbott* districts of additional state aid for preschool programs. In contrast, the Governor's Budget Message requires that, before establishing any "discretionary" funding, the Commissioner "shall determine whether some or all of the additional funds sought can be achieved by reallocating non-instructional expenditures, increasing the local property tax levy or achieving economies and efficiencies in the delivery of services and programs." (at D-120).

Public pronouncements of the Department have consistently adopted the same approach. As recently as February 6, 2003, a top official of the Department advised the *Abbott* districts that, "The state will meet its obligation to fully fund parity and preschool programs for Abbott districts." Last year, on March 18, 2002, the Department reassured *Abbott* districts that sufficient state funds would be available "to fully support the district's approved preschool plan." None of these policy statements gave any suggestion that the Department would look to local funding to defray the cost of preschool programs.

Finally, the Department contends that the issues are not ripe for determination and that action on the appeal should be deferred until a determination has been made on additional state aid. Pemberton responds that the issue of full state funding is clearly drawn and that it is entitled to immediate relief. Appeals involving school budgets in *Abbott* districts are of high priority and receive expedited consideration. Since the facts are undisputed and the parties have had adequate opportunity to brief the legal issues, no good reason exists to delay resolution of this dispute.

DECISION AND ORDER

It is **ORDERED** that summary decision be granted in favor of Pemberton. It is further **ORDERED** that the Department fully fund Pemberton's preschool program for FY 2004, subject to sufficient legislative appropriation.

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

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

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

July 30, 2003
DATE

ISRAEL D. DUBIN, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

7/31/2003
DATE

Mailed to Parties:

AUG - 6 2003

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

APPENDIX

EXHIBITS

Joint Exhibits:

J-1 Memorandum dated June 16, 2003, setting forth Revised Initial FY 2004 Preschool Expansion Aid

OAL DKT. NO. EDU 2203-03
AGENCY DKT. NO. 106-3/03

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

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Exceptions were filed by the Department of Education (Department), as were replies by the Board of Education (Board), in accordance with the provisions of *N.J.A.C.* 1:1-18.4.

In its exceptions, the Department urges the Commissioner to limit his adoption of the Initial Decision to finding that the Department correctly calculated the amount of the Board's Preschool Expansion Aid (PSEA) for the 2003-04 fiscal year, and to reject Administrative Law Judge (ALJ) Dubin's addressing of broader issues in a matter pled solely as an appeal of the Department's February 26, 2003 PSEA determination. The Department contends that the February 26 determination under appeal was confined to the issue of PSEA and "neither calculates nor advises [the Board] of the amount of Additional *Abbott v. Burke* State aid that it will receive" so that any assertion by the Board regarding such aid is "entirely inappropriate" in the present proceeding. (Department's Exceptions at 1-3, quotation at 3)

The Department further contends that the ALJ erred in relying on the Governor's Budget Message for FY '04 in concluding that the Board's approved Early Childhood Plan must be fully funded with State aid, since the FY '04 Appropriations Act, adopted by the Legislature and signed by the Governor as *P.L.* 2003, *c.*122, expressly revised the earlier Governor's Budget Message language as cited in the Initial Decision. The Department urges:

> Notably, the Governor's Budget Message for FY04 provided: "The amount appropriated hereinabove for Additional *Abbott v. Burke* State Aid will provide additional resources to 'Abbott districts' to meet the State's obligation to fully fund parity and *the approved early childhood operational plans*." (Emphasis added). The FY04 Appropriations Act provides: "The amount appropriated hereinabove for Additional Abbott v. Burke State Aid will provide additional resources to 'Abbott districts' to meet the State's obligation to fully fund parity *and approved 'Abbott' preschool expansion*." *L.* 2003, *c.* 122.
>
> ***
>
> Here, the Legislature revised the language contained in the Governor's Budget Message to clarify that, contrary to Judge Dubin's interpretation, the Department is not required to ensure that Pemberton's approved Early Childhood Plan is fully funded with State aid. By purposefully deleting the words "early childhood operational plans" from the Governor's Budget Message and replacing those words in the FY04 Act with "'Abbott' preschool expansion," the FY04 Act unequivocally demonstrates that, while the Department must ensure that Pemberton's "approved 'Abbott' expansion" is fully funded with State aid, the Department is not required to ensure that Pemberton's approved "early childhood operational plan" is fully funded with State aid. Moreover, this revision is consistent with the method, established in the FY04 Act, by which Preschool Expansion Aid is calculated: "funding the increase in the approved budgeted costs from 2001-2002 to 2003-2004 for the projected expansion of preschool programs in "Abbott districts." *L.* 2003, *c.* 122. (*Id.* at 4-5)

This interpretation, the Department avers, is consistent with the Court's language concerning Additional *Abbott v. Burke* Aid. The Department argues:

> In *Abbott v. Burke*, 153 *N.J.* 480 (1998), the Supreme Court opined, "the Commissioner may, before seeking new appropriations, first determine whether funds within an existing school budget are sufficient to meet a school's request for a demonstrably needed supplemental program." *Id.* at 518. The Court further opined, "[u]nderlying the Commissioner's proposal for whole-school reform, early childhood programs and supplemental programs, is the clear commitment that *if there is a need for additional funds*, the needed funds will be provided or secured." *Ibid.* (Emphasis added).
>
> The above-quoted language demonstrates that the Supreme Court intended for the Commissioner to ensure that the early childhood programs are fully funded, however, the Commissioner could first determine whether funds within an existing school budget are sufficient to meet a school's request for such programs. Because local tax levy is included [in] the budget, the Commissioner can consider those funds as well as other revenue supporting the budget when determining the amount of Additional *Abbott v. Burke* State aid, if any, that a district needs. (*Id.* at 6)

In reply, the Board counters that the ALJ did *not* address issues outside the scope of the pleadings, since the Petition of Appeal not only challenged the amount of PSEA awarded the Board, but also the Department's failure to fully fund the Board's approved preschool program.[1] (Board's Reply Exceptions at 2-4) The Board further objects to the Department's protestation over the scope of the ALJ's ruling, noting that the Department itself raised the issue of full funding by arguing, in its initial brief in support of a motion for summary decision, that "'as a matter of law,' while the State must ensure that Pemberton's preschool program is fully funded, there is not a concomitant obligation that such funding be provided by the State," and that the Department "sought summary decision based on the claim that there was no State obligation to fully fund the DOE-approved preschool program with State funds; the [Department] cannot now be heard to complain that the ALJ ruled adversely to the [Department] on the very 'matter of

[1] The Board points to its claim for relief, and also to ¶¶ 4, 7, 11, 13, 14, 18 and 20 of the Verified Petition, noting that while PSEA is mentioned, "the gravamen of [these] claims is that the State must fully fund the DOE-approved preschool program with State funds." (Board's Reply Exceptions at 3-4, quotation at 3)

law' asserted by the [Department]." (*Id.* at 4-5, quoting Department's *Phillipsburg*[2] Letter Brief of May 13, 2003 at 8) Neither, the Board alleges, can the Department claim that the Initial Decision wrongly addresses yet-to-be-determined Additional *Abbott v. Burke* Aid; this claim "disingenuously misconstrues" the Initial Decision, which did *not* find that the Board was owed Additional *Abbott v. Burke* Aid, but rather concluded that the State had an obligation, to be met however the State deemed fit, to provide full State funding for approved preschool programs, subject to Legislative appropriations. (*Id.* at 5-6, quotation at 6) The Board urges that deferral of the question of full State funding makes no sense as a matter of public interest, since the question will only recur later if not resolved here, where it has already been fully briefed and considered. (*Id.* at 6-7)

The Board next proffers that the Supreme Court's decision in *Abbott V, supra,* nowhere intimates that preschool programs should or could be funded in part by local tax share; indeed, the Board avers, the Court's decision was based on the recommendations of the Honorable Michael King, P.J.A.D., sitting as the remand court, and, while the Court disagreed with Judge King regarding full-day preschool, it "did not take issue with his conclusion that preschool would be funded by ECPA, T&E, parity funds and the incremental State funding needed to fully fund the preschool program." (Board's Reply Exceptions at 7-10, quotation at 8) Finally, the Board offers the Office of Legislative Services' analysis of the Department's FY '03 budget, explaining the purpose of PSEA as a new line item funding the increase in costs between 2001-02 and 2002-03 for programs which had been, "[u]p until this time***funded through a

[2] As noted in the Initial Decision at 2, the parties in this matter agreed to incorporate and rely upon submissions and arguments made in the matter of *Board of Education of the Town of Phillipsburg, Warren County, v. New Jersey State Department of Education*, OAL Dkt. No. EDU 3423-03, Agency Dkt. No. 104-3/03. As indicated below, that matter was decided by the Commissioner on September 25, 2003.

combination of Early Childhood Program Aid and Additional *Abbott v. Burke* Aid." This excerpt, the Board opines, "reflects the Legislature's clear understanding that prior to the 2001-02 school year, the State had fully funded preschool with State funds and that PSEA was to ensure full state funding for any increase in 2002-03 over 2001-02. Thus, when the FY '04 Appropriations Act provides that PSEA in 2003-04 is to fund the difference between the 2002-03 program and the 2003-04 program, the evident legislative intent is to continue the full State funding in effect prior to the 2001-02 school year -- and extended into the 2002-03 school year by PSEA -- into the 2003-04 school year." (*Id.* at 9-10)

Finally, the Board contends that the Department errs in claiming that the language of the Appropriations Act as ultimately adopted by the Legislature supports its position. According to the Board, the Initial Decision does not, as the Department alleges, rely exclusively on the earlier Governor's Budget Message, but rather places that message in the context of continuing expressions of legislative concern, the *Abbott* decisions, and the Department's repeated public pronouncements. (*Id.* at 10-11) Additionally,

> [t]he FY ['04] Appropriations Act still links the Additional *Abbott v. Burke* State Aid to the "State's obligation" to fully fund parity and approved Abbott preschool expansion. Significantly, the language is not limited to the formula for funding approved preschool expansion *aid*, but rather to the funding of preschool expansion. Moreover, the FY Appropriations Act does not define what the Legislature meant by the State's obligation so the Commissioner must "employ extrinsic aids, such as legislative intent or prior precedent, to interpret the language at issue." *In re Passaic County Util. Auth.*, 164 *N.J.* 270, 300 (2000) (citation omitted). (Id. at 11-12)

Thus, the Board concludes, "properly construed under governing legal principles," the FY '04 Appropriations Act not only fails to support the Department's position, but actually "reinforces the correctness" of the Initial Decision. (*Id.* at 12)

Upon his own review and consideration, as he did in the matter of *Board of Education of the Town of Phillipsburg, Warren County, v. New Jersey State Department of Education*, decided on September 25, 2003, subsequent to issuance of the Initial Decision herein, the Commissioner first concurs with the ALJ and the Board that the instant matter is not limited strictly to the question of whether the Department correctly calculated the amount of PSEA due the district for 2003-04. Notwithstanding that the Petition of Appeal was, in fact, pled largely in terms of PSEA as claimed by the Department, the Commissioner finds it in the best interest of both the parties in this matter and Abbott districts generally to decide the broader question squarely underlying the Board's specific allegations, that is, the question of whether Court, legislative and Department pronouncements, alone or in combination, require that the entire cost of approved Abbott preschool programs be funded, dollar for dollar, exclusively by the State.

The ALJ, concurring with the Initial Decision in *Phillipsburg*, *supra,* answered this question in the affirmative based on legislative intent as expressed through the Governor's FY '04 Budget Message, read in light of 1) Court language recognizing preschool as a critical component of Abbott reform efforts although not a constitutional mandate and acknowledging the statutory endorsement of the link between preschool and later educational achievement; 2) prior enactments reflecting the Legislature's concern

with fully funded early childhood education in Abbott districts; and 3) Department pronouncements expressing clear commitment to full funding of preschool programs.

The Commissioner, however, does not concur with the *Phillipsburg* analysis. With respect to the requirements of the Court, nowhere in the *Abbott* decisions is there a suggestion, let alone a directive, that approved Abbott preschool programs must be funded *exclusively* by the State. On exception, the Board argues implicit endorsement of its position by the Court's silence in response to Judge King's statement that preschool would be funded by ECPA, T&E, parity funds and "the incremental State funding needed to fully fund the preschool program," with no mention of local revenues. (Board's Reply Exceptions at 8-9) Similarly, based on the Board's earlier arguments, the ALJ cites to the Court's concern with municipal overburden and Abbott districts' inadequate tax bases and to its language referencing the State's "clear commitment that if there is a need for additional funds, the needed funds will be provided or secured." (Initial Decision at 5) These statements, however, do not even on their face require State funding regardless of need. Rather, they provide for the State to ensure, with additional aid if necessary, that sufficient funds are available to the district to fully fund its preschool program, that is, to ensure that any gap remaining after receipt of statutory formula aids will be addressed by the State *to the extent that need exists* because funds otherwise available to the district are insufficient to fully support the approved program. This reading is consonant not only with the Court's actual language and concern with local taxation capabilities, but also with its overall recognition that, while adequate funding is critical to achievement of a thorough and efficient system of public education in Abbott districts, such funding is a shared responsibility between the State and the local district.

Taken within the proper framework, then, as in *Phillipsburg,* the proffered Department pronouncements regarding "full funding" of Abbott preschool programs cannot be viewed as promises or expectations of dollar-for-dollar State funding regardless of resources available in the local district budget. Rather, they must be understood as reflections of the Department's commitment, and recognition of its obligation, to provide or secure additional State funds to the full degree necessary to support approved programs where local budgetary resources, including formula aids, local levies and monies realized through economies, efficiencies and reallocations, are found inadequate for this purpose. Indeed, this is the only interpretation consistent with sound educational policy, which must recognize *both* the critical importance of ensuring that approved Abbott preschool programs are supported by sufficient funds *and* the necessity to allocate State and local resources as efficiently and effectively as possible in meeting the shared responsibility for education in Abbott districts.

Finally, as in *Phillipsburg*, the Commissioner cannot ignore that the Legislature has now spoken definitively on the question posed by this appeal. Even granting, *arguendo*, that prior Legislatures provided for full State funding of Abbott district early childhood operational plans during the first years of their development, and that the Governor's Budget Message for FY '04 appeared to continue that pattern, the current Legislature has acted deliberately and decisively to clarify that its intent for the FY '04 budget year is to provide additional funding for *only* those costs directly associated with approved program expansion, not for the entire early childhood operational plan. In that regard, it is noted that there is no question, nor does the Board

except to the ALJ's conclusion, that the Department correctly calculated the district's PSEA in accordance with the prescribed legislative formula.

Accordingly, for the reasons set forth above, the Initial Decision of the Office of Administrative Law is rejected except insofar as it concludes that the Department correctly calculated petitioner's ECPA and PSEA for 2003-04. The Petition of Appeal, therefore, is dismissed in its entirety.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 9/25/03

Date of Mailing: 9/26/03

[3] Pursuant to P.L. 2003, c. 122, "*Abbott*" determinations are final agency actions appealable directly to the Appellate Division of the New Jersey Superior Court.

561-03

BOARD OF EDUCATION OF THE CITY OF MILLVILLE, CUMBERLAND COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning "Abbott" Board of Education claimed the Department was required to provide full State funding for its 2003-04 early childhood education program. The Department had provided Early Childhood Program Aid (ECPA) and Preschool Expansion Aid (PSEA) in accordance with prescribed formulas, but the district contended that the State was required to fully fund the difference between the total of these aids and the approved preschool budget.

The ALJ concluded, by reference to Initial Decisions in similar matters involving the Phillipsburg and Pemberton school districts, that the Department correctly calculated the district's formula aids, but that Court, Department and legislative pronouncements, taken together, require that the district's preschool plan be funded entirely by the State, subject to legislative appropriations.

The Commissioner concurred that formula aids were correctly calculated, but rejected the conclusion that full State funding of preschool program was required regardless of other funds available in the district budget. The Commissioner held that the State's obligation is to ensure that sufficient funds are available to fully support the district's approved early childhood education plan, with additional State aid to be provided where formula aids and local resources are together inadequate for this purpose. Petition was dismissed.

September 25, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 379-03

AGENCY DKT. NO. 44-2/03

BOARD OF EDUCATION
THE CITY OF MILLVILLE,
CUMBERLAND COUNTY,
Petitioner,

v.

NEW JERSEY DEPARTMENT
OF EDUCATION,
Respondent.

Arnold Robinson, Esq., appeared for petitioner (Robinson and Andujar, attorneys)

Kathleen Asher, Deputy Attorney General, for respondent, (Peter C. Harvey, Attorney General of New Jersey, attorney)

Record Closed: August 28, 2003 Decided: September 5, 2003

BEFORE **EDGAR HOLMES**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This is an appeal by the City of Millville School District, which is an *Abbott* school district, contesting the adequacy of the State preschool expansion aid granted to fund its early

childhood plan for the 2003-2004 fiscal year ("FY 2004"). Millville filed a verified petition of appeal with the Commission of Education on February 3, 2003. The State Department of Education filed an answer to the petition on February 3, 2003, and the matter was transmitted to the Office of Administrative Law on February 6, 2003, for hearing as a contested case.

A partial final decision was rendered by the Commissioner of Education on April 17, 2003. This decision essentially approved a withdrawal of certain issues.

Millville contends that it is entitled to full state funding of its approved preschool program. Therefore, it seeks an additional $1,763,866. of State Aid for its approved preschool program.

The New Jersey Department of Education denies that the State is legally obligated to provide full funding for Millville's preschool program. Instead, the Department maintains that preschool funding for *Abbott* districts may be derived from a combination of sources including, where applicable, local tax share. The Department seeks dismissal of the complaint on two grounds: first, that the amount of Preschool Expansion Aid (PSEA) awarded to Millville was correctly calculated in accordance with the relevant statutory provisions; and, second, that this appeal is premature because the Department has not yet determined whether Millville will receive additional state aid that could be used to support its preschool program.

The Honorable Ken R. Springer, ALJ, has issued an initial decision in a matter entitled *Board of Education of the Town of Phillipsburg v. New Jersey Department of Education,* OAL Docket No. EDU 3423-03, Agency Reference No. 104-3/03, on May 21, 2003. In that matter, Judge Springer addressed the identical legal issues and facts substantially similar to those presented here. Judge Israel Dubin followed Judge Springer's decision in *Pemberton BOE,* EDU 2203-03 on July 30, 2003.

On the return day of this matter, the attorneys agreed to proceed by stipulating the essential facts and relying upon the legal arguments already advanced in their prehearing briefs together with the matters presented to Judges Springer and Dubin. This agreement obviated the necessity of an evidentiary hearing.

STIPULATED FACTS

The parties stipulated that the Millville Board of Education seeks $1,763,866. of State aid calculated pursuant to the joint exhibits J-1, J-2, J-3 and J-4 attached hereto and made a part hereof.

LEGAL DISCUSSION

The parties rely on the legal briefs filed herein, filed in *Phillipsburg* and in *Pemberton* together with the legal discussions set forth in the initial decisions of Judges Springer and Dubin.

DECISION AND ORDER

It is **ORDERED** that summary decision be granted in favor of Millville. It is further **ORDERED** that the Department fully fund Millville's preschool program for FY 2004, subject to sufficient legislative appropriation.

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

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

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

September 5, 2003
DATE

Edgar Holmes
EDGAR HOLMES, ALJ

By: Joseph Martone ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

September 5, 2003
DATE

Mailed to Parties:

SEP 9 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/tmp

APPENDIX

EXHIBITS

Joint Exhibits:

J-1 January 6, 2003 letter Department of Education to Miller – 7 pages

J-2 February 18, 2003 letter Department of Education to Miller – 2 pages

J-3 February 6, 2003 memo Department of Education to Chief School Administrators – 2 pages

J-4 February 26, 2003 – memo Department of Education to Millville – 1 page

OAL DKT. NO. EDU 379-03
AGENCY DKT. NO. 44-2/03

BOARD OF EDUCATION OF THE CITY OF MILLVILLE, CUMBERLAND COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Exceptions were filed by the Department of Education (Department), as were replies by the Board of Education (Board), in accordance with the provisions of *N.J.A.C.* 1:1-18.4.

In its exceptions, the Department urges the Commissioner to limit his adoption of the Initial Decision to finding that the Department correctly calculated the amount of the Board's Preschool Expansion Aid (PSEA) for the 2003-04 fiscal year, and to reject Administrative Law Judge (ALJ) Holmes' addressing of broader issues. The Department contends that the determination under appeal neither "calculates nor advises [the Board] of the amount of Additional *Abbott v. Burke* State aid that it will receive" so that any assertion by the Board regarding such aid is "entirely inappropriate" in the present proceeding. (Department's Exceptions at 1-3, quotation at 2)

The Department further contends that the ALJ erred in relying, by reference to the Initial Decisions in the related matters of *Board of Education of the*

Township of Phillipsburg, Warren County, v. New Jersey State Department of Education, Agency Dkt. No. 104-3/03, OAL Dkt. No. 3423-03, and *Board of Education of the Township of Pemberton, Burlington County, v. New Jersey State Department of Education,* Agency Dkt. No. 106-3/03, OAL Dkt. No. EDU 2203-03,[1] on the Governor's Budget Message for FY '04 to conclude that the Board's approved Early Childhood Plan must be fully funded with State aid. The FY '04 Appropriations Act adopted by the Legislature and signed by the Governor as *P.L.* 2003, *c.*122, the Department notes, expressly revised the earlier Governor's Budget Message language. Specifically:

> Notably, the Governor's Budget Message for FY04 provided: "The amount appropriated hereinabove for Additional *Abbott v. Burke* State Aid will provide additional resources to 'Abbott districts' to meet the State's obligation to fully fund parity and *the approved early childhood operational plans.*" (Emphasis added). The FY04 Appropriations Act provides: "The amount appropriated hereinabove for Additional Abbott v. Burke State Aid will provide additional resources to 'Abbott districts' to meet the State's obligation to fully fund parity *and approved 'Abbott' preschool expansion.*" *L.* 2003, *c.* 122.
>
> ***
>
> Here, the Legislature revised the language contained in the Governor's Budget Message to clarify that, contrary to Judge Holmes' interpretation, the Department is not required to ensure that Millville's approved Early Childhood Plan is fully funded with State aid. By purposefully deleting the words "early childhood operational plans" from the Governor's Budget Message and replacing those words in the FY04 Act with "'Abbott' preschool expansion," the FY04 Act unequivocally demonstrates that, while the Department must ensure that Millville's "approved 'Abbott' expansion" is fully funded with State aid, the Department is not required to ensure that Millville's approved "early childhood operational plan" is fully funded with State aid. Moreover, this revision is consistent with the method, established in the FY04 Act, by which Preschool Expansion Aid is calculated: "funding the increase in the approved budgeted costs from 2001-2002 to 2003-2004 for the projected expansion of preschool programs in "Abbott districts." *L.* 2003, *c.* 122. (*Id.* at 4-5)

[1] Both matters have been subsequently decided by the Commissioner as indicated below.

This interpretation, the Department avers, is consistent with the Court's language concerning Additional *Abbott v. Burke* Aid. The Department argues:

> In *Abbott v. Burke*, 153 *N.J.* 480 (1998), the Supreme Court opined, "the Commissioner may, before seeking new appropriations, first determine whether funds within an existing school budget are sufficient to meet a school's request for a demonstrably needed supplemental program." *Id.*at 518. The Court further opined, "[u]nderlying the Commissioner's proposal for whole-school reform, early childhood programs and supplemental programs, is the clear commitment that *if there is a need for additional funds*, the needed funds will be provided or secured." *Ibid.* (emphasis added).
>
> The above-quoted language demonstrates that the Supreme Court intended for the Commissioner to ensure that the early childhood programs are fully funded, however, the Commissioner could first determine whether funds within an existing school budget are sufficient to meet a school's request for such programs. Because local tax levy is included [in] the budget, the Commissioner can consider those funds as well as other revenue supporting the budget when determining the amount of Additional *Abbott v. Burke* State aid, if any, that a district needs. (*Id.* at 6)

In reply, the Board posits that it is not seeking additional *Abbott v. Burke* State aid as claimed by the Department; rather it is requesting that, in compliance with the *Abbott V* mandate, the Department fully fund the approved early childhood education budget by filling, with funds designated specifically for that purpose, the gap of $1,763,866 left after payment of formula aids. (Board's Reply at 1-2)

The Board further argues that the Department's attempt to rely on the Legislature's amendment to the Governor's Budget Message cannot be sustained in view of the Court's mandate in *Abbott V*. The Board states:

> *Abbott V* clearly sets forth a mandate to fully fund Early Childhood programs. This mandate should be viewed in the context of earlier Abbott decisions where the Supreme Court recognized the existence of municipal overburdens and the lack of an adequate tax base facing many school districts. *See Abbott v. Burke*, 100 N.J. 269, 292-293 (1985) (*Abbott I*) citing *Robinson v. Cahill,* 69 N.J. 449, 465 (1976) which recognized a "lack of an adequate tax base for educational purposes as

> indicated by the gross disparities shown in per pupil tax resources." *See also Abbott v. Burke*, 119 N.J. 287, 355-357 (1990) (*Abbott II*).
>
> Upon a finding that the right of children to a thorough and efficient system of education is a fundamental right guaranteed by the Constitution, the Supreme Court, in *Robinson v. Cahill*, 69 N.J. 133 (1975), found that the Court was a "last-resort guarantor of the Constitution's command." *Id.* at 154. This supported their finding that "when there occurs a legislative transgression of a right guaranteed to a citizen, final decision as to the invalidity of such action must rest exclusively with the courts." *Id.* at 146-147.
>
> The Supreme [Court] has mandated, with respect to Early Childhood Programs, that when additional funds are needed they should be provided or secured by the Department. *See Abbott V*, 153 N.J. at 518. Accordingly, the Department's argument that legislative interpretation can circumvent the Supreme Court's Constitutional interpretation is without merit. (*Id.* at 2-3)

In addition to the arguments above, the Board further references the arguments of the petitioning boards in the related matters of *Board of Education of the Township of Phillipsburg, supra,* and *Board of Education of the Township of Pemberton, supra.* Briefly, those arguments contend that the instant matter is not limited strictly to the question of whether the Department correctly calculated the amount of PSEA due the district for 2003-04 and that deferral of the broader underlying issue would not serve the public interest; that the Supreme Court's decision in *Abbott V, supra,* nowhere intimates that preschool programs should or could be funded in part by local tax share; that Department communications pertaining to the 2003-04 school year repeatedly referenced "full funding" of early childhood education programs; and that the Department errs in claiming that the language of the Appropriations Act as adopted by the Legislature supports its position because the Act still links Additional *Abbott v. Burke* State Aid to the State's obligation to fully fund parity and approved Abbott preschool expansion.

Upon his own review and consideration, as in the matter of *Board of Education of the Town of Phillipsburg, supra,* and *Board of Education of the Township of Pemberton, supra*, both decided on September 25, 2003, subsequent to issuance of the Initial Decision herein,[2] the Commissioner first concurs with the ALJ and the Board that the instant matter is not limited strictly to the question of whether the Department correctly calculated the amount of PSEA due the district for 2003-04. Rather, the Commissioner finds it in the best interest of both the parties in this matter and Abbott districts generally to decide the broader question of whether Court, legislative and Department pronouncements, alone or in combination, require that the entire cost of approved Abbott preschool programs be funded, dollar for dollar, exclusively by the State.

The ALJ, through reference to the Initial Decisions in *Phillipsburg*, *supra,* and *Pemberton, supra,* answers this question in the affirmative based on legislative intent as expressed through the Governor's FY '04 Budget Message, read in light of 1) Court language recognizing preschool as a critical component of Abbott reform efforts although not a constitutional mandate and acknowledging the statutory endorsement of the link between preschool and later educational achievement; 2) prior enactments reflecting the Legislature's concern with fully funded early childhood education in Abbott districts; and 3) Department pronouncements expressing clear commitment to full funding of preschool programs.

The Commissioner, however, does not concur with this analysis. With respect to the requirements of the Court, nowhere in the *Abbott* decisions is there a

[2] See also *Board of Education of the Township of Neptune, Monmouth County, v. New Jersey State Department of Education*, similarly decided on September 25, 2003.

suggestion, let alone a directive, that approved Abbott preschool programs must be funded *exclusively* by the State. *Phillipsburg* and *Pemberton*, as well as the Board herein, cite to the Court's concern with municipal overburden and Abbott districts' inadequate tax bases and to its language referencing the State's clear commitment that if there is a need for additional funds, the needed funds will be provided or secured. (*Phillipsburg* Initial Decision at 5, *Pemberton* Initial Decision at 5, Board's Reply at 3) By reference, the Board additionally argues implicit endorsement of its position by the Court's silence in response to Judge King's statement that preschool would be funded by ECPA, T&E, parity funds and "the incremental State funding needed to fully fund the preschool program," with no mention of local revenues. (*Phillipsburg* Reply Exceptions at 8-9) These statements, however, do not even on their face require State funding regardless of need. Rather, they provide for the State to ensure, with additional aid if necessary, that sufficient funds are available to the district to fully fund its preschool program, that is, to ensure that any gap remaining after receipt of statutory formula aids will be addressed by the State *to the extent that need exists* because funds otherwise available to the district are insufficient to fully support the approved program. This reading is consonant not only with the Court's actual language and concern with local taxation capabilities, but also with its overall recognition that, while adequate funding is critical to achievement of a thorough and efficient system of public education in Abbott districts, such funding is a shared responsibility between the State and the local district.

Taken within the proper framework, then, as in *Phillipsburg* and *Pemberton,* the proffered Department pronouncements regarding "full funding" of Abbott preschool programs cannot be viewed as promises or expectations of dollar-for-dollar

State funding regardless of resources available in the local district budget. Rather, they must be understood as reflections of the Department's commitment, and recognition of its obligation, to provide or secure additional State funds to the full degree necessary to support approved programs where local budgetary resources, including formula aids, local levies and monies realized through economies, efficiencies and reallocations, are found inadequate for this purpose. Indeed, this is the only interpretation consistent with sound educational policy, which must recognize *both* the critical importance of ensuring that approved Abbott preschool programs are supported by sufficient funds *and* the necessity to allocate State and local resources as efficiently and effectively as possible in meeting the shared responsibility for education in Abbott districts.

Finally, as in *Phillipsburg* and *Pemberton*, the Commissioner notes that the Legislature has spoken definitively on the central question posed by this appeal. Even granting, *arguendo*, that prior Legislatures provided for full State funding of Abbott district early childhood operational plans during the first years of their development, and that the Governor's Budget Message for FY '04 appeared to continue that pattern, the current Legislature has acted deliberately and decisively to clarify that its intent for the FY '04 budget year is to provide additional funding for *only* those costs directly associated with approved program expansion, not for the entire early childhood operational plan. In that regard, it is noted that there is no question, nor does the Board except to the ALJ's conclusion, that the Department correctly calculated the district's PSEA in accordance with the prescribed legislative formula. Nor does the Commissioner agree, as set forth above, with the Board's contention that the Court has mandated exclusive State funding of early childhood education in Abbott districts; thus, the

Commissioner is not persuaded by the Board's argument that legislative interpretation cannot circumvent the requirements of the Court.

Accordingly, for the reasons set forth above, the Initial Decision of the Office of Administrative Law is rejected except insofar as it concludes that the Department correctly calculated petitioner's ECPA and PSEA for 2003-04. The Petition of Appeal, therefore, is dismissed.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 9/25/03

Date of Mailing: 9/26/03

[3] Pursuant to P.L. 2003, c. 122, "*Abbott*" determinations are final agency actions appealable directly to the Appellate Division of the New Jersey Superior Court.

562-03

BOARD OF EDUCATION OF THE CITY OF PASSAIC, PASSAIC COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning "Abbott" Board of Education claimed the Department was required to fund full cost of expansion of the district's preschool program from 2001-02 to 2002-03, and that the Department's methodology for reduction of initial Preschool Expansion Aid award (because enrollment was less than projected) improperly left the district with unfunded costs and forced its use of surplus to finish the 2002-03 school year. Petitioner had additionally sought a determination that the district could not be compelled to expend surplus to a level less than 2%, but attempted to withdraw that request at the close of proceedings.

The ALJ found that the *Abbott* Court mandate did not require full State funding of preschool programs regardless of need, and that the Department's per-pupil method of reducing aid for less-than-projected enrollment was a rational means of adjustment. Denying petitioner's request to withdraw the question because it had at that point been fully heard and briefed, the ALJ also found that Abbott districts can, under appropriate circumstances, be directed to allocate surplus to a level less than 2%.

The Commissioner concurred with the ALJ's conclusions, additionally clarifying that the Department's per-pupil reduction methodology was consistent with legislative intent as expressed in the FY'03 Appropriations Act. Petition was dismissed.

September 25, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3424-03
AGENCY DKT. NO. 105-3/03

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

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION,

Respondent.

Richard E. Shapiro, Esq., appearing for Petitioner

Allison C. Eck, Deputy Attorney General, appearing for Respondent
(Peter C. Harvey, Attorney General of New Jersey, attorney)

Record Closed: June 11, 2003 Decided: June 25, 2003

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

STATEMENT OF THE CASE

Petitioner Board of Education of the City of Passaic (Petitioner) is challenging Respondent Department of Education (Respondent) determination of funding for preschool program expansion for the 2002-03 school year. On April 4, 2003, the

Department of Education transmitted the matter to the Office of Administrative Law (OAL) for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13, with a request that the matter be expedited. Consequently, the hearing was held on June 10 & 11, 2003, at which time the record closed. This decision is rendered on an expedited basis.

FINDINGS OF FACT

1. On or about February 5, 2002, the Respondent approved Petitioner's Early Childhood Budget for the 2002-03 school year.

2. On February 22, 2002, after discussions with Petitioner, the Respondent made adjustments to the approved early childhood plan.

3. Petitioner requested additional funding for costs associated with providing special education services; supplemental adjustments were made.

4. Pursuant to an audit of Petitioner's Early Childhood Program Expansion and Enrollment data, enrollment was determined to be 1038 instead of the projected 1917.

5. As a result of the audited enrollment, the amount of Preschool Expansion Aid (PSEA) was reduced for the 2002-03 school year.

6. The initial PSEA calculation for 02-03 was based on the projected expansion over Petitioner's plan in the 2001-02 school year.

7. In the 2001-02 school year, Petitioner's total Early Childhood Plan totaled $8,476,408. For the 2002-03 school year, it was projected that Petitioner's plan would total $18,064,151.

8. The increased costs due to the expansion of the plan was projected to be $9,587,743.

9. There were, however, 879 fewer students enrolled than Petitioner had originally projected.

10. The amount of preschool expansion aid was reduced from $9,587,743 to $1,304,807.

11. Respondent calculated the amount of the award of preschool expansion aid on a per pupil basis.

12. Further review of Petitioner's approved Early Childhood Plan resulted in a total budget of $12,330,283 on April 25, 2003.

ANALYSIS AND CONCLUSION

Petitioner raises three issues in this appeal:

1. Does Respondent's failure to provide PSEA to fully fund the difference between Petitioner's approved Preschool Program for 2001-02 (the designated base year) and the 2002-03 year violate the mandate of the *Abbott* decisions;

2. Are Respondent's reductions in PSEA arbitrary and capricious; and

3. Did Respondent compel Petitioner to utilize a portion of the undesignated fund balance to fund the preschool program, thus bringing the fund balance to .76 percent?

I turn first to the issue, which succinctly stated, is whether Respondent is required, by virtue of the *Abbott* mandates, to fully fund the year to year expansion of the preschool programs, which, by regulation are required to serve an increased percentage of three to four year olds in successive years, beginning with 70 percent of eligible preschoolers in 2001-02 and increasing that number to 90 percent in 2003-04. *N.J.A.C.* 6A:24-3.3(b)1.

Throughout *Abbott v. Burke*, 153 *N.J.* 480 (1998) (*Abbott V*) the Court emphasizes adequate funding as critical to achieving a thorough and efficient

education. *Abbott V, supra* 517-18. The Court specifically relies on the statutory delegation of power to the Commissioner of Education under *N.J.S.A.* 18A:7F-6b to take such action as he may deem appropriate, including, among others, redirecting expenditures. Read in conjunction with other language from *Abbott V*, it is clear, although the court shifts the emphasis from financing a thorough and efficient education to education itself, the provision of adequate funding is a shared responsibility. For example, the Commissioner is directed to "ensure" programs are adequately funded and to "assist" the schools in meeting the need for transportation and other services. *Abbott V, supra* 507-508.

Moreover, in discussing the need for sufficient funds to be provided for Whole School Reform and for supplemental programs that are constituent parts of the reform, the Court acknowledges that there must also be a clear and effective funding mechanism in place and further acknowledges that the first step in making such a determination is whether funds within an existing school budget are sufficient to meet a school's request, although funds may not be reallocated if that will weaken other program. *Abbott V, supra* 518.

Although the foregoing is couched in terms of the use of funds for supplemental programs, the Court links the Early Childhood Programs by commenting

> Underlying the Commissioner's proposal for whole school reform, *early childhood programs*, and supplemental programs, is the clear commitment that if there is a need for *additional* funds, the needed funds will be provided or secured. *Id.* (Emphasis supplied).

The thread running through the *Abbott V* decision is to require adequate funding of the various components of Whole School Reform, including the early childhood program. The language is repeatedly clear, the Commissioner must "ensure" or the Commissioner must "assist."

Consequently, I **CONCLUDE** that adequate funding, in terms of the *Abbott* "mandate" means that the enquiry may start with analysis of the particular budget in question with a view toward "redirecting expenditures and/or reallocating funds; if there is insufficient funding available, then, the Commissioner must ensure that funds are provided.

Petitioner's assertion that failure to require full State funding of the Respondent's preschool program will result in the funding obligation falling on the District's taxpayers through local share is misguided. Review of the language of *Abbott* as well as the statutory provisions invoked by the Court reveals that the initial inquiry in the analysis of adequate funding should begin with a review of the school budget in question with the goal being to reallocate funds which have already been appropriated; thus, the burden on local taxpayers would not be increased.

Accordingly, I **CONCLUDE**, with respect to the issue Respondent's actions being violative of the *Abbott* mandates, Petitioner has failed to sustain the burden of proof.

I turn now to the issue of whether the methodology used to reduce the PSEA, *i.e.,* the per pupil cost, is arbitrary and capricious. PSEA is an amount of State aid to be utilized by a District to cover the costs of the expansion of its preschool program. The Legislature gave the Commissioner the discretion to adjust preschool expansion aid based upon actual need. (C-2, p. 53, line 2-3). Clearly, the choice was left to the Commissioner and, if the reasoning is sound and rational, it should not be disturbed.

In this case, the testimony reflects the preschool plan is based upon the projected costs required to provide preschool programs and services to the District's eligible universe of three and four year olds. The budget consists of fixed as well as recurring costs. A per pupil amount is arrived at by dividing the total budget by the number of students enrolled in the programs. The per pupil cost is an estimate of how much it costs the District to educate an individual student in its preschool program. Petitioner's program did not enroll as many students as originally projected; thus, the Petitioner's preschool program did not expand as projected.

Contrary to Petitioner's assertions, utilizing the per pupil amount to both increase and decrease the preschool budget over the course of a school year is a fair estimate since it is based on the projected expenses of the entire program. The testimony of Respondent's witnesses was instructive on this point indicating that the "per pupil" methodology is used in many other instances.

On the other hand, actual costs incurred cannot be accurately determined until the end of the school year when final audit is prepared. In order to provide adjustments, both increases and decreases, in the current year, the Respondent and the District must use estimates in an attempt to accurately gauge the costs to be incurred, during the fiscal year. As Respondent's witnesses further testified, the per pupil cost adjustment is a reasonable methodology because it is based upon quantifiable figures – namely, the number of students and the budgeted costs. Further, the per pupil amount is based upon the particular District's school budget. The per pupil amount accounts for all of the budgeted costs, is uniformly applied and provides a methodology that should closely approximate the audited costs incurred in providing a preschool education to the District's eligible three and four year old population.

I **CONCLUDE**, therefore, the per pupil calculation provided a rational, uniform basis for the determination made herein. I further **CONCLUDE** that Petitioner has failed to sustain the burden of proof on this issue.

Although Petitioner attempted to withdraw his request for a determination on the issue of whether Respondent has the authority to compel a District to reduce the undesignated fund balance below two percent to .76 percent to fund the preschool 2002-03 program, since testimony had been taken, trial briefs submitted and the record had closed, in fairness to Respondent, I will consider the question.

Respondent determined that in order to fund its educational programs and services in the 2002-03 school year, that Petitioner could appropriate a portion of its undesignated fund balance, which would bring that balance to below two percent. The

New Jersey Constitution mandates that the "Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all children in the State . . . ." *N.J. Const.*, art VIII, § 4, ¶1. Through the *Abbott v. Burke* litigation, the Supreme Court has directed the Commissioner and the Legislature to implement remedial measures in order to "ensure that public school children from the poorest urban communities receive the educational entitlements that the Constitution guarantees them." *Abbott v. Burke,* 153, *N.J.* 480, 489 (1998) (Abbott V).

The Commissioner is the chief officer of the Department of Education and has supervision of all schools of the State. *N.J.S.A.* 18A:4-22, *N.J.S.A.* 18A:4-23. See, *Hinfey v. Matawan Regional Bd. of Educ.*, 77 *N.J.* 514 (1978) (Finding that there is lodged with the Commissioner an encompassing responsibility over public education and broad authority to supervise all public schools). Moreover, the Legislature intended that the Commissioner have broad remedial powers under the Comprehensive Education Improvement and Financing Act (CEIFA), See *e.g., Abbott V*, 153 *N.J.* 480 at 499-502, and provided

> Commissioner may direct such budgetary reallocations and programmatic adjustments, or take such other measures as he deems necessary to ensure implementation of the required thoroughness and efficiency standards. *N.J.S.A.* 18A:7F-6.

Having been granted the power to direct reallocations of budgets as well as take all steps deemed necessary to ensure the provision of a thorough and efficient education, I **FIND** it is within the Commissioner's discretion to direct a District to appropriate surplus fund balances to support its educational programs and services, especially if, as in this case, analysis of the school budget disclosed funds which Respondent suggested could be reallocated and the District chose not to do so. For example, Respondent's witness testified that he suggested several non-instructional, non "*Abbott*" positions could be eliminated for economy purposes; the district chose not to follow the suggestion.

Contrary to Petitioner's allegations, there is no prohibition or statutory bar preventing a school district from appropriating money from its general fund which will result in a general fund surplus balance below two percent. Petitioner erroneously relies upon the language contained in the FY03 Appropriation Act which stated that in establishing the final award amount of *Additional Abbott v. Burke State Aid*, the Commissioner "shall consider all of the District's available resources and any appropriate reallocations, including, but not limited to, a reallocation of the District's undesignated general fund balance in excess of two percent." FY03, *L.* 2002, *c.* 38. A close reading of the section in question discloses that there is no mention of PSEA.

Moreover, because the analysis of adequate funding begins with the inquiry of whether the District has money which could be reallocated, I **FIND** when a school district has available revenue sufficient to fund expenses for the remainder of the school year, regardless of whether it is surplus or other undesignated funds, those monies should be utilized before additional State aid is provided. *Cf., Abbott V, supra,* 153 *N.J.* at 518 (providing that commissioner may, before seeking new appropriations, first determine whether funds within an existing school budget are sufficient to meet a school's request for a demonstrably needed supplemental program). Thus, I **CONCLUDE** the Respondent correctly determined that Petitioner should be required to utilize its available resources to fund the programs and services necessary to provide a constitutionally mandated educational program.

Based on all of the foregoing, I **CONCLUDE** this petition should be dismissed.

ORDER

I hereby **ORDER** this petition be and hereby is **DISMISSED WITH PREJUDICE**.

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

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

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

June 25, 2003
DATE

Maria LaFiandra
MARIA MANCINI LA FIANDRA, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

June 26, 2003
DATE

Mailed to Parties:

JUN 30 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jb

APPENDIX

Witnesses

Henry Lee

Yut'se Thomas

James Turek

Exhibits

For Petitioner:	For Respondent:	
Pet-1	No Number	Memo, March 18, 2002
Pet-2	No Number	Another directive to district about budget
Pet-3	R16-R17	Letter, October 14, 2002
Pet-4	R23-R24	Letter, February 3, 2002
Pet-5	R2-R9	Letter, February 5, 2002
Pet-6	R19-R21	Letter, February 22, 2002
Pet-7	R29	Memo, February 25,2003
Pet-8	No Number	FY 2002-03 Preschool Expansion Aid Notice
Pet-9	R35-R36	Letter, April 25, 2003
Pet-10	No Number	Adjustments to Preschool Expansion Aid (Prepared by Mr. Lee)
Pet-11	No Number	Budget costs not related to per pupil cost calculations (Prepared by Mr. Lee)
Pet-12	No Number	Letter, June 17, 2002
Pet-13	No Number	Office of Legislative Services Bulletin (Judicial Notice C2)
Pet-14	R33	FY 2002-03 Preschool Expansion Aid Notice ($118,064,151 plan)

C-1 FY03 Capital Construction

C-2 Analysis of NJ FY 2002-03 Budget

* Petitioner's documents were received in evidence; Respondent relied on many of the same documents and the Respondent's numbers are indicated for informational purposes only.

OAL DKT. NO. EDU 3424-03
AGENCY DKT. NO. 105-3/03

BOARD OF EDUCATION OF THE TOWN OF PASSAIC, PASSAIC COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. In accordance with *N.J.A.C.* 1:1-18.4, timely exceptions were filed by the Board of Education (Board), as were replies by the Department of Education (Department).[1]

In its exceptions, which reference prior briefs as well as arguments made in the concurrent matter of *Board of Education of the Township of Phillipsburg, Warren County, v. New Jersey State Department of Education*, Agency Dkt. No. 104-3/03, OAL Dkt. No. 3423-03,[2] the Board first urges the Commissioner to reject the Administrative Law Judge (ALJ)'s conclusion that approved Abbott preschool programs need not be funded exclusively by the State. The Supreme Court's decision in *Abbott V, supra,* the Board opines, nowhere envisions that preschool programs would or should be partly funded by local tax share; indeed, according to the Board, the Court's decision was based

[1] The Board additionally made a submission in response to the Department's reply. However, because applicable rules make no provision for this submission, the Commissioner does not consider it herein.

[2] Subsequently decided by the Commissioner on September 25, 2003.

on the recommendations of the Honorable Michael King, P.J.A.D., and, while the Court disagreed with Judge King regarding full-day preschool, it did *not* take issue with his conclusion that it was the State's obligation to fully fund preschool in Abbott districts. (Board's Exceptions at 3-4) However, the Board contends, even if the Commissioner were to find that the *Abbott* decisions do not require full State funding, the FY '03 Appropriations Act makes it clear that the Legislature "intended that preschool expansion aid would provide full State funding for the expansion of the approved preschool program in the 2002-03 school year over the 2001-02 approved program," so that the Department's actions, and the Initial Decision supporting them, are directly contrary to a Legislative mandate which the Initial Decision fails even to consider. (*Id.* at 4-5, quotation at 5) Finally, the Board argues, although the ALJ did not address the issue despite its having been briefed, the Department itself "repeatedly recognized" the State's legal obligation to provide full State funding for approved preschool programs in numerous memoranda to *Abbott* districts. (*Id.* at 5-6, quotation at 5)

The Board further objects to the ALJ's acceptance of the Department's utilization of a per-pupil formula for calculating adjustments to Preschool Expansion Aid (PSEA), contending that such acceptance is "contrary to fact, law and budgeting and funding practices relating to the Abbott districts." (*Id.* at 6) The Board first posits that Department-approved preschool budgets are *not* constructed on a per-pupil basis, as stated by the ALJ, but are instead derived by totaling the cost of all Department-approved items, including fixed costs; the per-pupil amount is then obtained by dividing the total budget by the projected number of enrolled students. Thus, the Board concludes, using the per-pupil amount to adjust PSEA necessarily leads to reductions that exceed the

actual savings arising from less-than-anticipated enrollment, thereby violating the legislative mandate (FY '03 Appropriations Act) that any adjustments to PSEA be based on "actual need;" in the Board's case, this methodology led to an undisputed shortage of over a million dollars in the amount actually needed to fund the preschool program for the remainder of the 2002-03 school year, rendering unsustainable the ALJ's characterization of adjusted PSEA as a "close approximation" or "fair estimate." (*Id.* at 6-9) Moreover, according to the Board, budgeting in Abbott districts, and funding by the Department, "is always based on the District's projection and the Department's determination of actual need during the school year," since actual *expenditures* will not be known for certain until after the annual audit, at which time the Department makes the necessary adjustments if State funding exceeds actual need. (*Id.* at 9) The Legislature is well aware of this situation, the Board argues, and for this reason it elected to base PSEA adjustments neither on estimates so as potentially to leave districts with shortfalls, nor on actual audited costs so that funding needs for the 2002-03 school year would not be determined until well after the school year had ended and such needs were moot; instead, it required the Department to "make adjustments based on the actual need projected by the District and then to take back any preschool expansion aid that turns out at the end of the school year not to be actually needed." (*Id.* at 9-12, quotation at 11) Indeed, the Board notes, the Initial Decision fails even to recognize the "obvious consequence of its reasoning," that is, the necessity for an adjustment, either up or down, following determination of actual costs through the annual audit. (*Id.* at 12)

Lastly, the Board excepts to the Initial Decision's "gratuitous adjudication" of the question of Department's authority to compel the District to expend

undesignated fund balance (surplus) so as to reduce it to less than 2%, an issue that was "not presented by [the] appeal and, therefore, was unnecessary for its resolution." During hearing, the Board explains, undisputed testimony established that allocations from surplus reducing it to .76 % were voluntarily undertaken by the Board in response to the Department's reduction in PSEA monies, but that the Department did not compel such allocations. (*Id.* at 12-14, quotation at 12) Thus, the Board avers, it attempted to withdraw the question of Department authority to compel expenditure of surplus below 2%, but the ALJ erroneously considered it nonetheless:

> The issue of when and to what extent the Department may compel reallocations by a District should be decided on a complete record that squarely presents this issue for the proper resolution of an appeal.***The initial decision's conclusion that broad reallocation authority may be exercised in these circumstances resolves an issue in the wrong case at the wrong time. Before such a broad issue is determined in an administrative appeal, there should be a full and complete record showing that the District was compelled to reallocate and the effect on the District of that compelled reallocation. This is not the proper case or record to decide issues that could affect all Abbott districts who are compelled to reallocate undesignated general fund balance below 2% in the future. Therefore, Petitioner respectfully requests that the Commissioner reject the initial decision's gratuitous resolution of an issue not properly before that tribunal. (*Id.* at 13-14)

In reply to the Board's exceptions, the Department first argues that the ALJ's conclusion with respect to State funding for approved preschool programs is contrary to neither the *Abbott* rulings nor any statutory or regulatory requirement. Indeed, the Department contends, *Abbott* does not require provision of additional State aid if a district has other revenue sufficient to be reallocated, but requires instead "an analysis of [the District's] budget with a view toward redirecting or reallocating expenditures and funds," with additional aid to be provided only if needed. (Department's Reply Exceptions at 3) The Department further urges adoption of the

ALJ's conclusion that the Department's method of adjusting the District's PSEA award was reasonably based, since any adjustments prior to determination of actual costs through audit, that is, during the current fiscal year, must necessarily be made on estimates, and the Department's method was based on uniform, quantifiable measures for determining "documented need" as directed by the Legislature. (*Id.* at 3-5) Finally, the Department objects to the Board's stance with respect to the propriety of determining the question of the Department's authority to appropriate undesignated fund balance (surplus) below 2%. The Department notes that this issue was identified at prehearing and addressed in both briefs and testimony, and that the Board did not attempt to withdraw it until after it had been fully litigated; thus, the Board is "disingenuous" in now asserting that the issue was not presented on appeal and a full record not developed. The Department also finds "incredible" the Board's claim that it voluntarily reduced its surplus below 2%, since this "was one of petitioner's main arguments as to why the reduction [in PSEA] should not be made, and the District certainly did not 'volunteer' to utilize its undesignated fund surplus balance for the pre-school program." The Initial Decision should be adopted, the Department contends, because the question of Department-directed reallocation of surplus below 2% will surely recur, and its determination here, following full hearing and briefing, will conserve time and resources, as well as provide guidance for future litigation. (*Id.* at 5-7, quotation at 6)

Upon his own review and consideration, the Commissioner initially concurs with the ALJ that the *Abbott* Court did not categorically require full State funding of preschool programs regardless of need. As set forth in *Board of Education of the Town of Phillipsburg, Warren County, v. New Jersey State Department of Education,*

decided by the Commissioner on September 25, 2003, at 16-17,[3] the *Abbott* decisions nowhere suggest, and certainly do not direct, that approved Abbott preschool programs must be funded *exclusively* by the State. Rather, they require the State to ensure, with additional aid where necessary, that sufficient monies are available to an Abbott district to fully fund its preschool program, that is, to provide or secure additional State funds to the full degree necessary to support approved programs where local budgetary resources are found inadequate for this purpose. Similarly, Department pronouncements regarding "full funding" of Abbott preschool programs must be understood as a reflection of, and commitment to, this shared obligation, recognizing both the critical importance of early childhood education in Abbott districts and the necessity of allocating resources efficiently and effectively in providing it. (*Id.* at 17)

The Commissioner agrees with the Board, however, that the central question in this matter cannot be resolved without express consideration of the FY'03 Appropriations Act, which establishes the requirements of the Legislature for PSEA for the 2002-03 school year. The Board contends that, even if the Commissioner were to find that the Court did not require full funding of preschool expansion, he cannot ignore statutory language demonstrating that the Legislature *did.* Specifically, the Board avers, the Legislature required that any adjustment to PSEA be based on "actual need," so that the Department's adjustment methodology, having resulted in less money than was actually needed to finish out the school year, cannot be sustained.

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[3] See also the concurrently decided matters of *Board of Education of the Township of Neptune, Monmouth County v. New Jersey State Department of Education; Board of Education of the Township of Pemberton, Burlington County v. New Jersey State Department of Education;* and *Board of Education of the City of Millville, Cumberland County v. New Jersey State Department of Education.*

The pertinent portion of the Act provides:

> The amount appropriated hereinabove as Abbott Preschool Expansion Aid is for the purpose of funding the increase in the approved budgeted costs from 2001-2002 to 2002-2003 for the projected expansion of preschool programs in "Abbott districts." Payments of Abbott Preschool Expansion Aid shall be based on documented expansion of the preschool program. Upon the Commissioner of Education's request, "Abbott districts" will be required to provide such supporting documentation as deemed necessary to verify that the actual expansion in the preschool program has occurred in the 2002-2003 fiscal year. Such documentation may include enrollment and attendance data that may be subject to an audit. Appropriate adjustments to a district's Abbott Preschool Expansion Aid amount may be made by the commissioner based on actual need. (Exhibit C-1, pages 52-53)

The above-quoted language, in the Commissioner's view, does not support the Board's contention. In the context of the full passage, it is clear that "actual need" refers not, as the Board argues, to a dollar-for-dollar match between State aid and the district's unaudited program costs, but to the extent to which the district's documented expansion differs from its projected. Quantifying, for current-year aid adjustment purposes, the dollar amount associated with that difference by means of a per-pupil cost, derived for each district by dividing its projected budget by its number of projected pupils, is a reasonable, objective and consistent Statewide methodology for carrying out the Legislature's directive; indeed, in most cases, it likely *would*, as found by the ALJ, result in a fair approximation of actual program expansion costs.[4] That the Board in this instance experienced so large a drop in aid based on the Department's determination of "actual need" was due *entirely* to the extraordinary difference between the district's initial enrollment projection (1917) and its actual documented enrollment (1038); such

[4] The Commissioner here notes that, contrary to the Board's representation on exception, the ALJ does not misunderstand or mischaracterize the manner in which preschool budgets are constructed in Abbott districts. Initial Decision at 5.

anomaly, however, does not render the Department's method of adjustment inherently infirm, improper, or in violation of law.

Similarly, there is no violation of the Act in the Board's being required, whether "voluntarily" or by Department direction, to expend surplus funds in order to complete its preschool program for the 2002-03 school year.[5] As noted by the Department in its brief before the ALJ, school districts, including Abbott districts, have no statutory or regulatory entitlement to retain unreserved, undesignated balances through the end of a school year; indeed, the very purpose of surplus is to provide an ability to meet unforeseen costs arising during the course of the year. (Department's Brief at 11) Within an appropriate context, such as when dealing as here with a dedicated, current-year State aid entitlement not structured as a dollar-for-dollar match, use of reserve funds--even to the point of bringing the remaining surplus balance below 2%--to address a gap between aid received and targeted program costs is entirely appropriate, notwithstanding that such funds may have derived from the general budget supported in part by local taxes. To the extent that current-year application of surplus may leave a district with less money to direct toward the following year's budget, or be construed, as it is by the Board herein, as an abrogation of the State's responsibility for "full" funding, the overall framework for State support of Abbott districts—the larger context within which the current matter must be viewed—acts to ensure that district students will not be deprived of the educational entitlements guaranteed them by the New Jersey Legislature and Constitution.

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[5] The Commissioner concurs with the ALJ and the Department that this issue is appropriately decided herein.

Accordingly, as clarified above, the Initial Decision of the Office of Administrative Law is adopted as the final decision in this matter. The actions of the Department are sustained and the Petition of Appeal dismissed.

IT IS SO ORDERED.[6]

COMMISSIONER OF EDUCATION

Date of Decision: 9/25/03

Date of Mailing: 9/26/03

[6] Pursuant to *P.L.* 2002, c. 38, "*Abbott*" determinations are final agency actions appealable directly to the Appellate Division of the New Jersey Superior Court.

563-03

563-03

GAIL REMPELL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST HANOVER, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

September 26, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 7571-01

AGENCY DKT. NO. 264-6/01

GAIL REMPELL,

Petitioner,

v.

BOARD OF EDUCATION OF EAST HANOVER TOWNSHIP, MORRIS COUNTY,

Respondent.

Richard A. Friedman, Esq., appearing for Petitioner
(Zazzali, Fagella & Nowak, attorneys)

Joseph R. Morano, Esq., appearing for Respondent
(Viola, Benedetti, Azzolini & Morano, attorneys)

Record Closed: August 6, 2003 Decided: August 8, 2003

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) from the Department of Education on August 31, 2001, for hearing as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

A hearing was scheduled for October 29, 2002 at the OAL, 33 Washington Street, Newark, New Jersey, which was adjourned at the request of Petitioner's counsel. The matter was rescheduled for April 22, 2003. Prior to the hearing, settlement discussions were held and a settlement was reached.

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

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

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

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

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

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

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

August 8, 2003
DATE

Maria M. La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

Receipt Acknowledged:

8-14-03
DATE

M. Kathleen Duncan/CG
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 14 2003
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jb

F-11.2

ZAZZALI, FAGELLA, NOWAK,
KLEINBAUM & FRIEDMAN
150 West State Street
Trenton, New Jersey 08608
(609) 392-8172
Attorneys for Petitioner

GAIL REMPELL,	:BEFORE THE OFFICE OF :ADMINISTRATIVE LAW
Petitioner,	:
v	:
	:AGENCY DOCKET NO.: 264-6/01
EAST HANOVER TOWNSHIP BOARD OF EDUCATION, MORRIS COUNTY	:OAL DOCKET NO.: EDUOR 07571-01N :
	: **SETTLEMENT AGREEMENT**
Respondent.	:

This Settlement Agreement is made between the petitioner, Gail Rempell, and the respondent, East Hanover Township Board of Education ("Board").

Introduction and Background

WHEREAS, petitioner filed a petition with the Commissioner of Education under Agency Docket No.: 264-6/01, OAL Docket No.: EDUOR 07571-01N, alleging that the reduction of her employment to part-time and assignment of other employees to positions as speech language specialists by the respondent violated her tenure and seniority rights.

WHEREAS, the parties are desirous of resolving this matter promptly and

F-11.3

amicably, and

WHEREAS a settlement in this matter will save both parties and the public the cost and uncertainties of litigation, the parties agree that this matter shall be resolved based upon the following terms.

1. Respondent shall pay to petitioner, within 30 days of the date of the Commissioner's approval of this Settlement Agreement, the sum of $9,000.00.

2. The parties agree that no deductions shall be taken for taxes or any other reasons from said payment, and that all taxes and other deductions shall be petitioner's responsibility.

3. Petitioner waives and abandons her claim that the number of speech language specialist positions and their percentages of employment now in effect in the respondent school district, specifically the employment of speech language specialists with one speech language specialist being employed full-time as a speech language specialist, three speech language specialists employed on a half-time basis, and one half-time speech language specialist - half-time co-teacher, all of whom who are either non-tenured or less senior than petitioner (except for the full-time speech language specialist), does not, in the factual circumstances of this matter, violate petitioner's tenure or seniority rights.

4. The parties agree that petitioner preserves, reserves, and retains her tenure and seniority status and rights, so that if a full-time speech language specialist position is created, re-established, or becomes vacant, petitioner may assert tenure and seniority claims to such position.

F-11.4

5. Although petitioner agrees to waive or relinquish her challenge to the number of speech language specialist positions and their percentages of employment as referred to in paragraph 3 above, in the event that such configuration is changed, such that a full-time speech language specialist position is created, re-established, or becomes vacant, petitioner reserves the right to assert tenure and seniority claims to any such speech language specialist positions.

6. In consideration of the above terms, petitioner agrees to withdraw the petition of appeal with prejudice.

7. The parties agree that this agreement is contingent upon the approval of the Commissioner of Education, and that if such approval is denied, neither the agreement nor any of its terms shall be admissible in any legal or administrative proceedings of any nature, and that in such event, the matter shall be returned to the Office of Administrative Law for further proceedings.

By: Gail Rempell Dated: 5/22/03
Gail Rempell, Petitioner

East Hanover Township Board
of Education

By: _____ Dated: _____
, Board President

EAST HANOVER TOWNSHIP SCHOOLS
20 School Avenue
East Hanover, New Jersey 07936
(973)-887-2112
(973)-887-2773 fax#

John L. Tudor
School Business Administrator/
Board Secretary

Larry Santos
Superintendent

July 7, 2003

Viola, Benedetti, Azzolini, & Morano LLC
Attorneys at Law
134 Columbia Turnpike
Florham Park, NJ 07932

ATTN: Mr. Joseph Morano, Esq.- Partner

Re: Rempell Settlement

Dear Mr. Morano:

Enclosed please find the certified minutes for the above referenced settlement that was approved during the June 19, 2003 board meeting.

Please feel free to contact me should you require any other information.

Very truly yours,

John L. Tudor
School Business Administrator/
Board Secretary

JLT:dcl
encl(s)

EXTRACT FROM THE MINUTES OF
A MEETING OF THE BOARD OF
EDUCATION OF THE TOWNSHIP
OF EAST HANOVER, MORRIS
COUNTY, N.J. AS RECORDED IN

THE OFFICIAL MINUTE BOOK

The Board of Education of the Township of East Hanover in the County of Morris, New Jersey, convened in Public Meeting on June 19, 2003 at 7:30 p.m., in the conference room of the board offices, 20 School Avenue, East Hanover, New Jersey.

The following members of the Board of Education were present:

Catherine Pfund-Olsen, President
Patricia Anderson
Edward Garcia
Lisa Krueger
Frank Verducci
Frank Hoffman
Frank Sullivan

The following motion was moved by Mr. Garcia and seconded by Mr.Hoffman and adopted by the Board of Education by the following roll call vote:

Approve the negotiated settlement agreement with Gail Rempell
in the amount of $9,000.00 which is attached.

STATE OF NEW JERSEY)
EAST HANOVER TWP.) ss
COUNTY OF MORRIS)

I, John L. Tudor, Secretary of the Board of Education, of the East Hanover Township School District, in the County of Morris, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of the Board of Education of said district duly called and held on June 19, 2003, has been compared by me with the original minutes as officially recorded in my office in the minute book of said East Hanover Township, Board of Education and is a true, complete copy thereof and of the whole of said original minutes so far as the same relate to the subject matter referred to in said contract in witness I have hereunto set my hand and affixed the corporate seal of said Board of Education this 7th day of July, 2003.

Board Secretary/Business Administrator

JLT:dcl

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OAL DKT. NO. EDU 7571-01
AGENCY DKT. NO. 264-6/01

GAIL REMPELL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST HANOVER, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 9|26|03

Date of Mailing: 9|26|03

564-03

564-03

THOMAS FEDOR,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF ELMWOOD PARK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning tenured principal claimed the Board reduced his employment from a 12-month to a 10-month position and similarly reduced his salary while retaining a less senior individual in a 12-month position, thereby violating his tenure and seniority rights.

The ALJ determined that a RIF, a reduction in petitioner's tangible employment benefits, occurred and, thus, petitioner's seniority rights were triggered. (*Carpenito*) Both petitioner and Michael Nazzarro were tenured employees but because petitioner's seniority as a high school principal exceeded that of Nazzarro, petitioner was entitled to bump Nazzarro for the position. The ALJ granted petitioner's motion for summary decision.

The Commissioner adopted the Initial Decision as his own and directed the Board to compensate petitioner as indicated in the Initial Decision.

September 26, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

TRANSCRIPT
ORAL INITIAL DECISION
OAL DKT. NO. EDU 7669-01
AGENCY DKT. NO. 287-7/01

THOMAS FEDOR,
Petitioner,
v.
ELMWOOD PARK BOARD OF EDUCATION,
Respondent.

Gregory T. Syrek, Esq., for petitioner
(Bucceri & Pincus, attorneys)

Matthew P. Demaria, Esq., for respondent

Record Closed: August 6, 2003 Decided: , 2003

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

Procedural History

On or about July 12, 2001, petitioner filed an appeal with the Commissioner of Education, alleging that respondent's action to reduce his employment from a 12-month position to a 10-month position while retaining a less senior individual in a 12-month position violated his tenure and seniority rights. On August 23, 2001, respondent filed its answer requesting dismissal of the petition. On September 10, 2001, the Department of Education, Bureau of Controversies and Disputes transmitted this matter

to the Office of Administrative Law as a contested case for a hearing pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13. The case was assigned to the undersigned judge on October 24, 2001, and a telephone prehearing conference held on December 19, 2001. The hearing scheduled for July 17, 2002 was adjourned at the request of counsel to August 14, 2002 and then to January 23, 2003. The scheduled hearing was adjourned at the request of counsel who indicated that a joint stipulation of facts and cross motions for summary decision would be filed. The parties have filed a joint stipulation of facts and cross-motions for summary decision. I have considered the briefs filed in the matter and have today heard oral argument, and am prepared to make a determination in this matter.

Stipulated Facts

The parties have filed a joint stipulation of facts, which is attached and constitutes the undisputed facts in this matter. They may be summarized as follows:

This case arises out of a dispute between respondent Elmwood Board of Education and petitioner an Elementary School Principal, Thomas Fedor. Petitioner holds the following certificates and endorsements issued by the State Board of Examiners:

1. Instructional Certificate with endorsement as Secondary School Teacher of Social Studies issued on July 19, 1966.
2. Educational Services Certificate with endorsement for Student Personnel Services issued January 1973.
3. Administrative Certificate with endorsements in:

    a. Principal/Supervisor issued September 1978.
    b. School Administrator issued October 1982.

Petitioner has been employed by respondent since 1966 and has held the following positions:

1966-1975	Teacher of Social Studies, Grades 7 to 12
1975-1978	Guidance Counselor, Grades 7 to 12
1978-1980	Elementary School Principal
1980-1986	Assistant to the Superintendent of Schools
1986-1988	Assistant to the Superintendent of Schools and Acting High School Principal
1988-1990	Assistant to the Superintendent of Schools
1990-1991	High School Principal (12 months)
1991-1992	High School Principal (12 months)
1992-1993	High School Principal (12 months)
1993-1994	High School Principal (12 months)
1994-1995	Elementary School Principal (12 months)
1995-1996	Elementary School Principal (12 months)
1996-1997	Elementary School Principal (12 months)
1997-1998	Elementary School Principal (12 months)
1998-1999	Elementary School Principal (12 months)
1999-2000	Elementary School Principal (12 months)
2000-2001	Elementary School Principal (12 months)
2001-2002	Elementary School Principal (10 months)

On April 24, 2001, respondent acted to appoint petitioner as an Elementary School Principal on a ten (10) month basis.[1] By decreasing petitioner's employment from twelve (12) months to ten (10) months, respondent reduced petitioner's employment and salary. Petitioner's salary for the 2001-2002 school year was $90,924.00 ($90,299.00 plus $625.00 longevity). If respondent had continued to employ petitioner on a twelve (12) month basis for the 2001-2002 school year, his salary would have been $109,108.00 ($108,483.00 plus $625.00 for longevity). Petitioner's salary for the 2000-2001 school year was $105,573.00.

As a result of the reduction in petitioner's employment, from twelve (12) months to ten (10) months, petitioner's sick time was reduced from fourteen (14) days to twelve (12) days. As a result of the reduction in petitioner's employment, from twelve (12) months to ten (10) months, petitioner's vacation time was reduced from twenty (20) days to six (6) days.

[1] At the time of the reduction, petitioner was employed by respondent as the Elementary School Principal for seven (7) consecutive years (from 1994-2001 and as a High School Principal for four (4) consecutive years (1990-1994).

At the time respondent decreased the Elementary School Principal position from twelve (12) months to ten (10) months, Michael Nazzaro (Nazzaro) held the position of High School Principal. Respondent has employed Nazzaro since 1968, in the following positions:

1968-1991	Teacher of Mathematics, High School
1991-1996	Teacher of Mathematics, High School and Facilitator
1996-1997	Assistant Principal
7/9/97-2/3/98	Acting High School Principal
2/4/98-Present	High School Principal (12 months)

Nazzaro was properly certified for the employment positions appointed to by respondent.

Petitioner alleges that the reduction in petitioner's employment, from twelve (12) to ten (10) months violates his rights under the Education Tenure Act, *N.J.S.A.* 18A:28 –1 to –18. Petitioner asserts that since the High School Principal position, held by Nazzaro, was not reduced from twelve (12) to ten (10) months, and petitioner obtained tenure as a principal in 1993, he is entitled to Nazzaro's position based on his seniority and bumping rights.

Discussion

1. Tenure Law

Tenure is a status in a particular position created by statute rather than an agreement of the parties. *Zimmerman v. Bd. of Educ. of Newark*, 38 *N.J.* 65, 72 (1962). Tenure serves to provide a measure of security to teachers and other school employees who faithfully serve for the requisite period. *Barnes v. Bd. of Educ. of Jersey City,* 85 *N.J. Super.* 42, 45 (App. Div. 1964). The Education Tenure Act, *N.J.S.A.* 18A:28-1 to –18, authorizes the tenure of educational personnel.

Educators who are employed in public schools must hold a valid certificate "to teach, administer, direct or supervise the teaching, instruction or educational guidance

of . . . pupils in such public schools." *N.J.S.A.* 18A:26-2. The State Board of Examiners has implemented the certification requirement by authorizing three certificates that an educator may hold: (1) Instructional; (2) Administrative; and (3) Educational Services. *N.J.A.C.* 6:11-2.3. In order to attain tenure, an educator must hold the appropriate certificate for his or her position. *N.J.S.A.* 18A:26-5. An educator may hold more than one type of certificate.

In addition to the three types of certificates an educator may hold, the State Board of Examiners has designated special endorsements under each type of certificate. *N.J.A.C.* 6:11-2.3. An educator must hold the appropriate certificate and endorsement for his or her position. *N.J.A.C.* 6:11-6.1, -6.2. An educator may possess multiple endorsements under a single certificate, qualifying him or her to fill any position covered by the respective endorsements. *N.J.A.C.* 6:11-6.2 (a)(2), (a)(8).

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

> Three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or (b) Three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or (c) The equivalent of more than three academic years within a period of any four consecutive academic years.
> [*N.J.S.A.* 18A:28-5.]

Once an individual has obtained tenure within a particular area, she or he cannot lose tenure protections as long as she or he continues within the area of tenure absent inefficiency, incapacity, conduct unbecoming a teaching staff member, or other just cause. *N.J.S.A.* 18A:28-5. In the event that a tenured educator is transferred or

promoted to a separately tenurable position, *N.J.S.A.* 18A:28-6 provides for the acquisition of tenure in the new position.[2]

Tenure does not apply in the same way for administrative and supervisory personnel as it does for teachers. *Nelson v. Bd. of Educ. of Township of Old Bridge*, 148 *N.J.* 358, 367 (1997). It has been uniformly recognized by both the State Board of Education and the Commissioner that the positions enumerated under *N.J.S.A.* 18A:28-5,[3] are separately tenurable, meaning that tenure accrued within one of the enumerated positions does not transfer to another enumerated position. *Id.* at 365 (*citing, Kaprow v. Bd. of Educ.*, 255 *N.J. Super.* 76, 92 (App. Div. 1992) (agreeing that "Assistant Superintendent" is a separately tenurable position)). The position of "Principal" is a separately tenurable position. *N.J.S.A.* 18A:28-5. Thus, an educator can only obtain tenure as a principal by holding the requisite certification and working as a principal for the requisite period of time. However, for purposes of acquiring tenure there is no distinction between the position of High School Principal and Elementary School Principal. *N.J.S.A.* 18A:28-5. The lack of distinction between the two categories

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[2] *N.J.S.A.* 18A:28-6 provides: Any such teaching staff member under tenure or eligible to obtain tenure under this chapter, who is transferred or promoted with his consent to another position covered by this chapter on or after July 1, 1962, shall not obtain tenure in the new position until after: (a) the expiration of a period of employment of two consecutive calendar years in the new position unless a shorter period is fixed by the employing board for such purpose; or (b) employment for two academic years in the new position together with employment in the new position at the beginning of the next succeeding academic year; or (c) employment in the new position within a period of any three consecutive academic years, for the equivalent of more than two academic years; ... in the event the employment in such new position is terminated before tenure is obtained therein, if he then has tenure in the district or under said board of education, such teaching staff member shall be returned to his former position at the salary which he would have received had the transfer or promotion not occurred together with any increase to which he would have been entitled during the period of such transfer or promotion.

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

implies that once an educator acquires tenure in a Principal position, the educator is entitled to tenure in any Principal position.

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

> a hearing ... by the commissioner, or a person appointed by him to act in his behalf, after a written charge or charges, of the cause or causes of complaint, shall have been preferred against such person, signed by the person or persons making the same, who may or may not be a member or members of a board of education, and filed and proceeded upon as in this subarticle provided.

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

2. A RIF is a reduction in any tangible benefit

Although there are many protections afforded to individuals with tenure, tenure does not prohibit a school district from engaging in a RIF. *N.J.S.A.* 18A:28-9.[4] In the event of a RIF, dismissals must be made on the basis of seniority[5] according to standards adopted by the State. *N.J.S.A.* 18A:28-10. Thus, if it is determined that a RIF occurred, the seniority of the individuals affected by the RIF must be considered.

---

[4] The "reduction-in-force" concept is embodied in *N.J.S.A.* 18A:28-9, which provides:

Nothing in this title or any other law relating to tenure of service shall be held to limit the right of any board of education to reduce the number of teaching staff members, employed in the district whenever, in the judgment of the board, it is advisable to abolish any such position for reasons of economy or because of reduction in the number of pupils or of change in the administrative or supervisory organization of the district or for other good cause . . .
[*N.J.S.A.* 18A:28-9].

[5] Seniority is a by-product of tenure and comes into play only if tenure rights are reduced by way of dismissal or reduction in tangible employment benefits.

Seniority is a right afforded to employees who have acquired tenure. Seniority entitles tenured employees to either continue in an existing job opening based upon their longevity of employment or to be placed upon an eligible list for reemployment when a new position becomes available. *N.J.A.C.* 6:3-5.1(i). In essence, seniority provides employees with bumping rights. Bumping rights are governed by *N.J.A.C.* 6:3-5.1 which provides, in relevant part:

> (b) Seniority ... shall be determined according to the number of academic or calendar years of employment, or fraction thereof, as the case may be, in the school district in specific categories as hereinafter provided.
>
> ...
>
> (h) Whenever a person shall move from or revert to a category, *all periods of employment shall be credited toward his or her seniority in any or all categories in which he or she previously held employment.*
>
> ...
>
> (l) The following shall be deemed to be specific categories, not necessarily numbered in the order of precedence:
>
> ....
>
> 4. High school principal;
>
> ...
>
> 9. Elementary principal
>
> [*N.J.A.C.* 6:3-5.1 (emphasis added).]

If the language of a statute is plain, unambiguous, and uncontrolled by other parts of the regulation, the words of the statute are to be given their ordinary and well-understood meaning. *Fahey v. Jersey City*, 52 *N.J.* 103, 106-7 (1968); *Safeway Trails, Inc. v. Furman*, 41 *N.J.* 467, 478 (1964); *Lane v. Holderman*, 23 *N.J.* 304, 313 (1957). A regulation is subject to the same rules of construction as a statute and should be construed according to the plain meaning of the language. *Medford Convalescent and Nurs. Ctr. v. Div. of Med. Assist. and Health Servs.*, 218 *N.J. Super.* 1, 5 (App. Div.1985). Seniority can only be obtained by the accrual of actual experience in a

specific job category.[6] *Bednar v. Westwood Bd. of Educ.*, 221 *N.J. Super.* 239, 241 *n.* 1 (App. Div. 1987). Thus, the concept of seniority is narrower than the concept of tenure.

A reduction in force is not limited to the complete elimination of positions. A reduction in hours of employment is considered to be a reduction in force. *Klinger v. Bd. of Educ. Cranbury*, 190 *N.J. Super.* 354, 357 (App. Div. 1982) (*citing Popovich v. Bd. of Educ.*, 1975 *S.L.D.* 737, 745); *see also*, *Bednar, supra,* 221 *N.J. Super.* at 240 (finding a reduction of an art teacher's full-time position to a part-time position constitutes a RIF); *Avery v. Bd. of Educ. Trenton State Board of Education,* EDU 8316-93, *State Bd. of Educ.* #95-97 (July 2001)<http://www.state.nj.us/njded/legal/sboe/2001/jul/sb95-97.pdf> (holding that petitioners suffered a RIF when the board "abolished their 12-month unrecognized positions and reassigned them to 10-month positions with recognized titles"). Thus, when a school board deems it necessary to reduce tangible employment benefits and/or eliminate a position, the seniority regulations shall be applied.

3. Analysis

Based on the stipulated facts and the evidence provided, there is no genuine issue of material fact. Petitioner, a tenured principal, experienced a reduction in salary, vacation days, and sick days as a result of respondent's decision to reduce the Elementary School Principal position from twelve (12) months to ten (10) months. Case law has consistently held that a reduction in hours is a RIF which triggers the application of the seniority regulations. Therefore, respondent had an obligation to consider petitioner's seniority status prior to reducing his hours.

[6]For example, an individual may obtain tenure in any "principal" position, but his seniority is based upon his actual experience with a specific age group. Thus, petitioner has tenure based on the eleven (11) years serving as principal, but only four (4) years of seniority for a High School Principal position and seven (7) years of seniority for the Elementary School Principal position.

For purposes of determining seniority, petitioner served in two different principal categories. Petitioner served four (4) years in the category of High School Principal, and seven (7) years in the category of Elementary School Principal. Petitioner's tenure and service in both principal categories entitled him to assert bumping rights for a principal position in either category.[7]

The undisputed facts indicate that Nazzaro had also obtained tenure as a Principal. However, for purposes of determining seniority, Nazzaro served as principal in the High School category for three (3) years, four (4) months and twenty-five (25) days. Petitioner served in the High School category for four (4) years. Consequently, at the time of the RIF, petitioner's seniority in the High School Principal category exceeded Nazzaro's. Since petitioner was tenured as a Principal and had more seniority in the High School Principal category then Nazzaro, petitioner was entitled to bump Nazzaro for the High School Principal position.

Conclusion

Respondent engaged in a RIF when it reduced the Elementary School Principal position from a twelve (12) month position to a ten (10) month position. Because respondent engaged in a RIF, it had an obligation to consider the seniority rights of those affected by the RIF. Based on the stipulated facts and evidence submitted by the parties, it is clear that respondent failed to fulfill its obligation under the tenure act. Petitioner, based upon his seniority, was entitled to bump Nazzaro for the High School Principal position.[8]

---

[7] Even if seniority were determined based on the broader category of "principal", petitioner, with his eleven (11) years in a principal position, would still have more seniority than Nazzaro and, as such, petitioner would be entitled to bump Nazzaro for the High School Principal position.

[8] Moreover, the collective bargaining agreement negotiated several years ago, has no relevance to the subject matter of the instant dispute, which involves petitioner's seniority rights as a result of a reduction in force.

Order

Based on the above, it is hereby **ORDERED** that petitioner's motion for summary decision is granted. For school year 2001-2002, petitioner is entitled to the difference between the salary he actually earned in the ten-month position and the amount he would have earned as a 12-month high school principal. Petitioner will also be entitled to a back-pay differential for the 2002-2003 school year and thereafter until he is placed or paid for a twelve-month principal position. He is also entitled to restoration of lost sick days and vacation days as well as any other benefits or emoluments of employment loss as a result of respondent's action. I am not, however, awarding prejudgment interest as requested, since I do not find based upon the information available to me that respondent's action was in "bad faith."

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

Within thirteen (13) days from the date on which this recommended oral decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

END OF TRANSCRIPT

I, Anna M. Leggett, certify that the foregoing is a true and accurate transcript, to the best of my ability, of Judge Elinor R. Reiner's oral decision rendered in the above matter on August 13, 2003.

August 13, 2003
DATE

Anna M. Leggett
ANNA M. LEGGETT, SECRETARY

August 13, 2003
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

8-15-03
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

AUG 18 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

al

OAL DKT. NO. EDU 7669-01
AGENCY DKT. NO. 287-7/01

THOMAS FEDOR,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF ELMWOOD PARK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions.

Upon careful and independent review of the record in this matter, the Commissioner concurs that once petitioner was subject to a reduction in his tangible employment benefits, as a tenured principal, his seniority rights were triggered. *See Carpenito v. Board of Education of the Borough of Rumson*, 322 *N.J. Super.* 522, 531, (App. Div. 1999). For the reasons set forth by the Administrative Law Judge (ALJ), the Commissioner further agrees that petitioner has established he was entitled to the 12-month High School Principal position held by Michael Nazzaro.

Accordingly, the Commissioner adopts the ALJ's recommendation to grant summary decision to petitioner and directs the Board to compensate petitioner as indicated on page 11 of the Initial Decision.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 9|26|03
Date of Mailing: 9|26|03

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

565-03

JAMES ALT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BERGENFIELD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning teacher alleged the Board failed to acknowledge his tenure and seniority rights upon his reemployment following a reduction in force.

The ALJ concluded that petitioner forfeited his prior tenure and seniority rights when he refused to accept the full-time position offered to him by the Board in 1992. (The Board had sent him a certified notice, the receipt of which was signed by his daughter.) The ALJ concluded he was rehired by the Board as a new teacher in 2001 and was not entitled to his prior seniority, vacation or sick time. Moreover, the ALJ concluded that there were no equitable circumstances present that could operate to require the Board to grant any form of relief to petitioner as a result of the appeal. Petition was dismissed.

The Commissioner concurred with the ALJ's findings and conclusions, clarifying only that, under these particular circumstances, where petitioner failed to respond to a duly served recall notice in 1992, the Board reasonably determined that petitioner had abandoned his tenure and seniority rights.

September 29, 2003

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 9624-02

AGENCY DKT. NO. 303-9/02

JAMES ALT,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF BERGENFIELD, BERGEN COUNTY,

Respondent.

Alfred F. Maurice, Esq., for petitioner, (Springstead & Maurice, attorneys)

Joanne L. Butler, Esq., for respondent, (Schenck, Price, Smith & King, attorneys)

Record Closed: August 7, 2003 Decided: August 15, 2003

BEFORE **EDITH KLINGER**, ALJ:

On September 25, 2002, petitioner, James Alt, filed a Verified Petition before the Commissioner of Education to compel the respondent, Board of Education of the Borough of Bergenfield (Board), to grant him appropriate tenure and seniority rights,

pursuant to *N.J.S.A.* 18A:28-12, after he was allegedly recalled following a layoff from his prior teaching position.

On October 28, 2002, the Board filed its answer to the petition and on November 22, 2002, the Department of Education transmitted the matter to the Office of Administrative Law (OAL) as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The hearing was held on June 24, 2003 and the record closed on August 7, 2003 after receipt of the last submission from the parties.

Alt was employed by the Board as an Industrial Arts teacher on or about September 1, 1969. He remained in that position until he was subject to a reduction in force on or about June 30, 1988.

On June 26, 1991, the Board offered Alt a five-sixths position as a teacher of Industrial Arts. He admits that he received the offer and declined to accept the position.

On May 13, 1992, the Board sent Alt a notice offering him a full-time position in Technology Education, the equivalent of his former Industrial Arts position. The notice was sent to his home by certified mail and the receipt for the letter was signed by Alt's daughter who was seventeen years old at the time. He confirmed that his daughter lived with him and that it was his daughter's signature on the receipt. He does not assert that his daughter was under any disability.

Alt never responded to the offer. He now claims that his daughter never gave him the letter and that this was an improper way for the Board to notify him of the vacant position. He argues that the letter should have been sent by certified mail with the receipt for his signature only.

Service in administrative actions may be made by certified mail, return receipt requested, by regular mail, or in any manner designed to provide actual notice to a

party. *Shannon v. Academy Bus Lines*, 346 *N.J. Super.* 191, 196, (App. Div. 2001); *N.J.A.C.* 1:1-7.1(a). In actions brought in the Superior Court of New Jersey, one may obtain *in personam* jurisdiction over an individual by leaving a copy of a summons and complaint at that individual's usual place of abode with a competent member of the household, aged fourteen or above, residing there. R. 4:4(a)(1) of the Rules Governing the Courts of the State of New Jersey. There is no requirement for service to an 'addressee only' in either forum. I **CONCLUDE** that a Board need provide no greater service of a notice containing a job offer than required to initiate an action against an individual. Therefore, I **CONCLUDE** that Alt must be deemed to have received the offer.

Between approximately 1988 and 2000, Alt was successfully engaged in the restaurant business in New York. In 2000, he decided to return to teaching, applied for a position in the Paramus school system and was hired. In fact, Richard Cirelli, Assistant Superintendent for Personnel of the Bergenfield Board, wrote Alt a letter of reference in support of his application to teach in Paramus. Cirelli testified that, prior to this time, Bergenfield had not been contacted by Alt since he refused the five-sixths position in 1991.

Based upon Alt's success in the restaurant business and his failure to inquire about a teaching position for at least eight years, it may be inferred that he was not particularly interested in being recalled to a full time teaching position in Bergenfield during this period. I **CONCLUDE** that Alt's failure to respond to the Board's offer coupled with his failure make further inquiry for approximately eight years is the equivalent of his refusing the full time position offered.

During the course of Alt's application to Paramus, he had occasion to contact members of the teaching staff in Bergenfield and learned that there was a position open in his field at the Roy W. Brown school there. He was urged by a friend teaching at the Roy W. Brown school to speak to the principal. The principal in turn urged Alt to apply for the vacancy.

The opening at Roy W. Brown was a posted position. Cirelli testified that, if there is a position available which is subject to a recall list, the position is not posted. Alt denies that he ever saw the posting but I **FIND** this to be irrelevant to the present appeal.

I **FIND** that the Bergenfield Board never contacted Alt about filling the position; he approached them. In his letter of application, dated February 28, 2000, he wrote

> I am contacting you to express my interest in an Industrial Arts teaching position at the Roy W. Brown Middle School. I am currently self-employed as an owner/manager of a restaurant. However, I am extremely interested in changing my career path back towards education.
>
> I am an experienced teacher, who taught nineteen years at the Roy W. Brown Middle School from 1969-1988.
>
> ...
>
> I am confident that my strong educational background and skills obtained through my work experience of nineteen years will enable me to be an asset to your teaching staff. Thank you for your time and consideration, and I am looking forward to hearing from you.

The letter is similar to the one Alt wrote to apply for the position in Paramus. It must be noted that Alt mentioned nothing about being recalled or asserted any prior tenure or seniority rights in this letter. He simply applied for a vacant teaching position in his field.

As a result, I **FIND** that Alt was not recalled by the Board to his former teaching position in Bergenfield. This leaves the issue of whether he should have been recalled, that is, whether he was still on the preferred list in 2000 after refusing the Board's offer in 1992.

All of the existing case law says he was not. A teacher who is subject to a reduction in force and refuses an assignment within the scope of his or her certificate abandons the right to tenured employment. *Ralph v. Highland Park Board of*

Education, 91 *S.L.D.* 2476 (McKeown, 1991); *aff'd* 91 *S.L.D.* 2484; *Collins v. New Milford Board of Education,* 86 *S.L.D.* 2231 (Dower-LaBastille 1986); *aff'd*, 86 S.L.D. 2240); *Clark v. Margate Board of Education*, 74 *S.L.D.* 678, *aff'd*, 75 *S.L.D.*1082, *aff'd*, *N.J. Super.*, App. Div., 76 *S.L.D.*1134. Since Alt refused the tenured position offered in 1992, I **CONCLUDE** that the Board had no reason to retain him on the preferred employment list and his tenure and seniority rights were abandoned at that time.

The only remaining issues are Alt's assertions that he is entitled to relief for equitable reasons. The first is that he gave up his position in Paramus to his detriment based upon representations made by Board employees. The second is that the Board is estopped by the representations of its employees from denying him the restoration of his tenure and seniority he seeks.

Alt claims that Bergenfield lured him away from his teaching position in Paramus with promises that he would be given back his former tenure status and seniority and receive a higher salary. Cirelli testified that Alt was not offered enough of a financial inducement for him to leave Paramus, in fact, it would have been unethical for Bergenfield to lure Alt away from Paramus. Alt offered no evidence of a significant difference in salary between Paramus and Bergenfield, and, therefore, based upon the testimony of Cirelli, I **FIND** nothing to support Alt's claim that he was lured away by the promise of more money.

Alt claims he was told that he would be a tenured teacher and retain his prior seniority when he returned to Bergenfield. Cirelli admitted that he thought that Alt was returning to the faculty with his prior tenure and seniority status and might have expressed this opinion to Alt. Dr. John Galish has been superintendent of schools in Bergenfield since 1992. He recommended that the Board hire Alt in 2001. Galish said that he initially thought Cirelli's representations to Alt might bind the Board but later learned that they could not.

Alt was actually treated as a tenured teacher when he began teaching again at Roy W. Brown. He was observed and evaluated on forms designated for tenured

teachers. A notice posted in the teacher's room during the 2001-2002 school year stated that Alt had nineteen years of seniority. This notice is from an unknown source and did not originate with the Board.

Respondent maintains that the errors of its employees do not create an estoppel for the Board. The case law is clear that representations of an individual Board member or administrator are insufficient to bind the Board to a particular course of action. *Robert Busler v. East Orange BOE*, EDU 3916-00, *Comm'r*, (August 30, 2001), *affirmed. St. Bd.*, (February 6, 2002) http://lawlibrary.rutgers.edu/oal/search.html; *Dorrington v. North Bergen BOE*, 1982 *S.L.D.* 247 (Campbell 1982), *aff'd*, 1982 *S.L.D.* 256. This can only be accomplished by official Board action.

In his testimony, Alt could not remember whether anyone told him before he was hired in about November 2001 that his employment would have to be approved by the Board or that the Board had to approve the restoration of his prior tenure and seniority rights. He was never told that the Board had given its approval. He just assumed his teaching contract was for tenured employment. However, according to the Commissioner's decision in *Busler*, *supra*, absent formal action or ratification by the Board, Alt could not reasonably rely upon representations by Board employees. I, therefore, I **CONCLUDE** that these representations are insufficient to confer Alt's prior tenure and seniority and do not create an estoppel against the Board.

By letter dated June 27, 2002, Galish informed Alt that he intended to clear up any misunderstanding that might have arisen concerning the terms and conditions of his employment. He clarified the Board's position on the issue as follows:

> You continued to remain on the preferred eligibility list for a full time teacher position within the scope of your certification. Thus, by letter dated May 13, 1992, you were offered a full time position as a Technology Education teacher, the newly changed title for the Industrial Arts teacher position you formerly held, You declined this offer of employment as well.
>
> Please be advised that your refusal of a full time position within the scope of your certification constitutes an abandonment and results in the forfeiture of tenure and seniority rights accrued as a full time teacher.

> Thus, although you have become employed with the Bergenfield Board of Education recently, the tenure and seniority rights that accrued with your previous employment were forfeited and do not apply to your current employment with the Board.
>
> Please also be advised that any purported personal promises that may have been made to you by anyone are ineffective to bind the Board. By law, the Board only acts by formal action and no formal action to restore your forfeited tenure and seniority has been undertaken by the Board.
>
> This letter resulted in the present appeal.

Alt will become a newly tenured teacher in Bergenfield within about one year. Consequently, his only detriment, if any, is that he would have acquired tenure one year earlier if he had remained in Paramus. This is somewhat offset by his assertion that he earned a higher salary in Bergenfield. He seeks restoration of his seniority and his prior accrued sick and vacation time.

In summary, I **CONCLUDE** that Alt forfeited his prior tenure and seniority when he refused to accept the full time position offered to him by the Board in 1992. I **CONCLUDE** that he was rehired by the Board as a new teacher in 2001 and is not entitled to his prior seniority, vacation or sick time. I **CONCLUDE** that there are no equitable circumstances present that can operate to require the Board to grant any form of relief to petitioner as a result of this appeal.

Accordingly, it is **ORDERED** that the appeal of James Alt is hereby **DISMISSED WITH PREJUDICE** because there is no relief to which he is entitled.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and

unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 15, 2003
DATE

EDITH KLINGER, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

AUG 18 2003
DATE

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

AUG 18 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

pb

APPENDIX

Witnesses:

For Petitioner:

James Alt

For Respondent:

Richard Cirelli

John Galish

Exhibits:

J-1 Letter, dated June 27, 2002, Galish to Alt

P-1 Notice, seniority list

P-2 Evaluation of Tenure Teacher Performance, April 12, 2002

P-3 Evaluation of Tenure Teacher Performance, April 23, 2003

R-1 Letter, dated May 13, 1992, offer of full time position

R-2 Copy of Return Receipt for certified mail

R-3 Letter, dated June 26, 1991, offering five-sixths position

R-4 Letters of Application and enclosures, February 28, 2000

R-5 Letters of Application and enclosures, May 18, 2000

OAL DKT. NO. EDU 9624-02
AGENCY DKT. NO. 303-9/02

JAMES ALT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BERGENFIELD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions and the Board's reply thereto are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4, and were considered by the Commissioner in reaching his decision.[1]

Upon careful and independent review of the record in this matter, the Commissioner essentially concurs with the ALJ's findings and conclusions, clarifying only that, under these particular circumstances, where petitioner failed to respond to a duly served recall notice in 1992, the Board reasonably determined that he had abandoned his tenure and seniority rights.[2] Additionally, the Commissioner concurs, for the reasons set forth by the ALJ, that petitioner has failed to demonstrate he is entitled to equitable relief.

[1] Both the exceptions and the reply thereto essentially reiterate arguments which were presented in papers previously considered by the Administrative Law Judge (ALJ). To the extent petitioner's submission included evidence that was not presented at the hearing or was not before the ALJ, such evidence is not considered by the Commissioner. *N.J.A.C.* 1:1-18.4(c).

[2] In this connection, the Board understandably questions,"[i]f Petitioner believed he was never recalled, and therefore entitled to a position, why did he submit applications to the Board in 2000 and 2001? As clearly indicated in Exhibits R-4 (2000) and R-5 (2001- when he was hired), Petitioner applied for positions with the District.

Accordingly, the Initial Decision is adopted with clarification as set forth herein and the Petition of Appeal is dismissed.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 9/29/03

Date of Mailing: 9/29/03

Nothing is referenced in either application *** to indicate that Petitioner seeks to be employed in the position to which he would have recall rights.***" (Board's Letter memorandum in Reply to Petitioner's Post-hearing Brief, August 7, 2003 at 1-2)

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

566-03

566-03

CARL SUNDERLIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF LINDEN, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

September 29, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NO. EDU 1666-97

AGENCY DKT. NO. 1-1/97

CARL SUNDERLIN,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF LINDEN, UNION COUNTY,

Respondents.

Gail Oxfeld Kanef, Esq., for Petitioner
(Oxfeld & Cohen, attorneys)

Alan J. Schnirman, Esq., for Respondent
(Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record Closed and Decided: August 12, 2003

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) from the Department of Education on February 6, 1997 for hearing as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. The case was assigned to the undersigned on March 3, 2003.

A hearing was scheduled for May 16, 2003 at the OAL, 33 Washington Street, Newark, New Jersey. Prior to the hearing, settlement discussions were held and a settlement was reached. The parties having agreed and stipulated, as indicated by

their signatures on the attached Stipulation of Dismissal with Prejudice, that this matter should be dismissed.

I have reviewed the record and dismissal and I **FIND**:

1. The parties have voluntarily agreed to the dismissal as evidenced by their signatures or their representatives' signatures.

2. The dismissal fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this dismissal meets the requirements of *N.J.A.C.* 1:1-19.1 and that the dismissal should be approved. I approve the dismissal and, therefore, it is hereby **ORDERED** that this matter be and hereby is **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

August 12, 2003
DATE

Maria M. LaFiandra
MARIA MANCINI LA FIANDRA, ALJ

Receipt Acknowledged:

8-15-03
DATE

M. Kathleen Dunn/CH
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 18 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jb

SCHWARTZ SIMON EDELSTEIN
CELSO & KESSLER LLP
Ten James Street
Florham Park, New Jersey 07932
(973) 301-0001
Attorneys for Respondent

CARL SUNDERLIN, Petitioner, vs. BOARD OF EDUCATION OF THE CITY OF LINDEN, Respondent.	OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO. EDU-166-97 AGENCY DOCKET NO. 1-1/97 **STIPULATION OF DISMISSAL WITH PREJUDICE**

It is hereby stipulated and agreed by the undersigned that this matter is hereby dismissed with prejudice and without costs.

OXFELD COHEN

Attorney for Petitioner

By: _____
Gail Oxfeld-Kanef

DATED: 8/6/03

SCHWARTZ SIMON EDELSTEIN
CELSO & KESSLER LLP
Attorney for Respondent

By: _____
Alan J. Schnirman

DATED: 8/7/03

OAL DKT. NO. EDU 1666-97
AGENCY DKT. NO. 1-1/97

CARL SUNDERLIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF LINDEN, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of dismissal transmitted to the Commissioner by the Office of Administrative Law have been reviewed. It is noted that this matter was characterized as a Settlement, pursuant to *N.J.A.C.* 1:1-19.1, by the Administrative Law Judge in her Initial Decision. The Commissioner, however, determines that because no settlement terms were brought to the record, this matter is more appropriately categorized as a withdrawal under *N.J.A.C.* 1:1-19.2. The Commissioner approves the withdrawal and, consequently, this matter is no longer deemed to be a contested matter before him and is, accordingly, dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 9|29|03

Date of Mailing: 9|29|03

~~576-03~~
567-03

567-03

B.R., on behalf of minor child, M.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning aunt challenged the Board's residency determination that M.P., who came from Poland to live with her, was not entitled to a free public education under the "affidavit student" provision of N.J.S.A. 18A:38-1(b).

The ALJ concluded that M.P. was entitled to a free public education in the District since she came to live with petitioner due to legitimate family or economic hardship and not solely in order to attend school in the District. Moreover, petitioner provided all of M.P.'s financial support and declared M.P. as a dependent on her income tax return. The ALJ ordered that M.P. be admitted to the District without cost and that the Board's counterclaim for tuition be denied.

The Commissioner adopted the Initial Decision as his own.

October 2, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1011-03
AGENCY DKT. NO. 283-9/02

B.R. o/b/o minor child M.P.,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF CLIFTON,
Respondent.

David R. Fromkin, Esq., for petitioner

Anthony V. D'Elia, Esq., for respondent
(Chasan, Leyner, Bariso & Lamparello, attorneys)

Record Closed: August 14, 2003 Decided: August 15, 2003

BEFORE **KEN R. SPRINGER**, ALJ:

Statement of the Case

This is an appeal on behalf of a high school student seeking enrollment in the Clifton public school district. Petitioner came from Poland to live with her aunt and uncle because her father is ill and unable to earn a livelihood. She resides in Clifton and attended Clifton High School for the 2002-2003 academic year. The dispute involves whether petitioner is entitled to a free public education under the "affidavit student" provision of *N.J.S.A.* 18A:38-1(b).

Basically, the issue is whether petitioner satisfies the two-part statutory test for admission as an affidavit student: first, the "hardship test," *i.e.*, whether the child's parent is incapable of supporting or providing care for the child "due to a family or economic hardship;" and, second, the "gratis test," *i.e.*, whether she is "supported by such other person gratis as if [s]he were the other person's own child."

Procedural History

On or about September 2, 2002, B.R. applied to the Clifton Board of Education ("Board") for admission of her niece M.P. to the local public high school. In support of that application, she submitted an affidavit from the child's father in Poland verifying that he is seriously ill and provides no financial support for his child. Although the affidavit appeared to satisfy the statutory requirements, Clifton denied admittance for lack of adequate documentation.

Thereafter, on September 12, 2002, the aunt filed a verified petition with the Commissioner of Education ("Commissioner"), contending that petitioner is eligible to attend school in the district. The Board filed its answer and counterclaim on November 12, 2002. Pursuant to *N.J.S.A.* 18A:38-1(b), M.P. was admitted to school, provided that the aunt and uncle would be liable for tuition if the Board ultimately prevailed in this litigation. Subsequently, on January 6, 2003, the Commissioner transmitted the matter to the Office of Administrative Law ("OAL") for hearing as a contested case. The OAL held a hearing on August 14, 2003. Witnesses and exhibits are listed in the appendix.

Findings of Fact

All of the material facts are undisputed. I **FIND**:

M.P., age 17, lived with both parents and her brother in a one-bedroom apartment in Poland. Last summer, her father became seriously ill and was hospitalized for several weeks. According to the father's affidavit, he remained "unconscious and in critical care" for two weeks. Hospital records, translated from

Polish, corroborate that the father was treated for "bilateral pneumonia, acute respiratory failure, chronic anemia [and] arterial high blood pressure." After discharge from the hospital, the father required further medical treatment and had "to be assisted and looked after by another person." On doctor's orders, he is "discouraged from traveling" and is "unable to drive a car."

Prior to his hospitalization, the father had supported his family by operating a convenience store and traveling around Poland to various flea markets. Unable to work or to travel, the father now survives on a meager disability pension from the Polish government. Because of extreme financial difficulties, the father sent his daughter to live with B.R. and her husband in the United States.

B.R., petitioner's aunt, is also her godmother. She and her husband have lived in the City of Clifton for eight years. presently, they own a house in Clifton and pay real estate taxes that support the local school system. While M.P. has been staying with them, the aunt and uncle have paid all of her living expenses. Their joint income tax return for 2002 reflects that the aunt and uncle claimed M.P. as their dependent. They do not receive any financial support from M.P.'s parents in Poland. Indeed, they send money to M.P.'s parents in Poland "to help them out."

M.P. came to the United States because of financial problems at home and not in order to get an education at Clifton High School. Her aunt testified that M.P. can continue living at her home "beyond the school year free of charge." When M.P. graduates from high school her aunt "wants her to go to college."

Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that M.P. satisfies the statutory criteria and is entitled to a free public education in the Clifton school district.

N.J.S.A. 18A:38-1(b) provides that public schools shall be free to any person over five and under twenty years of age who is kept in the home of another person domiciled within the school district and supported by such other person gratis as if he were such other person's own child. A sworn statement from the resident must establish that he or she is domiciled within the district, that he or she will assume all personal obligations for the child and that he or she intends to support the child gratuitously for a longer time than merely through the school term. In addition, a sworn statement from the child's parent or guardian must show that he or she is incapable of supporting or providing care for the child "due to a family or economic hardship" and that the child is not residing with the resident "solely for the purpose of receiving a free public education in the district."

If the school board determines that the evidence does not support the validity of the claim, it may deny admission to the child and the resident may appeal to the Commissioner for a hearing. At such hearing, the resident "shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in this subsection." *Id.* Such proceedings are subject to the requirements of due process, and a district may not automatically deny an application on the basis of inadequate documentation without consideration of the full circumstances developed at the evidentiary hearing. *J.A. v. Board of Educ. for South Orange and Maplewood*, 318 *N.J. Super.* 512 (App. Div. 1999).

Recently, the Appellate Division construed the pertinent statute as "directed at instances where the student is living with a parent or guardian claiming to be but not actually domiciled in the school district or, alternatively, where a child is placed with a person other than the parent or guarding to obtain the benefit of a free education in that district" *P.B.K. o/b/o E.Y. v. Board of Educ. of Tenafly*, 343 *N.J. Super.* 419, 428 (App. Div. 2001). Specifically, the Court held that the prohibition does not apply where a student will be left "without a school even though a resident domiciliary." *P.B.K.*, at 428.

Unrefuted evidence shows that M.P. came to live with her uncle and aunt in Clifton due to legitimate family or economic hardship and not solely in order to attend

the Clifton School District. Her relatives in Clifton are long-time residents who own their own home. Moreover, the record establishes that the aunt and uncle provide all of M.P.'s financial support and have declared her as a dependent on their income tax return. Consequently, she is clearly eligible for free attendance in the Clifton Public Schools.

Order

It is **ORDERED** that M.B. be admitted to the Clifton School District without cost.

And further **ORDERED** that the Board's counterclaim for tuition is hereby denied.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Aug. 15, 2003
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

AUG 18 2003
DATE

Mailed to Parties:
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

AUG 18 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

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APPENDIX
List of Witnesses

1. B.R., aunt of M.P.

List of Exhibits

No.	Description
P-1	Copy of affidavit of non-resident parents on form prepared by the Clifton Public Schools, dated December 2002
P-2	Copy of English translation of document prepared by Dr. Barbara Urbas-Myrczek, dated September 6, 2002
P-3	Copy of English translation of document prepared by Dr. Kazimiera Nowara, dated May 21, 2003
P-4	Copy of 2002 federal income tax return of the uncle and aunt
P-5	Copy of credit card receipt, dated June 10, 2003
P-6	Copy of 2002 Polish tax return of the father

OAL DKT. NO. EDU 1011-03
AGENCY DKT. NO. 283-9/02

B.R., on behalf of minor child, M.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions.

Upon careful and independent review of the record in this matter, the Commissioner concurs that petitioner has demonstrated that: 1) she is domiciled within the Clifton School District; 2) she is supporting M.P. *gratis*; 3) M.P.'s parents are incapable of supporting M.P. and caring for her in their own country due to economic and family hardship; and 4) M.P. is not residing with petitioner solely for the purpose of receiving a free public education in the District. M.P. is, therefore, entitled to attend school in the Board's district, free of charge, pursuant to *N.J.S.A.* 18A:38-1 *et seq.*

Accordingly, the Initial Decision of the ALJ is adopted for the reasons expressed therein.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 10|2|03

Date of Mailing: 10|3|03

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

568-03

BOARD OF EDUCATION OF THE TOWNSHIP OF SPRINGFIELD, UNION COUNTY,	:	
PETITIONER,	:	
V.	:	
NEW JERSEY STATE DEPARTMENT OF EDUCATION, BOARD OF EDUCATION OF THE BOROUGH OF POINT PLEASANT BEACH, OCEAN COUNTY AND BOARD OF EDUCATION OF THE CITY OF SUMMIT, UNION COUNTY,	:	COMMISSIONER OF EDUCATION
	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

In December 2001, the Ocean County Superintendent of Schools notified respondent Point Pleasant Beach Board (Point Pleasant) that it was the district of residence for A.M. and her children, S.M. and M.C., for 1999-2000. Point Pleasant filed an appeal of that determination 84 days later. The Assistant Commissioner of Education for Finance reversed the determination in March 2002 and found petitioner Springfield Board was the responsible Board. Petitioner challenged the determination by the Assistant Commissioner that it was the district of residence for A.M. and her children and contended that Point Pleasant's appeal of the Ocean County Superintendent's decision was untimely.

The ALJ found that, as a matter of law, the appeal by Point Pleasant to the Assistant Commissioner was not made in a timely fashion as it was filed well beyond the 30-day requirement and no compelling circumstances existed to relax the rules for filing appeals. The ALJ granted summary decision in favor of petitioner.

The Commissioner adopted the Initial Decision with modification. The Commissioner concurred that Point Pleasant's appeal was time-barred and, applying general principles of equity, the Commissioner found that respondents advanced no compelling reason to excuse Point Pleasant from the 30-day filing requirement. The Commissioner granted summary decision in favor of petitioner and set aside the March 2002 determination.

October 2, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 5987-02

AGENCY DKT. NO. 184-6/02

BOARD OF EDUCATION OF THE TOWNSHIP OF SPRINGFIELD, UNION COUNTY,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION, BOARD OF EDUCATION OF THE BOROUGH OF POUINT PLEASANT BEACH, OCEAN COUNTY AND BOARD OF EDUCATION OF THE CITY OF SUMMIT, UNION COUNTY
Respondent.

Thomas O. Johnston, Esq., Esq., for petitioner, Springfield Township Board of Education (Porzio, Bromberg & Newman, attorneys)

Kathleen Asher, DAG., for respondent, New Jersey State Department of Education (Peter C. Harvey, Attorney General of New Jersey, attorney)

Kevin B. Riordan, Esq., for respondent, Point Pleasant Beach Board of Education (Berry, Sahradnik, Kotzas, Riordan & Benson, attorneys)

Arla Cahill, Esq, for Summit Board of Education (Schenck, Price, Smith & King, attorneys)

Record Closed: August 14, 2003 Decided: August 21, 2003

BEFORE **STEPHEN G. WEISS,** ALJ

Procedural History

This matter was transmitted to the Office of Administrative Law by the Department of Education as a contested case on July 26, 2002 and involves a claim by the petitioner, Board of Education of the Township of Springfield (hereinafter "Springfield Board"), that it is not responsible for the education costs for two children during the 1999-2000 school year since they were not domiciled within the district. The remaining respondents are the New Jersey Department of Education and the Board of Education of Point Pleasant Beach. On July 7, 2003 the Springfield Board and the Summit Board entered into a stipulation of dismissal with respect to any claims between them pertaining to the case.

The essential underlying facts are as follows:

On February 2, 2000, the Point Pleasant Board of Education (hereinafter "Point Pleasant Board") renewed an earlier request to the Ocean County Superintendent of Schools that she investigate into and determine the appropriate district of residence for one A.M. and her two minor children who had moved from Springfield to Point Pleasant Beach in 1999 to reside with A.M.'s boyfriend. The children were enrolled in the Point Pleasant Beach School district for the 1999-2000 school year. In November 1999, A.M. and her children moved into a motel in Point Pleasant Beach, A.M. declared herself to be homeless and she requested public assistance. See *N.J.A.C.* 6:5-1.4(d). Ultimately, in a letter dated December 5, 2001, the Ocean County Superintendent of Schools notified the Point Pleasant Beach Board that as a result of her investigation she determined that Point Pleasant Beach was the district of residence for 1999-2000. That letter was date stamped as received by the Board on December 11, 2001.

On March 5, 2002, 84 days after the determination by the Ocean County Superintendent of Schools was made known to the Point Pleasant Beach Board, it filed an appeal of that determination. On March 20, 2002, the Assistant Commissioner of Education for Finance issued a determination reversing the Ocean County

Superintendent of Schools and determining that Springfield, not Point Pleasant Beach, was to be considered the district of residence for the family during the period in question. In his determination the Assistant Commissioner noted that A.M. and her children had lived in Springfield with A.M.'s parents until June 1999 when they vacated because of the issuance of a restraining order filed by A.M.'s parents. Noting that in his view the issue turned on whether the family was "homeless," the Assistant Commissioner found that their relocation to Point Pleasant Beach was not intended to be permanent and the family had to be considered as "homeless" while they stayed there. Thus, citing *N.J.S.A.* 18:7B-12(c), the Assistant Commissioner determined that since the district of residence for children whose parent or guardian temporarily moves from one school district to another as a result of being homeless shall be the district in which the parent or guardian last resided prior to becoming homeless, Springfield was liable for the cost of their education. He concluded that Point Pleasant Beach could not be the district of residence since the family did not have a fixed, regular residence there. Thus, the school district responsible for the costs therefore had to be Springfield, the last district of permanent residence. Springfield then timely filed a petition of appeal challenging the determination and the matter was transmitted to the Office of Administrative Law as a contested case. Thereafter, a motion for summary decision was filed by the Springfield Board on the basis that Point Pleasant Beach Board's appeal on March 5, 2002 was out of time under the applicable law.[1]

Discussion

Pursuant to *N.J.A.C.* 1:1-12.5(b), any party may move for summary decision upon any of the substantive issues in a case, and the administrative law judge may make a ruling in favor of the movant when the papers filed, together with any supporting affidavits, demonstrate that no genuine issue as to any material fact exists and the moving party is entitled to a summary decision as a matter of law. The OAL rule is essentially the same as the summary judgment rule contained in the New Jersey Rules of Court (see *R.* 4:46-29(c)). *See also, Brill v. Guardian Life Ins. Co.*, 142 *N.J.* 520

[1] The "merits" of the controversy are not addressed by the motion.

(1995). Since the appeal by Point Pleasant Beach from the determination of the Ocean County Superintendent came 84 days after the Superintendent's decision was received by it, Springfield maintains that the undisputed facts clearly demonstrate under the regulations in effect at the time the decision was made (an appeal to the Assistant Commissioner had to be made in 30 days), the appeal was untimely and should be dismissed.

The pertinent regulations in effect at the time of the March 5, 2002 decision were *N.J.A.C.* 6:5-1.4(d) and *N.J.A.C.* 6:20-5.3(d) (e) and (f). The first provided that where there was a dispute regarding a determination of the appropriate district of residence, the districts involved were immediately to notify the county Superintendent of Schools who would resolve the dispute. If, as here, the Superintendent could not resolve the dispute, an appeal could be made to the Assistant Commissioner, Division of Finance. Subsection (d) of *N.J.A.C.* 6:20-5 specifically addressed the time frame for the appeal process and stated that where a district contested a determination of residence written notification had to be submitted to the Assistant Commissioner within 30 days of the receipt of the final notice as to the determination of the district of residence. In this case it took 84 days.

Although both regulations have been repealed, (the current version of *N.J.A.C.* 6:5-1.4(d) is *N.J.A.C.* 6A:17-2.8, effective February 19, 2002 and the current version of *N.J.A.C.* 6:20-5.3 is *N.J.A.C.* 6A:23-5.1(d) effective July 1, 2001), the regulations are virtually identical to the prior regulations. Thus, under the regulations in effect at the time the controversy arose, and now, a district contesting a determination of residence and seeking to appeal the same to the Assistant Commissioner must file the appeal within thirty days. *See Lower Camden County Regional School District No. 1 v. Department of Education, Bureau of School Finance*, EDU 8578-98 and EDU 8579-98, Initial Decision June 28, 1999, adopted by the Commissioner, August 13, 1999, aff'd State Board of Education, July 5, 2000. Under both the prior and the current rules governing district of residence disputes over "homeless" children, the County Superintendent's decision has to be appealed within the thirty-day time frame. No

matter which version of which regulation is applied, in my view no change was made or intended to be made with respect to the thirty-day time limit and, unless reasons exist to relax the limitation, the appeal in this matter must be deemed to have been launched substantially out of time.

In its reply brief the Point Pleasant Board points out there are no cases interpreting the provisions applicable to appeals from the County Superintendent's decision which resulted in dismissal on the basis of untimeliness and, citing the recent decision in *Unangst v. Board of Education of the Township of Fredon*, OAL Dkt. No. EDU 9828-98, 2003 WL 1795761 (March 13, 2003) argues that the same criteria for relaxing the 90-day time period with respect to appeals to the Commissioner of Education in school law controversies, generally, should be followed here as well.

In that decision the Commissioner repeated his oft cited references to decisions dealing with the subject (*e.g., Reily v. Board of Education of Hunterdon Central Regional High School District*, 173 *N.J. Super.* 109 (App. Div. 1980); *Weir v. Board of Ed. Of Northern Valley Regional High School District*, 1984 *S.L.D.* (decided by the Commissioner July 20, 1984); aff'd, Superior Court of New Jersey, Appellate Division, Dkt. No. A-3520 84T6 (April 9, 1986, unreported*); Polaha v. Buena Regional School District,* 212 *N.J. Super.* 628 (App. Div. 1986). Thus, according to Point Pleasant Beach, the rule, if it applies, should be relaxed since its effective ability to review the reasons for the County Superintendent's decision and to lodge a timely appeal was shortened by the following factors: (a) the district was on a Christmas-New Year's break between December 24, 2001 and January 2, 2002; and (b) the matter was not transmitted to Board counsel's office until mid-January 2002 when he had been diagnosed with a condition which ultimately necessitated he remain out of work on doctor's orders for six weeks. Thus, these two factors, combined with what the Point Pleasant Beach Board characterizes as the "extraordinary delay" that transpired when the matter was pending before the Ocean County Superintendent, provides sufficient justification for relaxation. Moreover, according to counsel, the usual reasons for enforcing strict time limits are not present here: preservation of the record and stability

of the educational process. Since Springfield was well aware of the potential claim, Point Pleasant Beach Board argues that petitioner suffered no prejudice by the relatively short delay.

I agree that the relaxation rule as to appeals to the Commissioner is the starting point for the inquiry in this case, too. Thus, *N.J.A.C.* 6A:3-1.16 specifically provides that where time limits are not contained in a statute, or in or underlying OAL rule, they may be relaxed or dispensed with by the Commissioner where, " . . . strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice." What constitutes "strict adherence" is a fact sensitive issue as witnessed by the many cases decided by the Commissioner concerning the same. However, as the Springfield Board accurately points out, cases relaxing or waiving the 90-day rule with regard to controversies and disputes generally are rare and the rule is sparingly invoked. *See, e.g., DeMaio v. New Providence Bd. of Ed.*, 96 *N.J.A.R.* 2d (EDU) 449; *Gordon v. Passaic Bd. of Ed.* 1985 *S.L.D.* 1929, *aff'd* New Jersey Superior Court, Appellate Division, Dkt. No. A-3294-84T7 (May 27, 1986) (unreported), *certif. den.* 105 *N.J.* 534 (1986); Dreher v. Jersey City Bd. of Ed., EDU 2777-87 (decided by the Commissioner February 2, 1988), aff'd State Board of Education (July 8, 1988); *Unangst v. Township of Fredon, supra*.

Having reviewed the cited cases, as well as others touching on the time limit question, I am convinced that in this case, as a matter of law, the appeal by Point Pleasant Beach Board to the Assistant Commissioner was not made in timely fashion and no compelling circumstances exist dictating that I recommend that the time limit be relaxed. There are no constitutional issues involved. There are no overriding issues of public importance either. While the question of determining homelessness under the regulations is certainly of scholarly interest, each such case is peculiarly fact sensitive and how the Commissioner might rule on the merits of this case may or may not have any bearing on subsequent such disputes involving different parties and different circumstances.

Nor is there any indication, as there were in a few cases, that the person against whom the rule is sought to be applied has somehow deliberately been misled or has been prevented from knowing and understanding his or her rights. Indeed, a lack of sophistication with regard to the time limit is no excuse. *See, e.g., Weir, supra*. While I appreciate there was a 10-day vacation break in late December, the 30-day limit is not a school day concept, it is a calendar day rule. Furthermore, while it is regrettable that Board counsel had a medical issue, it is unclear exactly when that occurred and the firm is a relatively large one. It would be poor precedent for me to conclude that since one particular attorney might have been out unavailable to put together an appeal in a timely fashion, this relieves the client of the burden of the rule to the detriment of the person in whose favor the rule is sought to be enforced.

Finally, while this may be a "money" case involving tuition for two students, the amount involved is not so monumental as to require the Point Pleasant Beach Board be relieved of the obligation on the basis of "hardship" despite its failure timely to file its appeal. While perhaps no "bright line" standard can be established to determine what is or is not substantial, the facts of this case do not compel relaxation based upon financial or other considerations. *Cf. Hoffman v. Hillsborough Board of Education,* 96 *N.J.A.R.* 2d (EDU) 943. If missing a 30-day deadline by 54 days is excusable, why have a time limit at all?

Accordingly, for the reasons set forth, summary decision in favor of the petitioner because of the untimely filing by the Point Pleasant Beach Board of its appeal to the Assistant Commissioner should be granted.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of

Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 21, 2003
DATE

STEPHEN G. WEISS, ALJ

Faxed to the Department of Education on:

August 22, 2003
DATE

Mailed to Parties:
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

AUG 25 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

al

OAL DKT. NO. EDU 5987-02
AGENCY DKT. NO. 184-6/02

BOARD OF EDUCATION OF THE TOWNSHIP OF SPRINGFIELD, UNION COUNTY,	:	
PETITIONER,	:	
V.	:	
NEW JERSEY STATE DEPARTMENT OF EDUCATION, BOARD OF EDUCATION OF THE BOROUGH OF POINT PLEASANT BEACH, OCEAN COUNTY AND BOARD OF EDUCATION OF THE CITY OF SUMMIT, UNION COUNTY,	:	COMMISSIONER OF EDUCATION
	:	DECISION
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Respondents' exceptions and petitioner's reply thereto were submitted in accordance with *N.J.A.C.* 1:1-18.4.

In its exceptions, respondent New Jersey State Department of Education renews its contention, previously argued before the Administrative Law Judge (ALJ), that this matter should proceed to hearing since the Commissioner is permitted to relax the rules for the filing of appeals pursuant to *N.J.A.C.* 6A:3-1.16. In this connection, the Department asserts that injustice will result if the Commissioner strictly adheres to the "30 day requirement." (Department's Exceptions at 5) The Department also argues that this matter presents "unique and compelling circumstances" warranting such relaxation. (*Ibid.*)

Similarly, respondent Board of Education of the Borough of Point Pleasant Beach, (hereinafter, "Point Pleasant") admits that it filed a late appeal of the Ocean County Superintendent's decision to the Assistant Commissioner of Finance, but maintains that this late filing should be excused by the Commissioner. (Point Pleasant's Exceptions at 1) Point Pleasant cites as a basis for the excusal the reasons considered by the ALJ in his Initial Decision, adding that the County Superintendent's delay in initially deciding this matter contributed to its late appeal. "First," Point Pleasant explains, "they had to find the records, almost two years old, which supported the appeal to the Ocean County Superintendent. Then a decision on whether or not to appeal had to be made." (*Id.* at 2) Furthermore, Point Pleasant argues that the County Superintendent's delay "certainly lulled Point Pleasant Beach, without the availability of advice of counsel, into believing this was not an urgent matter." (*Id.* at 3)

In reply, petitioner, Board of Education of the Township of Springfield, counters that neither respondent has introduced facts in the record to challenge its motion for summary decision. Petitioner contends that even if Point Pleasant's claim regarding its attorney's illness is true, it fails to explain why it did not file a challenge before the middle of January 2002. Neither, petitioner continues, does a one-week break at Christmas justify a March 2002 untimely filing. Additionally, petitioner argues that the relaxation rule advanced by the respondent Department is not applicable to this matter, since that regulation, *N.J.A.C.* 6A:3-1.16, concerns only those rules under Chapter 3, Controversies and Disputes. Finally, petitioner attests that this matter does not present "unusual and compelling" circumstances, as argued by the Department, but is strictly a monetary dispute. (Petitioner's Reply at 4, 5) Petitioner concludes, therefore, that it is entitled to summary decision.

Upon careful and independent review of the record in this matter, the Commissioner finds, like the ALJ, that there can be no dispute that Point Pleasant's appeal pursuant to *N.J.A.C.* 6:20-5.3(d), now codified at *N.J.A.C.* 6A:23-5.2(d), was untimely.[1] Furthermore, applying general principles of equity, the Commissioner finds, for the reasons expressed by the ALJ, that respondents have advanced no compelling reason to excuse Point Pleasant from the 30-day filing requirement.[2]

Accordingly, the Initial Decision of the ALJ is adopted, with modification as set forth herein. Summary decision in favor of petitioner is hereby granted; Point Pleasant's March 2002 appeal to the Assistant Commissioner is time-barred and the decision resulting therefrom, consequently, is set aside.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 10/2/03

Date of Mailing: 10/3/03

[1] In the first paragraph of its letter dated March 1, 2002, Point Pleasant indicates that its appeal "corresponds to the requirements of *N.J.A.C.* 6:20-5.2(d)(1-3)." (*sic*) (Petitioner's Motion for Summary Decision at Exhibit Q)

[2] In this connection, the Commissioner recognizes that the relaxation rule found at *N.J.A.C.* 6A:3-1.16 is restricted to the rules set forth in Chapter 3.

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

569-03

DR. MICHAEL A. COLUCCI,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF TUCKERTON, OCEAN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning superintendent/business administrator claimed the Board terminated his employment without following statutorily required tenure removal procedures.

The ALJ found that petitioner filed his petition 160 days after he received the final notice of "the subject of the requested contested case hearing." The ALJ dismissed the petition as untimely, finding it barred by the 90-day rule, *N.J.A.C.* 6A:3-1.3.

The Commissioner adopted the findings and determination in the Initial Decision as his own.

October 2, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
ON MOTION PURSUANT TO
***N.J.A.C.* 6A:3-1.3**
OAL DKT. NO. EDU 4208-03
AGENCY DKT. NO. 88-3/03

DR. MICHAEL A. COLUCCI,

Petitioner,

v.

BOARD OF EDUCATION TUCKERTON ELEMENTARY SCHOOL, OCEAN COUNTY,

Respondent.

Richard A. Carlucci, Esq., for petitioner (Griffith and Carlucci, attorneys)

Michael K. Willison, Esq., for respondent (Dickie, McCamey & Chilcote, attorneys)

Record Closed: August 15, 2003 Decided: August 19, 2003

BEFORE **EDGAR R. HOLMES**, ALJ:

STATEMENT OF CASE AND PROCEDURAL HISTORY

The Respondent BOE terminated petitioner from his position as Superintendent and Business Manager at the Tuckerton Elementary School and petitioner appeals to the Commissioner of Education pursuant to *N.J.S.A.* 18A 6-9 *et seq.*

The matter was transmitted to the Office of Administrative Law (OAL) to be heard as a contested case pursuant to *N.J.S.A.* 52:14 B-1 to 15 and *N.J.S.A* 52:14F-1to13.

SUMMARY OF THE RELEVANT FACTS

Petitioner signed two contracts with the BOE for the two positions of Superintendent and Business Manager on August 26, 2002. Both contracts were to be effective October 1, 2002 through June 30, 2005, unless terminated earlier. The contracts were terminated earlier. On September 24, 2002, respondent's solicitor notified petitioner of the BOE's decision to terminate his contracts and on September 30, 2002, the BOE rescinded the contracts. On October 1, 2002, the decision was mailed to petitioner who received it on October 2, 2002.

Petitioner filed his petition on March 11, 2003, alleging that the BOE failed to identify the underlying cause of its decision to terminate petitioner in writing or to provide petitioner with an opportunity to be heard, among other things, all contrary to *N.J.S.A.* 18A:6-10, 6-11 and 6-7.1.

However, petitioner does not allege that the respondent BOE failed to provide him with adequate and sufficient notice that the Board took adverse action against him on September 30, 2002. That notice was provided to him both before and after the adverse action, on September 24, 2002, and on October 2, 2002. He admits it in his pleadings.

SUMMARY OF THE RELEVANT LAW

The New Jersey Administrative Code at *N.J.A.C.* 6A:3-1.3(d) provides in pertinent part:

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing.

In petitioner's brief, this rule is thoroughly discussed.

> New Jersey courts which have interpreted the 90-day filing requirement have applied it strictly. See Kaprow v. Board of Ed. of Berkeley Township, 131 N.J. 572, 622 A.2d 237 (1993). See also Nissan v. Board of Ed. of The Twp. of Long Beach Island, 272 N.J.Super. 373, 640 A.2d 293 (1994); Wilson v. Toms River regional S.D., 96 N.J.A.R.2d (EDU) 872 (1996); Hoffman v. Twp. of Hillsborough, 96 N.J.A.R.2d (EDU) 817 (1996); McCrea v. Upper Saddle River Bd. Of Education, 96 N.J.A.R.2d (EDU) 801 (1996).

In Kaprow, supra, Petitioner was terminated as a tenured assistant superintendent as a result of a reduction in force ("RIF") on June 30, 1981. The Local Board failed to notify Kaprow of his post-RIF rights to certain positions in the district which later became available, despite having a legal duty to provide such notification. Kaprow ultimately learned that the Local Board had failed to notify him of the availability of subsequent positions when he received a letter from the Board Secretary on February 28, 1998. Five months after obtaining this information, Kaprow filed a Petition of Appeal with the Commissioner of Education.

Affirming the dismissal of Kaprow's Petition, Supreme Court of New Jersey concluded that he was on notice of the Board's failure to notify him of post-RIF positions upon receipt of the February 28, 1998 letter from the Board Secretary. The Court noted that N.J.A.C. 6:24-1.2 (c) [now 6A:3-1.3 (d)] does not specify what constitutes adequate notice. However, the Court concluded that notice is sufficient when it informs the individual of "some fact that he or she has a right to know and that the communicating party has a right to communicate." 131 N.J. at 587. It held that the letter from the Board Secretary clearly advised Petitioner of the facts which gave rise to his Petition. Accordingly, the 90-day time period for filing began to run from that date. His petition, filed five months later, was therefore untimely.

It is noteworthy that the Kaprow Court barred the Petition as untimely, even though the Local Board had neglected its statutory duty to notify Kaprow of the availability of post-RIF positions. While the Court disapproved of the Board's conduct, it did not view such conduct as a basis for a departure from strict enforcement of the 90-day statute of limitations.

This point was re-enforced by the Superior Court in Nissan v. Bd. Of Ed. of The Twp. of Long Beach Island, supra. In Nissan, the Court cited Kaprow for the principle that the limitations period "gives school districts the security of knowing that administrative decisions regarding the operation of the school cannot be challenged after ninety days." 272 N.J.Super. at 380 [citing Kaprow, 131 N.J. at 582]. The Nissan Court then went on the hold that "it is not necessary for the purposes of this discussion to decide whether the Local Board acted correctly" in connection with the conduct alleged in Petitioner's Petition. Id. Rather, the Court stated that "what is important is that the Local Board had the right to know within 90 days whether its action was going to be challenged." Id.

In this matter, petitioner filed his petition 160 days after he received the final notice of "the subject of the requested contested case hearing." The alleged failure of the BOE to provide the petitioner with the due process provided by law is not relevant. A contested case hearing

before The Commissioner or his designee is the forum in which such alleged failures are to be cured. Access to this forum is time barred after 90 days.

ORDER

I **DISMISS** the petition filed herein as untimely and **FIND** that it is barred by the 90-day rule, *N.J.A.C.* 6A:3-1.3.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

8/19/03
DATE

EDGAR R. HOLMES, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

8/20/03
DATE

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

AUG 26 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

/lam

WITNESSES

For Petitioner:

None

For Respondent:

None

EXHIBITS

For Petitioner:

None

For Respondent:

None

OAL DKT. NO. EDU 4208-03
AGENCY DKT. NO. 88-3/03

DR. MICHAEL A. COLUCCI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF TUCKERTON, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions were submitted in accordance with *N.J.A.C.* 1:1-18.4.

In his exceptions, petitioner renews his argument, initially raised in his Brief in Opposition to Motion to Dismiss Appeal, that, pursuant to *Lavin v. Board of Education of the City of Hackensack*, 90 *N.J.* 145 (1982), he has a statutory entitlement to the procedural safeguards enacted by the Legislature in *N.J.S.A.* 18A:6-7[1], *N.J.S.*A. 18A:6-10 and *N.J.S.A.* 18A:6-11 and, therefore, the 90-day limitations period is inapplicable to his claims herein.

Upon careful and independent review of the record, the Commissioner concurs with the Administrative Law Judge that this matter is untimely, pursuant to *N.J.A.C.* 6A:3-1.3(d). In so concluding, the Commissioner finds without merit petitioner's argument that the 90-day

[1] Petitioner's reference to this provision may have been a typographical error, since, in his earlier brief, referenced above, he refers to "*N.J.S.A.* 18A:6-7.1" when arguing that he was denied the safeguards to which he was entitled by statute. In any event, neither *N.J.S.A.* 18A:6-7, which requires persons employed in teaching capacities to take an oath to support the Constitution of the United States, nor *N.J.S.A.* 18A:6-7.1, which establishes the requirements for criminal history record checks for candidates of school employment, appears germane to petitioner's claims.

time limitation is inapplicable because his claim is a "statutory entitlement," unrelated to his employment or performance, within the intendment of the Court's determination in *Lavin, supra.* In *Lavin,* the Supreme Court created a *limited* exception to the timely filing requirements when it ruled that crediting military service is a statutory entitlement that is a reward for military service, not for performance as a teacher, and, thus, is not subject to the applicable limitations period. However, this limited exception for statutory entitlements has been strictly applied. *See, e.g., North Plainfield Educ. Ass'n v. Bd. of Educ.*, 96 *N.J.* 587 (1984); *Kaprow v. Board of Education of Berkeley*, 131 *N.J.* 572 (1993); *Nissman v. Board of Education of the Township of Long Beach Island*, 272 *N.J. Super.* 373 (App. Div. 1994), *certif. denied*, 137 *N.J.* 315 (1994). As the Supreme Court in *Kaprow* reasoned:

> Because the decision necessary to confer tenure under *N.J.S.A.* 18A:28-5 is based on an evaluation of teacher performance, behavior, and efficiency, *** the only way Kaprow could acquire tenure rights, and therefore RIF rights, was through employment in the school district. Kaprow's RIF rights are then distinguishable from the petitioner's right to military service credit in *Lavin*; Kaprow is not entitled to his RIF rights independent from the administration of a school system or from his standing as a tenured assistant superintendent.*** *Kaprow, supra,* at 586.

Similarly, even assuming, *arguendo*, the procedural safeguards established in statute would apply to petitioner herein, an issue which would be addressed were this matter to be reviewed on its merits, such statutory rights and protections are acquired only through employment in the school district and cannot, therefore, be viewed as independent from his employment or from the administration of a school system. Where such a "functional relationship" exists, *Kaprow, supra,* at 586, the "statutory entitlement" exception in *Lavin* does not apply.[2] Furthermore, the

[2] See also, *Balwierczak et al. v. Board of Education of the Township of Berkeley Heights, Union County,* decided by the Commissioner December 8, 1999 (No. 407-99), *aff'd* State Board of Education May 3, 2000, where former employees of the Union County Regional High School District alleged that the Board of Education of Berkeley Heights, the district to which they transferred upon dissolution of the regional district, denied them their rights to the

Commissioner finds nothing in this record which warrants relaxation of the filing requirement, pursuant to *N.J.A.C.* 6A:3-1.16.

Accordingly, the Initial Decision is adopted for the reasons expressed therein and amplified above. The Petition of Appeal is dismissed.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 10/02/03

Date of Mailing: 10/03/03

salary guide placement to which they were entitled pursuant to *N.J.S.A.* 18A:13-64, the Commissioner found that the pertinent statute was designed to operate, upon the dissolution of a regional district, as a "save harmless" provision, and absent rights and benefits accrued through prior employment, *N.J.S.A.* 18A:13-64 does not operate to independently create a benefit; *Nadasky et al. v. Board of Education of the Township of Clark, Union County,* decided by the Commissioner July 9, 2001 (No. 211-01), where retired employees of the Board asserted a statutory right to be paid for unused accumulated sick leave at the contractual rate established by their collective bargaining agreement, the Commissioner rejected their claim that the 90-day rule was inapplicable pursuant to *Lavin, supra*; *Board of Education of the Township of Hamilton, Mercer County* v. *M.M. on behalf of minor child, C.B.*, decided by the Commissioner November 19, 2001 (No. 452-01L), where the petitioning Board of Education argued that reimbursement of tuition is a statutory entitlement not subject to the 90-day rule, the Commissioner determined that, to the extent a local board seeks an order directing payment of tuition pursuant to *N.J.S.A.* 18A:38-1 *et seq.*, such a proceeding is subject to compliance with *N.J.A.C.* 6A:3-1.1 *et seq.* and does not fall within the limited exception enunciated in *Lavin, supra*, for statutory entitlement.

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

5 76-03

BOARD OF EDUCATION OF THE CITY OF GLOUCESTER, CAMDEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning "Abbott" District appealed the Department's determination of its 2003-04 preliminary "maintenance budget," alleging that the Department's review was not in accordance with the July 23, 2003 Order of the Supreme Court.

The ALJ found: 1) the "ancillary" issue of moneys due the District as a consequence of its latest figures indicating that its undesignated general fund balance was below two percent was a "distribution" issue more properly resolved subsequent to receipt of the District's Comprehensive Annual Financial Review (CAFR); 2) the District had demonstrated a reasonable basis to justify its request for a 30 percent natural gas increase; 3) the rule duly promulgated to implement the Court's Order for "maintenance" controlled in this proceeding, and the Office of Administrative Law lacked jurisdiction to determine its validity; 4) the Department had employed a uniform, rational approach in calculating the District's Early Childhood Plan figure and such figure, therefore, was properly established at $650,011; and 5) the District's encumbrances which remained unpaid as of June 30, 2003 were properly excluded from its maintenance budget.

The Commissioner concurred with the ALJ's findings and conclusions with respect to deferring of the undesignated general fund payment question until review of the CAFR, calculation of the Early Childhood Plan figure, and jurisdiction and application of the "maintenance" rule. The Commissioner rejected the granting of a 30 percent increase for natural gas finding that the Department's offered 15 percent increase was not unreasonable or improper, and, while sustaining the propriety of the Department's calculation with respect to the District's encumbrances, he clarified the methodology to be utilized in arriving at this figure.

October 20, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4158-03

AGENCY DKT. NO. 188-6/03

BOARD OF EDUCATION OF THE CITY OF GLOUCESTER, CAMDEN COUNTY,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION,

Respondent.

Richard E. Shapiro, Esq., appearing for petitioner

Cindy Campbell, Deputy Attorney General, for respondent (Peter C. Harvey, Attorney General of New Jersey, attorney)

Record Closed: September 23, 2003 Decided: September 24, 2003

BEFORE **JOHN R. FUTEY**, ALJ:

STATEMENT OF THE CASE

In this matter petitioner, the Board of Education of the City of Gloucester, Camden County (hereinafter "Gloucester") appeals a notice by respondent, the New Jersey State Department of Education (hereinafter "DOE") regarding its supplemental funding request for the 2003-2004 budgeted year, pursuant to *N.J.A.C.* 6A:24-1.1 *et. seq.*

PROCEDURAL HISTORY

On March 24, 2003, the DOE moved before the Supreme Court for an Order modifying the decision in *Abbott v. Burke*, 153 *N.J.* 480 (1998) (Abbott IV). See also *Abbott v. Burke*, 172 *N.J.* 294 (2002) (IX). The DOE requested that the discretionary additional *Abbott v. Burke* State Aid (Supplemental Aid) that it would be required to provide in *Abbott* Districts in 2003-2004 be limited to an amount sufficient to support those programs, positions and services in the districts approved budgets for 2002-2003. On April 8, 2003 the Education Law Center (hereinafter "ELC") cross-moved for an order setting an expedited schedule for the DOE's decisions on districts-budgets and requiring the DOE to conduct a formal evaluation of the implementation of the Whole School Reform (hereinafter "WSR"), etc. On April 29, 2003, the Supreme Court Ordered the DOE and the ELC to participate in mediation before the Honorable Phillip S. Carchman, J.A.D., to attempt to resolve issues raised by their motions.

Mediation resolved all issues except the 2003-2004 budget process, so the DOE's motion for an Order extending by an additional year the one-year relaxation of remedies granted in *Abbott IX* remained outstanding. However, the parties agreed to an expedited schedule for budget approvals and appeals, beginning with DOE's reviews and approval and approvals of districts' budgets by May 30, 2003. Districts' appeals from the DOE's reviews were to be transmitted to the Office of Administrative Law (hereafter "OAL") where administrative law judges (hereinafter "ALJs") were to issue initial decisions (hereinafter "ID's") within twenty-five days of the appeal. The DOE's Commissioner was to issue final decisions within twenty-five days of the IDs. On May 20, 2003, the Supreme Court issued an Order incorporating the parties' mediation agreement and providing that the schedule would remain in effect until further order of the Court.

On May 30, 2003, the DOE issued decisions on the *Abbott* districts' budgets. In accordance with the issuance of those letters, in this matter, the DOE's Assistant Commissioner, Division of Abbott Implementation (Gordon MacInnes) notified Gloucester that the DOE had completed its initial review of the District's 2003/2004 expenditure budget dated April 9, 2003, with a budget code 4900. On June 5, 2003, the District's verified petition of appeal was filed

with the DOE. *N.J.S.A.* 18A:6-9. Thereafter, the DOE transmitted this matter as a contested case to the OAL, where it was filed on June 9, 2003, pursuant to the provisions of *N.J.S.A.* 52:14B-1 through –15 and *N.J.S.A.* 52:14F-1 through –13. On June 20, 2003 the DOE's answer was filed in the OAL.

On June 24, 2003, Supreme Court issued an Order approving the mediated agreement and scheduling argument on DOE's motion for an Order extending the relaxation of remedies granted in *Abbott IX.* On July 1, 2003, the DOE moved for an Order amending the schedule for processing the appeals to allow the Court to rule on the standard in the appeals to the OAL for hearings and issuance of initial decisions. On July 10, 2003, the Supreme Court heard Oral Argument on the budget process. The Supreme Court granted the DOE's motion and relaxed *Abbott v. Burke* 153, *N.J.* 480 (1998) (*Abbott V*) remedies as applied to the 2003-2004 budget process.

The Supreme Court also set a schedule for new DOE decisions on supplemental funding and the administrative appeal and hearing process and ordered the DOE to promulgate emergency regulations governing the process. The DOE, relying on the Fiscal Year 2004 Appropriations Act and the Supreme Court's July 23, 2003, Order, promulgated emergency regulations amending *N.J.A.C.* 6A:10, including *N.J.A.C.* 6A:10-1.2, 3.1, -4.2 and –4.7. The regulations are effective August 22, 2003 and expire June 30, 2004.

I was assigned to this matter on June 16, 2003. As a result, I conducted a telephone conference with Gloucester's attorney Richard Shapiro, Esq. and the Deputy Attorney General assigned at the time, James Harris, on June 26, 2003, at which time procedural issues were discussed and a timeline regarding initial hearing was set to be heard for the days of July 11 and July 17, 2003. Based upon the extension of time which was granted by the Supreme Court hereinabove, that schedule was adjourned in order to allow further clarification from the Supreme Court before a further hearing in this matter. That telephone conference took place on July 9, 2003, based upon the foregoing procedural readjustments made by the Supreme Court. Thereafter, upon being advised that the matter was once again ripe for hearing before the OAL, I conducted a telephone conference with counsel on September 2, 2003, at which time the parties agreed to a hearing schedule for the date of September 18, 2003. A letter confirming same was

sent by fax on September 9, 2003, which also set the matter down to be heard peremptorily before me commencing at 9:00 am on the agreed upon date. However, on September 17, 2003, at approximately 3:30 pm, I was for the first time advised that my matter which was peremptorily set for the next day, was to be adjourned at the purported order and direction of some unidentified OAL authority due to the unavailability of Mr. Shapiro, who was then still appearing before the Honorable Edith Klinger, ALJ, at the Newark OAL. Accordingly, I was summarily directed and told that Mr. Shapiro would not be available at the agreed upon and peremptorily set time and date. I nonetheless conducted a telephone conference with both counsel at 4:00 pm on September 17, 2003, at which time both counsel agreed that they would be available at 1:30 pm on September 18, 2003 at the OAL, Trenton. Judge Klinger acceded accordingly. The matter proceeded to hearing on that day. However, since various issues could not be resolved between the parties at that time and due to the scheduling demands of Mr. Shapiro, the matter was continued and heard with the full consent of all the parties on Sunday, September 21, 2003, between 8:45 am and 12:20 pm as well as on September 23, 2003 between 7:30 am and 9:00 am, which ended in virtual darkness (but for the emergency light in the hearing room) as OAL and its surrounding environment experienced an extended power outage due to a vicious storm. The end of the matter was taped on a portable tape battery-operated recorder. Upon completion of all the testimony and upon receipt of all the documentation at that time, the hearing record closed.

STIPULATIONS AND REMAINING ISSUES

At the commencement of the hearing, the parties indicated that they had had an opportunity to confer between the first and scheduled hearing dates and had arrived at a stipulation regarding all funding requirements requested by the District as contained in R-1 and R-7, and as more fully set forth in the written summation of DAG Campbell filed on the last day of hearing herein, except for issues involving utility rate increases (most directly only the gas rate), the Early Childhood Plan for budget year 03-04 (hereinafter "EC Plan 03-04") and the figures utilitized for the Early Childhood Plan for budget year 02-03 (hereinafter "ECP 02-03"), as well as whether or not billing encumbrances should have been calculated in the budget for 03-04, or whether there should have been included in the previous budget for 02-03. These became the framed issues for hearing. It is noted that an ancillary "issue" also arose regarding the excess fund account whose balance was $1,538,947, with the additional Abbott vs. Burke aid to be

$475,703 and the timing of its reimbursement and disbursement to the District. Although I was subsequently advised by the deputy attorney general who substituted in for Mr. Harris and who tried this matter before me, Cindy Campbell, and her supervisor, Assistant Attorney General Michelle Miller, upon my order and direction to report its status to me at 3:30 pm on September 22, 2003, that the issue regarding the date of disbursement of that excess fund back to Gloucester had not yet been clarified, I was nonetheless told by them that it is still not an issue for resolution by this tribunal but rather a simple matter of disbursement. In the event the Comprehensive Annual Financial Review (hereinafter "CAFR") demonstrates that there is an entitlement, current "point in-time" estimates by the DOE suggest that the undesignated general fund may, however, have a surplus in excess of 2 percent. However, the DOE acknowledged that should Gloucester's surplus be determined to be under or below the 2 percent under CAFR, Gloucester will then get the receivable. Thus, this issue will be resolved at that time, although the DOE's representative at hearing, Andrew Bishop, conceded that, according to his own personal and unofficial understanding, this may be the first year that the DOE reduced the undesignated general fund prior to receipt of the CAFR.

TESTIMONY OF THE WITNESSES

In this matter four people testified and their relevant testimonies are summarized as follows:

Dr. Mary Stansky

Dr. Mary Stansky is Gloucester's Superintendent of Schools where she is in her fifth year. As a result of the current budget appeal, the amount that Gloucester thought they would get was the amount of $547,000 in order to hire additional people pursuant to a settlement which had been negotiated with DOE in February 2003. They had an agreement to hire those people, which included two Spanish teachers to meet the "Full Content" standard, one more facilitator for tutoring, six additional tutors, and one additional security person (in one of the four schools where they had no security personal at all.) Gloucester has four schools in its District, including an alternative high school for grades 7 through 12, a junior through senior high school for grades 7 through 12, an intermediate school for grades 4, through 6 and a pre-K through 3 school. They

understood that the maintenance budget would be sufficient in order to meet the ongoing needs of the District and provide the above-cited services. However, given the denial of those funds by DOE they would be unable to provide for those positions in the 03-04 budgeted year, even though they were previously provided during the 02-03 budgeted year. She reviewed a list of the positions and programs that would be lost without that supplemental aid, the after-school and summer programs, and as well as the professional development costs, all of which had been contained in the prior year's budget (P-1). The school supply costs will also be cut. As a result of the adjustment required by DOE in February 2003, which resulted in a reduction of the two Spanish teachers, in the amount of $106,500, the total amount of the loss was recorded as being $6,024,498 (less the $106,500 indicated hereinabove). They are nonetheless required to provide those services for the "Whole School Reform." Those figures were prepared in February 2003 as a maintenance figure at the time and did not include the non-discretionary items, most of which had been resolved as set forth hereinabove in the stipulation entered into between the parties at the due process hearing. She did not believe that the State has relieved them of their obligations for education for this year, however.

Robert Stewart

Robert Stewart is an independent auditor employed by Gloucester. He is the co-owner of an auditing firm in Marlton, New Jersey. He has been a Certified Public Accountant since 1974. On an annual basis his CPA firm conducts audits on an independent basis regarding approximately forty districts throughout the State of New Jersey. This is his first year with Gloucester.

In addition to being a licensed CPA, he is also licensed as a public school accountant which he also received in 1974, and is also a registered municipal accountant (since 1976.) He testified regarding the encumbrances which the district feels should be attached and given credit for in the 03-04 budget year. An encumbrance is a order issued to a vendor but which results in it not being paid by June 30, which is the end of the standard fiscal year. If is not signed off or paid in that year's end by June 30 it serves as a reservation of fund balance as an open encumbrance. It is the district's position that the amounts which constitute encumbrances were denoted and recorded as such by DOE for the 03-04 year in the total amount of $797,686, and

actually should have been charged against the preceding year of 02-03, even though they were not accounts payable.

In that regard, he reviewed the Gloucester Board of Education's Secretary's Reports (P-2 and P-4) regarding the amounts of outstanding expenditures in place as of June 30, 2003. That review comprised Fund Ten, which includes Fund 11 (the general fund), Fund 12 (which comprises the capital fund), and Fund 13 (which constitutes the special school account) (P-3). Those outstanding expenditures should be treated as part of the 02-03 expenditures of the district since, even though they will be spent after June 30, they must be attributed back to the prior budget year of 2002-03. However, it was the district's position that the DOE did not see them as a proper entry. It was his conclusion that all the outstanding expenditures should be made part of the expenditures for the 02-03 year and then added to the DOE's actual expenditure for calculation of the 03-04 budget. Otherwise, there will be a shortfall in that amount of $797,686 in the 03-04 budget.

In the process, he conceded that, from an accounting standpoint, many of those expenditures did remain outstanding as open encumbrances because paperwork had not been completed and the vendors payments had not been completed prior to the end of the fiscal year of June 30, 2003. He also acknowledged that he did not know how much had been even spent to date from the total of the $797,686, representing both of the above cited funds 10 and 15 (this being the Blended Resources Fund.) Finally, he noted that they employ general accepted accounting principles (more commonly referred to as "GAAP"s) in order to arrive at applying credit for outstanding expenditures, even though DOE does not view them as being actual expenditures from the 02-03 year,. The district wants those open expenditures counted for that year, thereby increasing its total allotment for 03-04.

James Devereaux

James Devereaux is the Business Administrator and Board Secretary of Gloucester, which role he has held for three months. He had prior experience as the Township Manager and for two of the three years, Chief Financial Officer, of Washington Township, Gloucester County between 1987 and 1990, the Chief Financial Officer and Administrator for Gloucester City

between 1990 and 1992, and the Township Administrator of Manalapan Township for 9 years, prior to assuming his current role with Gloucester, City.

He testified regarding the issues of utility rate increase as well as the Early Childhood Plan aid in this matter.

Regarding the utility rate increase, the DOE authorized the amount of $91,591.95 for the 03-04 year, while the district seeks the amount of $116,694 for the same period. He based his calculation upon actual bills for natural gas and electricity on behalf of the district which he culled from the 02-03 school year. Thereafter, he separated out the billings for the gas increase verses the electricity increase. He applied a 15 per cent increase only for the electrical component based upon a Board of Public Utilities order of August 2003 which authorized the Public Service Electric and Gas Company to charge that rated increase. It is noted that the DOE did not challenge that figure at the due process hearing. Rather, as stated hereafter, regarding the testimony of DOE's Andrew Bishop, although the DOE originally allocated a zero increase for that purpose, it acceded to the district's request for the 15 percent adjustment only for the electricity for the 03-04 budget year. This constitutes a further stipulation in this matter. And I so **FIND**.

The only utility rate challenge therefore remained regarding the natural gas increase, which the district projected as being 30 percent. Devereaux arrived at that percentage increase based upon his research regarding the market conditions and fluctuations in the natural gas market. In that regard, he referred and offered into evidence two articles from which he had gleaned the range of increases as occurring between 20 and 70 percent projected for the ensuing year, based upon American Industry Standards and an article from the Energy Information Administration. His conclusion was that the increase would probably fall somewhere between those two areas, and, as a result, he merely picked the figure of 30 per cent as being on the low end of that range to support that increase. On cross-examination, he acknowledged that the one article upon which he relied referred to there being projected levels 60 to 70 percent higher than last year as related to a comparison with last summer's rates only. He noted, however, that it would be totally impossible to project over-all figures for the entire year but felt that 30 percent

was a reasonable estimate given what he had otherwise determined from those articles as well as his discussions with unnamed personnel at Public Service Electric and Gas.

As to the issue involving the Early Childhood Plan aid (hereinafter "ECP") a review of the district's budget (R-1) reveals that the DOE treated the EC Plan for 02-03 as a negative in the amount of $3,490,379. The DOE's number is based upon a January 02 letter which stated that the approved plan was that figure. However, Gloucester's approved DOE budget for 02-03 was actually $3,203,949, as of October 2, 2002. (See P-9 and P-10) Yet, on February 25, 2003, Gloucester was told by DOE that they would receive a lesser amount after having deducted the amount of $740,531 from that previously approved figure. This would leave a balance of an actual budget of $2,463,418 for Early Childhood Plan purposes as being the actual budget for the 02-03 year. Thus, they contend that DOE used the wrong figure by employing the amount of $3,490,379 since the actual budget of $2,463,418 was the actual budget for the ECP for the 02-03 period. As a result, it is their contention that the district actually lost nearly $1,000,000 when one combines the nearly $200,000 which they had been reduced by DOE in the budget adjustment on February 25, 2002 ($3,490,379 verses the actual budget of $3,203,949) and the reduction they received of $740,531, which they got as a result of the letter of February 25, 2003. The district should have actually received their increased amount of $376,950 to the bottom line budget. Instead, the DOE's use of the $3,490,379 constituted a negative to the district in the amount of $650,000. He conceded that the district did not do a similar calculation for 03-04.

Andrew Bishop

Andrew Bishop testified on behalf of the DOE as a budget manager, which role he has assumed for several districts, including Gloucester, since December 2001. He is an accountant by trade, has been a Certified Public Accountant since 1994, and has spent over 18 years engaged in audit practice.

He reviewed the maintenance calculation work sheet prepared by DOE (R-1) and (R-7) and indicated that, overall, the DOE attempted to strike a systematic approach to establishing the maintenance budget for 03-04 regarding approved ECP's. In the Gloucester City matter, after they adjusted the 02-03 budget they did a comparison of the budget verses actual calculation for

the programs in place and made a computation of projected spending of Gloucester in that regard (R-2). In that regard, the ECP budget for 02-03 for Gloucester was $3,490,379 (R-4) as an approved budget plan and, as a result, they came to the conclusion that there was not an expansion of a budget but rather a reduction of $650,011 when they compared the EC plan for 02-03 ($3,490,379) verses the EC plan for 03-04 in the amount of $2,840,368, thereby leaving the reduction to $650,011.

Regarding the utilities allowance, Bishop indicated that the DOE originally had calculated the projected increases for electricity and gases being zero. However, as a result of the due process hearing herein, the DOE conceded and agreed that Gloucester should receive a 15 percent increase regarding the electricity based upon the verification that the BPU had granted a rate increase to Public Service Electric and Gas. At the same time however, the DOE was not convinced that any similar bona fide increase for natural gas was adequately demonstrated by the district. However, in the spirit of attempting to maintain uniformity in that regard, it nonetheless conceded and agreed that a 15 percent increase for natural gas expenditures would also be appropriate for the 03-04 budget year, that being based upon his review of a fellow budget director's e-mail which referenced a recommendation for same by the New Jersey Association of School for Business Officials (hereinabove "NJASBO"). He also noted however, that should the actual expenditures exceed that amount, emergency appropriation requests can be made by the district and will be given appropriate review by the DOE upon submission of same.

Regarding any credits for encumbrances, he noted that the DOE worked up the CPA report and gave credit for the actual spending, since actual spending is the best information available, as opposed to encumbrances, which appear as a carryover beyond the authorized fiscal year. As a result, only accounts payable before June 30, and even paid very shortly after June 30 will be given recognition by the DOE on a consistent bases. The DOE's conclusion was that bills not paid by that time would be listed and included in the ensuing budget for 03-04.

LEGAL ANALYSIS

In this matter, Gloucester and the DOE have, as a result of the due process hearing, made significant efforts toward resolving the outstanding issues relative to the maintenance budget

presented for the 03-04 year. Both sides should be commended in that regard since considerable energy was spent during the pendency of the due process hearing in order to re-address all those issues. The stipulations set forth on the record regarding the vast majority of the figures and as referenced hereinabove at the beginning of this decision, reflect those positive and strenuous efforts. Accordingly, only three issues remained at the commencement of the due process hearing and for which findings and conclusions are made at this time it being my understanding that the excess Fund account issue is a distribution issue more properly assessed at the CAFR. After having considered the evidence presented, regarding the utility rate increase, I **FIND** that, since the parties have jointly agreed to an adjustment regarding the electricity rate increase to 15 percent, that issue is also stipulated and moot as an issue before me at this time. That agreement was apparently predicated upon an assessment that the BPU order regarding the PSE&G increase demonstrated the projected increase for electricity over the next year. At the same time, however, I **FIND** that the district has demonstrated a reasonable or plausible basis to suggest a 30 percent increase regarding the natural gas increase, due to the volatility and uncertainty of that market over time. After considering the documentation presented in support of Gloucester's claim regarding a 30 percent increase, I **FIND** it to be somewhat reasonably determined based upon the projections set forth in the articles which were submitted in support of their calculation in that regard. Although there is absolutely no way to demonstrate the viability of the natural gas increases over the next year the district's attempted assessment at least gives a tangible basis upon which to assert the projected increase of 30 percent. And I so **FIND**. As a result, absent any other realistic or corroborated showing to the contrary and/or any other authority who could substantiate anything short of a 30 percent increase, I reject DOE's acquiescence for a 15 percent increase by a preponderance of the credible evidence. I **FIND** that the DOE accepted and conceded a 15 per cent increase, consistent with the electricity rate increase, in order to maintain as must uniformity as possible. However, as was gleaned from the hearing, Gloucester had at least some corroborating proofs while DOE did not. The purported reliance upon the NJASBO e-mail was highly deficient in that regard. And, in any event, to the extent that any amount over DOE's conceded 15 percent gas increase exceeds that amount in reality, those increase must be viewed as unforeseen circumstances and/or unanticipated expenditures, for which cash payment should be forthwith issued by DOE and Gloucester can make a request for emergency appropriations at any time that the projected estimated figures do exceed the authorized budgeted

amount. Thus, they will not be prejudiced in that regard because they do have relief at hand to address those gas increases above 15 percent.

Regarding the Early Childhood Plan figure, I **FIND** that the DOE properly attempted to employ a systematic approach to maintaining a uniform analysis for all of the affected districts and utilized that concept in its assessment of and comparison of the 02-03 and 03-04 budget for Gloucester. In the process, I **FIND** that the use of an approved plan-to-plan review (emphasis added) was reasonable under the circumstances and, accordingly, I will not disturb DOE's determination to fix a review at a uniform period in time, being the date of the actual approved budget, whether or not any subsequent adjustment resulted in recalculations thereafter. Therefore, I **FIND** that the utilization of the ECP budget for 02-03 in the amount of $3,490,379 was properly compared with the ensuing budget for 03-04, of $2,840,368, resulting in a reduction in aid between the two periods of $650, 011. And I so **FIND**.

Although, on first blush, it appeared incongruous to observe that the DOE considered the 02-03 budget figures for the district of $3,490,379 as the baseline which later became emasculated and/or reduced for whatever reason(s) the district has presented nothing which convinces me that any other accounting calculation practice is more do-able. This failing was similarly reflected in the presentation about the encumbrance issue. The proofs were highly deficient and devoid of any detail or clarity to give credence to the District's positions in those regards. The DOE has at a minimum created a systematic approach to be applied across the board among all the boards by comparing "approved" budgets to "approved" budgets. As a result, the DOE's allocation of ECP data correctly reflects the proper comparison data.

At the same time, I also **FIND** that Gloucester's Devereaux incorrectly included the approved preschool expansion aid, which had been based upon a projected enrollment of 336 pupils. At the end of the school year, however, only 238 pupils had been actually enrolled. As a result there was no real expansion at all, and the DOE properly adjusted the expansion aid for 02-03 to be zero (even though technically it was really a negative $1,018,027 for that period.)

Thus, Gloucester erred when it included the approved ECP expansion aid because the final approved ECP expansion aid was zero. As a consequence, I **FIND** that, by comparing only

the final approved ECPs for the two budget periods, the DOE properly calculated Gloucester's ECP aid for 03-04 as being $650,011.00.

Finally, as set forth at the commencement of the due process hearing in this matter, I **FIND** that the DOE properly determined the actual spent expenditures are to be used for calculations purposes instead of the encumbrances, the latter of which have not resulted in a full, credited payment, even according to all appropriate accounting standards, and that, accordingly, the DOE followed proper, sound procedures in calculating and giving credit for only those expenditures which became actual by the end of the fiscal year. Even the district's independent auditor could not confirm the status of any on-going actual payments subsequent to that time, which further illustrates the vagueness with which such calculations would have to be made. The only realistic approach is that which was employed by the DOE under the circumstances. And I so **FIND**.

As a result, notwithstanding any purported "generally accepted accounting principles," (GAAP) as articulated by Gloucester's independent auditor Stewart (but which were not established or corroborated and even though not challenged on its face by the DOE at the due process hearing at all), I am nonetheless satisfied and **FIND** that the DOE has clearly established that any billings for services of any sort will only be allocated and credited in the budget year when the funds are spent and not when reserved as an indebtedness or encumbrance to the district, consistent with the maintenance standard ordered for districts under Abbott. An encumbrance is an accounting tool which permits a district to reserve funds for purchase orders that may have been issued but for which the goods or services have not yet been received. Thus, I **FIND** that any encumbrances which remained open and/or unpaid after June 30, 2003, are chargeable to the budget for 03-04, and not in the proceeding year of 02-03. By contrast, the DOE did give Gloucester credit for true accounts payable in 02-03.

This is based upon the definition of maintenance budget found at *N.J.A.C.* 6A:10-1.2, which specifically provides that a district's maintenance budget shall (emphasis added) include "a budget funded at a level such that the district can implement 2002-2003 approved and provided (emphasis added) programs, services and positions and includes documented increases in non-discretionary expenditures and adjustments for actual 2002-2003 expenditures.

Further, if even Gloucester's Stewart could not determine even at this time how many or how much of Gloucester's open encumbrances were accounts payable in 02-03, then how could the DOE be expected to make either an informed decision or apply any credit for those goods or services which have yet to be received at this time.

Of course, Gloucester will be able to have any adjustments made thereto when its Comprehensive Annual Financial Report (otherwise referred to as "CAFR") is made by the DOE approximately two months from now, in November 2003. At that time, Gloucester will hopefully be able to convert its open encumbrances into accounts payable.

I also **FIND** that the Supreme Court set a schedule for new DOE decisions on supplemental funding and the administrative appeal and hearing process and ordered the DOE to promulgate emergency regulations governing the process. The DOE, relying on the Fiscal Year 2004 Appropriations Act and the Supreme Court's July 23, 2003, Order, promulgated emergency regulations amending *N.J.A.C.* 6A:10, including *N.J.A.C.* 6A:10-1.2, 3.1, -4.2, and –4.7. The regulations are effective August 22, 2003, and expire June 30, 2004. Among these emergency regulations, *N.J.A.C.* 6A:10-1.2. move states completely:

> "Maintenance budget" means, for the 2003-2004 school year, a budget funded at a level such that the district can implement 2002-2003 approved and provided programs, services, and positions and includes documented increases in non-discretionary expenditures and adjustments for actual 2002-2003 expenditures. Examples of non-discretionary expenditures are increases in contracted salaries, health benefits, and special education tuition. Maintenance does not include the restoration of programs, positions, or services that were provided in previous years or new programs, positions, or services unless necessary to meet paragraph 2c of the Supreme Court's order of June 24, 2003 in *Abbott v. Burke*. Maintenance also does not include non-recurring 2002-2003 expenditures.

The district bears the burden of proving that DOE's calculation of its maintenance budget failed to follow the maintenance budget review required under *N.J.A.C.* 6A:10-1.2. In this matter, I **FIND** that, given the level of proofs and testimony offered by both sides, the DOE

developed Gloucester's 03-04 maintenance budget after it reviewed Gloucester's approved budget for 02-03, made adjustments for actual (emphasis added) expenditures, allowed increases in non-discretionary costs, and dedicated costs for any non-recurring items as mandated in the maintenance budget formula definition. As a result, I **FIND** that the DOE did properly determine Gloucester's 03-04 maintenances budget in accordance with established Supreme Court criteria and appropriate DOE regulations, the only exception to that finding being my determination regarding the utilization of the projected 30 percent natural gas rate increase requested by Gloucester.

Finally after having considered the arguments advanced herein and pursuant to my announced determination at the due process hearing, I **FIND** that the DOE regulations define "maintenance budget" consistent with the Supreme Court mandate and order relative to implementation of those regulations. I further adopt the relevant findings and conclusions in that regard which were contained in the Order Relative to Maintenance Budget of Honorable John R. Tassini, ALAJ, in the matter of *Board of Education of Asbury Park vs. New Jersey Department of Education*, OAL Docket No. EDU 4095-03, Agency No. 199-6/03 dated September 4, 2003, and the Order Relative to Maintenance Budget rendered by Honorable Joseph F. Martone, ALJ, in the matter of the *Board of Education, of Neptune vs. New Jersey Board of Education,* OAL Docket No. EDU 4096-03; Agency No. 202-6103, dated September 10, 2003. And I so **FIND**.

CONCLUSIONS AND ORDER

Based upon all of the foregoing, I **CONCLUDE** that the DOE has demonstrated the reasonableness of its budget for the Gloucester district for the 03-04 school year by a preponderance of the credible evidence. It is **ORDERED** that the proposed budget, as fixed by the DOE for that period, except as to the natural gas rate increase, is **AFFIRMED**. The denial of the 30 percent natural gas rate is **REVERSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within the time allowed under the existing orders of the New Jersey Supreme Court and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Notwithstanding the provisions of any rule to the contrary, exceptions to Initial Decisions of the Office of Administrative Law in *Abbott* District budget appeal matters shall be filed within five (5) days of the date of mailing of the Initial Decision, and reply exceptions shall be filed within two (2) days of receipt of exceptions. File written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 24, 2003

DATE

JOHN R. FUTEY, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

September 24, 2003

DATE

E-mailed Initial Decision to the parties on:

September 24, 2003

DATE

JRF/mamf

WITNESSES

For petitioner

Dr. Mary Stansky

Robert Stewart

James Devereaux

For respondent

Andrew Bishop

EXHIBITS

For petitioner

P-1 Summary of budget items by Dr. Mary Stansky

P-2 Fund 10 Account

P-3 Abbreviated detailed budget accounts status for Fund 10

P-4 Fund 15 board secretary's report for June 30, 2003

P-5 Abbreviated detailed budget account status for Fund 15

P-6 2003 audit financial summary

P-7 Comparison chart

P-8 Utility calculations rate

P-9 Early Childhood Plan aid calculations for 02-03

P-10 Additional Early Childhood Plan calculations for 02-03

P-11 Letter from Gordon MacInnes to Dr. Mary Stansky, dated January 6, 2003

For respondent

R-1 Maintenance Budget calculation worksheet

R-2 Schedule A from KPMG audit

R-3 School District Budget Statement for the 2002-2003 school year

R-4 Budget approval letter for 2002-2003 Early Childhood Plan

R-5 Budget approval letter for 2003-2004 Early Childhood Plan

R-5.1 Salary Increase Spreadsheet for 2003-2004

R-6 Special Education Tuition Calculation for Gloucester City

R-7 Supplemental Abbott v. Burke Aid calculation worksheet

R-8 School District Budget statement for the 2003-2004 school year

R-9 IDEA increase in aid spreadsheet

R-10 Extraordinary aid spreadsheet

Joint exhibit

J-1 Letter from Gordon MacInnes to Dr. Mary Stansky, dated August 27, 2003

OAL DKT. NO. EDU 4158-03
AGENCY DKT. NO. 188-6/03

BOARD OF EDUCATION OF THE CITY OF GLOUCESTER, CAMDEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

The record of this local "Abbott" District's appeal of the Department's decision on its supplemental funding request for the 2003-04 school year, and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions of Gloucester and those of the Department, along with both parties' reply exceptions were duly submitted in accordance with the schedule established in response to the Court's Order for expedition and were considered by the Commissioner in reaching this decision.

Upon careful and independent review of the record, the Commissioner determines to adopt in part, reject in part and modify in part the Initial Decision of the OAL as detailed below.

Initially, it is noted that petitioner's exceptions strenuously urge that the Commissioner should reject the Administrative Law Judge's (ALJ) resolution of the undesignated general fund issue in this matter, *i.e.*, that "[this issue] is still not an issue for resolution by this tribunal but rather a simple matter of disbursement," a question which would ultimately be resolved at the time of the Comprehensive Annual Financial Report (CAFR)

review.[1] (Initial Decision at 5) (Petitioner's Exceptions at 10-11) Petitioner reports that, subsequent to the receipt of the Department's August 27, 2003 budget decision letter, its auditor conducted a preliminary audit of the undesignated general fund balance which demonstrated that the District's fund balance was now below the required two percent level, contrary to the Department's budget letter calculation and, therefore, "the District should immediately be awarded the Abbott v. Burke State Aid receivable that was improperly and prematurely deducted in the [Department's] August 27, 2003, letter. (Petitioner's Exceptions at 12) The District argues that the Department has a legal obligation to accept its supplemental documentation and to cure any deficiencies in the District's budget that were based on the Department's consideration of outdated and inaccurate information. It, thus, proffers that the required adjustments should be immediately made based on its newly provided supplemental updated information and should not await the CAFR. The District further charges that the Department improperly reduced the undesignated general fund balance, which it had determined was in excess of two percent, prior to the receipt of the CAFR, in violation of the FY 04 Appropriations Act.

In reply, the Department advances "that the ALJ properly found that the issue of when and how Gloucester City would receive its disbursement from the Department if its undesignated general fund balance was below two percent was not a legal issue before him in this matter. However, the issue of the calculation of Gloucester City's excess fund balance was a legal matter properly reviewable by the ALJ in this case." (Department's Reply Exceptions at 2-3) The Department further advances that the Supreme Court's Order directed it to provide the districts with their preliminary maintenance figures for the 2003-04 school year by

[1] Petitioner charges that such determination of the ALJ was the result of an improper *ex parte* conversation with counsel for respondent in this matter and, therefore, the Commissioner is obligated to grant the relief it seeks. Petitioner is advised that "allegations" of impropriety by an ALJ are not properly before the Commissioner of Education nor do such "allegations" provide a basis for the granting of petitioner's requested relief in this forum. Rather, these are appropriately cognizable before the OAL. *See N.J.A.C.* 1:1-14.5; Code of Judicial Conduct for Administrative Law Judges, Canon 3A(6); and *N.J.A.C.* 1:31-3.1(a)4.

August 27, 2003. In fulfillment of that directive, the Department utilized the most recent calculations, provided by the District, to make the requisite projections in its August 27, 2003 budget letter. Although recognizing "the Supreme Court's encouragement to accept supplemental documentation [from districts], the Supreme Court's holding should not be construed such that the Department should accept piece-meal and potentially inaccurate data on an on-going basis, particularly where the district's CAFR will be submitted in several weeks and there will be finality in the data." (Department's Reply Exceptions at 5)

Upon consideration of the arguments advanced by the parties on this issue, the Commissioner, while conceding that the District's *entitlement* to payment may have been properly addressed by the ALJ in these proceedings, concurs that *timing* of such payment was not amenable to resolution by the ALJ. It must be observed, however, that the District's proffered arguments herein are somewhat disingenuous. While charging that the Department improperly made reductions to its undesignated general fund balance based on preliminary projections in advance of its receipt of the CAFR, it, nonetheless, demands payment based on its "supplementary" projections, also prior to completion of the CAFR process. Under the circumstances existing here, the Commissioner determines that resolution of this issue is appropriately deferred subsequent to the completion of the CAFR process. If the District's supplementary information at that time demonstrates that its undesignated general fund balance is below two percent, adjustment will be made to its aid award pursuant to the Appropriations Act (New Jersey Fiscal FY 04 Appropriations Act, *P.L.* 2003, *c.* 122).

Turning to the remaining issues in dispute herein, the Commissioner, first, concurs with the ALJ that the OAL does not have jurisdiction to determine, directly or indirectly, the validity of *N.J.A.C.* 6A:10-1.2, as such determination is solely within the jurisdictional purview of the Appellate Division or the Supreme Court. R.2:2-3(a); *see, also, Pascucci v.*

Vagott, 71 *N.J.* 40, 51-52 (1976); *Wendling v. N.J. Racing Com'n*, 279 *N.J. Super.* 477, 485 (App. Div. 1995). Even if it were to be assumed, *arguendo*, that the OAL has jurisdiction to determine "a choice of law" as argued by the District, the Commissioner agrees with the ALJ that the Department's definition of "maintenance budget," as detailed in *N.J.A.C.* 6A:10-1.2, does not differ in any appreciable way from the Supreme Court's definition of that term contained in its Budget Order of July 23, 2003. Consequently, the Department's application of such regulatory definition in its review and approval of the District's 2003-04 budget is wholly appropriate.

In his consideration of the ALJ's grant of a 30 percent natural gas rate increase to the District, the Commissioner cannot agree with the ALJ that the District has met its burden of establishing the necessity of an increase of this magnitude. At this juncture, the Commissioner finds that a review of the respective parties' burdens of proof in this matter is particularly instructive. In this regard, the Commissioner recognizes that the Supreme Court's Order provides that the Department "shall bear the [initial] burden of moving forward to establish the basis for any proposed reductions to the [Abbott] district's maintenance budget based on the effective and efficient standard set forth in the DOE's emergency regulations."****Abbott v. Burke*, M-976 September Term 2002, at 7. However, as indicated in the Department's preliminary maintenance decision letter dated August 27, 2003 (Exhibit J-1), the District's maintenance budget was not reduced based on ineffectiveness or inefficiency. Therefore, pursuant to *N.J.A.C.* 6A:24-9.6(c), the District bears the burden of proving that the Department's calculations were unreasonable or otherwise improper. Here, the Initial Decision reflects that James Devereaux, Business Administrator and Board Secretary of Gloucester, testified that he arrived at the projected 30 percent increase in natural gas cost

> based upon his research regarding the market conditions and fluctuations in the natural gas market. In that regard, he referred

> and offered into evidence two articles from which he had gleaned the range of increases as occurring between 20 and 70 percent projected for the ensuing year, based upon American Industry Standards and an article from the Energy Information Administration. His conclusion was that the increase would probably fall somewhere between those two areas, and, as a result, *he merely picked the figure of 30 per cent as being on the low end of that range to support that increase.* (emphasis supplied) (Initial Decision at 8)

Although reporting that the Department "accepted and conceded a 15 per cent increase, consistent with the electricity rate increase, in order to maintain as [much] uniformity as possible" *id.* at 11, and recognizing testimony advanced by the Department's witness that such a figure was based on the recommendation of the New Jersey Association of School Business Officials (NJASBO), the ALJ, nonetheless, granted the increase finding "Gloucester had at least some corroborating proofs while DOE did not." The Commissioner disagrees. Mindful of the District's burden on this issue, the Commissioner finds the proofs advanced by the District to be deficient and devoid of any *competent* evidence that would offer credence to its position with respect to a 30 percent natural gas cost increase. As such, the Commissioner finds that the Department's offered 15 percent increase cannot be found unreasonable or improper. Therefore, the ALJ's finding in this regard is rejected. The District is also reminded that, should its actual natural gas cost exceed the allotted 15 percent, *N.J.A.C.* 6A:10-3.1(g) provides a mechanism for it to apply for additional supplemental funding.

The Commissioner, similarly, concludes that the District has not met its burden of establishing that the Department's use of an *approved* plan-to-plan review to determine the District's Early Childhood Plan figure was unreasonable or otherwise improper. In the Commissioner's view, the process used by the Department, based on the only available "like" components for comparison, *i.e.*, approved 2002-03 and 2003-04 Early Childhood Plans, in order to determine the change in district need from one year to the next, fully allows for reasonable,

fair and consistent preliminary determinations under circumstances where precise calculations must necessarily await the results of the CAFR. As well articulated by the ALJ in her Initial Decision in *Board of Education of the City of Plainfield, Union County, v. New Jersey State Department of Education*, OAL Dkt. No. EDU 5502-03, Agency Dkt. No. 206-6/03, decided September 26, 2003:

> I have considered the arguments of counsel and must agree with the position espoused by the DOE.***Although I agree with the District that the consistent use of the DOE's methodology does not in itself make it correct, I do not agree that simply because it does not work to the District's advantage makes it incorrect. The methodology utilized by the DOE has been applied to all "Abbott Districts" uniformly and has served to increase maintenance budgets in over half of the Districts. The District has not established that the use of this methodology is *per se* improper, illegal, inconsistent with the New Jersey Supreme Court's Order of July 23, 2003 or violative of any of its constitutional rights. The DOE is obligated only to utilize an approach that is reasonable and uniformly applied. Here they have done so. If the methodology is to be changed in each area in which an Abbott District is not advantaged, there will be no uniformity or equity to the provision of Abbott funds. Thus, I reject the District's argument and CONCLUDE that the DOE's methodology is reasonable and will not be second-guessed. (*Id.* at 8)

As such, the Commissioner agrees with the ALJ that the District's Early Childhood Plan adjustment for the 2003-04 school year was properly calculated at $650,011. In so holding, the Commissioner is also mindful that, to the extent that the results of the Department's reasonable approach may be imperfect, even after adjustment following audit, *N.J.A.C.* 6A:10-3.1(g) provides a mechanism for the District to obtain additional supplemental funding where unanticipated expenditures or unforeseen circumstances warrant.

As to whether the Department appropriately excluded certain of the District's encumbrances in the development of its maintenance budget, the Commissioner finds that the ALJ's analysis erred in concluding that only expenditures fully *paid* by June 30, 2003 were properly attributable to the 2002-03 budget and all expenditures which remained unpaid after

June 30, 2003 were chargeable to the District's 2003-04 budget, and were not to be included in the calculation of its "maintenance budget." Rather, he finds, the focus of the inquiry in this area is properly the timing of the *receipt* of goods and services, not payment. The ALJ's analysis appears to reflect a fundamental misunderstanding of the differentiation between the terms "encumbrances" and "accounts payable." Respondent's exceptions explain:

> An encumbrance is an accounting tool that permits Gloucester City to reserve funding for purchase orders that were issued during the 2002-2003 school year, but the goods or services were *not* received by (sic) as of June 30, 2003. An encumbrance is not an expenditure in the 2002-2003 school year, but rather merely a reservation of fund balance, which may be expended in the 2003-2004 school year if the goods and services are received. By contrast, an account payable is an expenditure which is incurred in the 2002-2003 school year for goods and services actually received or provided prior to June 30, 2003.
>
> With regards (sic) to those purchase orders for goods and services that have not been received or provided before June 30, 2003, they would be rolled over as encumbrances into 2003-2004 school year. As such these purchase orders are properly excluded from the 2003-2004 maintenance calculation, which properly includes only approved goods and services actually provided in the (sic) 2002-2003. They are not to be included in the 2003-2004 maintenance budget for Gloucester City since they have not been received or provided in that year. (emphasis supplied) (Respondent's Exceptions at 5-6)

Therefore, the Commissioner clarifies that, to the extent that the "encumbrances" as discussed in the Initial Decision represent charges for goods and services *provided* by June 30, 2003, *i.e.*, they have become accounts payable, these are properly chargeable to the District's 2002-03 budget and appropriately included in its "maintenance budget" for 2003-04. Those "encumbrances" representing goods and services not received by that date are properly excluded from the 2003-04 maintenance budget calculation. Petitioner's exceptions assert that the auditor for the District audited certain sections of the District's records, subsequent to June 30, 2003 and immediately prior to the hearing, and, citing Exhibits P-3 and P-6, contends

that he found that the Department had failed to allocate certain open encumbrances to 2002-03 expenditures. (Petitioner's Exceptions at 18-19) The Commissioner, while recognizing that it is entirely possible that adjustments in this area are necessary, in light of the District's burden in this regard and based on the proofs brought to the record, is unable to definitively determine which of the District's encumbrances have become accounts payable by virtue of the receipt of the encumbered goods or services on or before June 30, 2003 so as to be considered 2002-03 expenditures. The Commissioner, therefore, concludes that the District's encumbrances were properly excluded as a budget expense for 2002-03 by the Department, and he directs that any required adjustments be made, based on updated information, in the course of the CAFR review scheduled to begin in November 2003.

Accordingly, the Initial Decision of the OAL is adopted in part, rejected in part and modified in part as set forth above. The instant Petition of Appeal is hereby dismissed.[2]

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 10/20/03

Date of Mailing: N/A

[2] The Commissioner so determines, based upon the proofs brought to *this* record, while acknowledging that the presentation of such evidence may have been disadvantaged by both a Court Order to expedite proceedings and the unavailability of the CAFR until November 2003. In any event, beyond his determination herein, the Commissioner underscores the availability of a mechanism for Abbott districts to address needs, arising during the year due to unanticipated expenditures or unforeseen circumstances, for additional resources to implement Department-approved programs and services. *N.J.A.C.* 6A:10-3.1(g).

[3] Pursuant to *P.L.* 2003, *c.* 122, "Abbott" determinations are final agency actions appealable directly to the Appellate Division of the New Jersey Superior Court.

577-03

BOARD OF EDUCATION OF THE CITY OF VINELAND, CUMBERLAND COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning "Abbott" District appealed the Department's determination of its 2003-04 preliminary "maintenance budget," alleging that the Department's review was not in accordance with the July 23, 2003 order of the Supreme Court.

The ALJ determined that the OAL does not have jurisdiction to determine the validity of *N.J.A.C.* 6A:10-1.2. The ALJ also concluded that: 1) the Department incorrectly included encumbrances, reserves for inventory and capital reserves in calculating the excess fund balance; 2) the Department erred in including $1,863,652 of unspent salary and benefits funds in calculating the excess fund balance; 3) the sum of $74,349 for transportation should be added to the District's budget as a nondiscretionary item; 4) the District's request for $1,000,000 for No Child Left Behind should be denied as beyond the maintenance standard; and 5) the District's request for $110,543 for its Second Chance Program should be granted.

The Commissioner concurred with the ALJ's findings and conclusions with respect to the disputed issues except in three instances wherein the Commissioner rejected the ALJ's findings and concluded that: 1) the Department correctly included encumbrances, reserves for inventory and capital reserves in calculating the excess fund balance; 2) the Department correctly included $1,863,652 in unspent salary and benefit funds in calculating the excess fund balance; and 3) the District's request for $110,543 in additional funds for its Second Chance Program did not comport with the maintenance budget standard set forth at *N.J.A.C.* 6A:10-1.2 and, therefore, the District's request for additional funds for this program was denied.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4156-03

AGENCY DKT. NO. 190-6/03

BOARD OF EDUCATION OF THE CITY OF VINELAND, GLOUCESTER COUNTY,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION,

Respondent.

Robert A. De Santo, Esq., for petitioner (Gruccio, Pepper, De Santo & Ruth, attorneys)

Jennifer Killaugh-Herrera, Deputy Attorney General, for respondent (Peter C. Harvey, Attorney General of New Jersey, attorney)

Record Closed: September 22, 2003 Decided: September 25, 2003

BEFORE **JOHN SCHUSTER III**, ALJ:

PROCEDURAL HISTORY

Petitioner appeals the May 30, 2003 determination of the department relating to its 2003-2004 budget and additional *Abbott v. Burke* State Aid application for the same year. On March

17, 2003, Vineland submitted to the respondent a proposed budget for the 2003-2004 school year. On May 30, 2003, the department issued a decision modifying the proposed budget based on the New Jersey Supreme Court order of July 23, 2003, directing that 2003-2004 budgets should be funded at a level which will enable the district to continue implementing its 2002-2003 approved programs, services and positions (the "maintenance" standard). Onto June 6, 2003, petitioner filed with the Department a Verified Petition of Appeal alleging the respondent was improperly calculating its proposed budget and not applying the practice as set forth in *Abbott v. Burke* decisions and orders. The matter was then transmitted to the Office of Administrative Law (OAL) on June 9, 2003, as a contested case pursuant to *N.J.A.C.* 52:14B-2(b). The respondent filed an Answer to the Verified Petition on June 12, 2003 denying any non-compliance in the budget process. The matter was heard on September 18 and 19, 2003, at the OAL in Mercerville, New Jersey. The record remained opened pending the exchange of supporting documentation so that a stipulation regarding special education costs could be made. The stipulation was confirmed on September 22, 2003, and record closed.

STATEMENT OF THE CASE

The Board of Education of the City of Vineland (hereinafter petitioner or Vineland) disputes the calculation by the New Jersey State Department of Education (hereinafter respondent or Department) of its 2003-2004 operating budget. That dispute is significant because the petitioner relies upon supplemental aid provided by the respondent granted pursuant to the line of cases commonly referred to as the *Abbott v. Burke* decisions. These decisions require the Department to provide certain districts with supplemental financial aid in order for those districts to provide a thorough and efficient education for its students. Pursuant to the recent Supreme Court decision of July 23, 2003, the respondent is to provide to the petitioner supplemental aid in an amount as was provided in the 2002-2003 budget and as adjusted to provide for modifications in expenses which are non-discretionary expenses on the part of the petitioner. This is commonly referred to as the "maintenance" standard and pursuant to emergency regulations adopted by the Department, they are defined as the funding for those programs which were previously approved by the Department and provided by the petitioner in the 2002-2003 school year. The petitioner has argued that the respondent, in calculating Vineland's 2003-2004 budget, violated some basic accounting principles and did not include in

its budget calculation various items that should have been included pursuant to the Supreme Court directive. On the other hand, the Department has taken the position that this whole exercise is of minimal consequence because the budget that has been presented by the Department to Vineland is only an interim budget and final numbers will not be determined until the early part of November, 2003, when final calculations are completed. The various issues to be determined in this hearing are enumerated as follows: (1) Did the August 27, 2003 determination letter issued by the Department to Vineland accurately calculate the maintenance standard amount on the approved 2002-2003 budget as mandated by the July 23, 2003 order of the New Jersey Supreme Court? (2) Did the August 27, 2003 determination letter issued by the Department to Vineland correctly calculate the sum of $8,817,650, as the amount of additional excess fund balance that would be available for the 2003-2004 spending? (3) Did the August 27, 2003 determination letter issued by the Department to Vineland properly identify with specificity the Department's approval and disapproval of proposed expenditures in Vineland's 2003-2004 submitted budget?

The petitioner argues that the Department did not appropriately calculate the maintenance standard amount as set forth in the approved 2002-2003 budget and therefore incorrectly calculated the sum of $8,817,650, as the excess fund balance that will be available for the petitioner in the 2003-2004 school year. Vineland further argues that because the Department did not specify which expenditures were approved and which were disapproved, the proposed figures in the respondent's suggested budget did not provide funding for non-discretionary items and/or underprovided for those items. The Department's position is that estimated figures are satisfactory at this stage in the budget process. It argues that even though certain includable expenditures were omitted from the calculation those exclusions are of no consequence because they, along with the review process before this tribunal, is a meaningless exercise until final calculations are made on or about the first week of November. The primary area of dispute is the deductions in the 2002-2003 budget for under-spending in funds 11 and 15, the exclusion of some non-discretionary expenditures and the calculation of the excess fund balance in the proposed 2003-2004 budget. Therefore, the following is an item-by-item review of the evidence presented by the petitioner for modification of the proposed budget.

Excess Fund Balance

The Department has determined that the excess fund balance in the estimated 2003-2004 Vineland budget is $8,817,650. The excess fund balance is an amount which the Department says should be carried over into the 2003-2004 budget as unspent funds or monies on hand that were not spend in the previous year. The petitioner argues that this is an overestimate and the Department's calculations in arriving at this figure does not take into account basic accounting principles for reserves and payables which must be considered. In particular, Vineland points to the audit of its books and records by certified public accountants hired by the New Jersey State Department of Treasury. This audit was performed by Menzoni-Preziosi and Company, P.A., and has been entered into evidence as R-13. Vineland specifically points to Schedule G (page DOE 001236) of that report which recognizes encumbrances and reserves in support of its position (P-4). That schedule lists an adjustment to the surplus balance of $3,714,380 made up of encumbrances (accounts payable) in the amount of $3,041,818, reserves for inventory in the amount of $518,986 and a capital reserve account in the amount of $153,576. Petitioner argues through its Assistant Superintendent for Business and Board Secretary, Kevin J. Franchetta, that the encumbrances and reserves are required to be deducted from the Department's proposed excess fund balance because they are comprised of real debt and monies which must be held in reserve. The Department takes the position that the number it has designated as the excess fund balance is merely an estimate and should not be of any concern, as it is anticipated that a new figure will be determined when the final budget is struck in the beginning of November, 2003. Joseph Kirchon, the Budget Manager for the Department who handled the Vineland request for supplemental aid, testified that the excess fund balance of 8.8 million dollars was an overestimate, but it was his understanding by way of a Department directive that in calculating the excess fund balance he was not to look at setoffs, even though that is customary in accounting practice. I **FIND** that in determining the excess fund balance, it is acceptable accounting practice as evidenced by the Menzoni-Preziosi audit report that encumbrances and reserves should be included in the calculation of that amount. I therefore **CONCLUDE** that the excess fund balance as determined by the respondent in the amount of $8,817,650 should be reduced by the existing encumbrances and reserves in the amount of $3,714,380 so that the appropriate excess fund balance should be $5,103,270.

Fund 11 and 15 Adjustments

The Department takes the position that $7,491,019 of the fund 11 and fund 15 accounts remain unspent in the 2002-2003 budget. It says that because it was unspent, it should be a deduction from that budget in calculating the base 2002-2003 state program budget (P-2). Vineland's position is that not all of those moneys should be deducted because some of those funds were for salaries and benefits for positions that were "approved and provided," but paid for from other sources. Quinten J. Phillips, Jr. the Executive Director of Personnel for the Vineland Board of Education testified that he was familiar with this issue and testified to the following facts. In the 2002-2003 school year there were an inordinate amount of leaves of absence without pay, retirements and resignations in its staff. Those positions were filled primarily with substitute teachers or temporary hires which gave the district a one-time cost savings in salaries and benefits. That cost savings amounted to $2,126,478, but would not be duplicated again in the 2003-2004 school year. In addition, there were four other positions that were previously approved and the associated services were provided through outside contractors, substitute teachers or by some other method. Those positions were for a supervisor, speech therapist, music teacher and bilingual math teacher. The total cost in salary and benefits for those positions is $237,204. He further testified the cost to petitioner in the 2002-2003 year to provide those services was approximately $500,000. Vineland is saying that the leaves, retirements, resignations and unfilled full-time positions were all approved and the services of those positions were provided in the 2002-2003 school year and, therefore, should not be taken away in the 2003-2004 school budget as they satisfy the "maintenance" standard. Consequently, Vineland is seeking to have the fund 11 and 15 deduction reduced by the cost of providing these services in the 2003-2004 school year. That cost would be $2,126,478 plus $237,204 in savings less the $500,000 in costs paid to provide those services. That amount is $1,863,652. *See* P-14.

The respondent argues that leaves, resignations, etc. occur every year and the cost savings are rightfully deducted from the fund 11 and 15 accounts. However, the Department presented no evidence to dispute the testimony of Mr. Phillips that this was an unusual event resulting in part from a higher than normal number of pregnancies. This is in spite of the fact that respondent had audits of petitioner's budgets for the past few years and could have shown that these amounts were not extraordinary if, in fact, they were not.

I **FIND** that the positions affected by the leaves of absence, retirements and resignations as well as the four unfilled full-time positions were approved in the 2002-2003 budget and the services associated with those positions were provided by the petitioner in various ways. Therefore, those positions meet the maintenance standard and must be deducted from the surplus in the fund 11 and 15 accounts, as they are not likely to be recurrent at least to the extent they were in the prior year. I **CONCLUDE** that the fund 11 and 15 accounts of $7,491,019 shall be reduced by $1,863,652 so that the proper deduction is $5,627,367. This then changes the base 2002-2003 state program budget to $134,256,430.

Non-Discretionary Additions

Vineland is seeking $2,555,473 in what it characterizes as mandated or non-discretionary expenses that were not considered by respondent. Those expenses are for transportation, the Second-Chance Program special education and the No Child Left Behind Program.

The Department has conceded that special education costs for out-of-district tuition, residential placements and Bayada nurses were omitted from the proposed 2003-2004 budget and should have been included. It has been stipulated that the sum of $1,370,581 be included in the proposed budget as a non-discretionary addition.

With respect to transportation issues, the petitioner is requesting $74,349 in additional funding which is comprised of $66,000 in salary and $8,349 in benefits for six bus drivers. Vineland's Coordinator of Transportation, Joseph D. Callavini, testified that his duties include the coordination of transporting 11,500 students within the district area of 64 square miles to their specific destinations in a timely manner. He stated that during the early part of the 2002-2003 school year, he found it necessary to develop six new routes and add 6 new drivers which he got from the substitute driver pool. Two drivers were needed because students were not arriving to their school early enough for them to participate in the petitioner's School Breakfast Program. Mandated by *N.J.S.A.* 18A:33-10 (P-7). One driver was needed because of an increase enrollment at one of the elementary schools and one driver was needed because of an increase in enrollment at the County Votec facility. He stated that without the additional buses the petitioner would have violated existing regulations by exceeding passenger capacity and that

would create obvious safety concerns. Two more drivers were needed to transport additional special education students. He further testified that the substitute drivers were paid from the substitute driver fund resulting in a negative balance in that fund at the end of last year. Both Mr. Callavini and Mr. Phillips testified because these six positions were needed on a full-time basis, they had to be filled with full-time employees and part-time drivers could not be continued to be drawn from the substitute list. To do otherwise would violate both the union contract between the petitioner and the drivers' union as well as the New Jersey Department of Personnel civil service rules.

The respondent takes the position that regardless of the reason why full-time drivers are needed this year, those positions did not exist last year and, therefore, are not permitted under the "maintenance" standard.

I **FIND** that petitioner is required to provide transportation for its students and it must do so in accordance with adopted regulations, existing union contracts and pursuant to State civil service rules and regulations. I further **FIND** that the need for six additional drivers has been demonstrated by a preponderance of evidence and the cost for same is reasonable. Therefore, I **CONCLUDE** that the addition of six bus drivers is an allowable non-discretionary item in accordance with the decision of the New Jersey Supreme Court and the sum of $74,349 should be added to the non-discretionary items list.

No Child Left Behind Textbooks, Supplies and Materials

Vineland believes it should receive an extra $1,000,000 in funding to implement its No Child Left Behind (NCLB) Program. Mrs. Marie M. Adair, the Assistant Superintendent of Curriculum and Instruction testified that the NCLB is a federally-mandated and partially federally-funded program which requires that certain basic standards in language arts and math be met by the year 2014. In addition, that program mandates that until the full standard is met, the districts must show annual improvement in test scores in those areas. Mrs. Adair testified that Vineland is not meeting all of its interim requirements, as improvements are not being continually made in test scores to satisfy the mandates of this program. She testified that in order to rectify that situation, petitioner instituted a number of pilot programs to determine the most

effective teaching aids so that continual improvement can be demonstrated in accordance with the program's mandates. She stated that she has developed an improvement plan for the petitioner district which she believes will meet the requirements of this program. That improvement plan will consist of new materials, additional staffing and a coordinated curriculum so that as the students progress in grade, they can build on the foundation that has been previously established for them. This is necessary, she says, to show adequate yearly progress which is a requirement of the NCLB Program. The pilot programs that were tested indicate positive results on the part of the participants. Mrs. Adair testified that in order to meet the annual improvements requirements of the NCLB Program it will be necessary for Vineland to implement the Harcourt Trophies in Waterford Language Arts Program and for mathematical improvements institute the Everyday Mathematics Program in grades K through 6 and the Corps Plus Math Program in grades, 9, 10 and 11, as a supplement for those students who need extra help. The total cost for instituting these three teaching systems would be $1,000,000.

The Department takes the position that instituting these teaching programs is clearly a change in the curriculum and one that was not previously "approved and provided" by the petitioner. Therefore, the Department argues, that these expenses are beyond the "maintenance" standard set by the Supreme Court. In addition, the Department states that in this year of severe budget crunching, the petitioner will have to make due with what was has been in existence and although improvements are desirable at this time there is not available funding to provide for them.

I **FIND** that the Department's position is correct, in that the implementation of new teaching devices reach beyond the "maintenance" standard of those devices that were previously approved and provided by the District. I therefore **DENY** Vineland's request for any funding to modify its No Child Left Behind Program.

Second Chance Program

Vineland is requesting $110,543 in additional funding for its Second Chance Program. Dr. Keith Figgs, the Assistant Superintendent for Administration, testified on behalf of Vineland that the petitioner's Second Chance Program is part of the mandated Required Programs for Secondary Schools which he says the Department requires be in place. Dr. Figgs testified that *N.J.A.C.* 6A:24-1.4(j) states: "The Board shall implement its department-approved plan providing for the establishment of an alternative middle school and high school, or other comparable program, to meet the needs of students who are disaffected or disruptive or who have not been successful in traditional learning environments." Dr. Figgs stated that Vineland has an alternative program called its Second Chance Program for those students who don't deal well in the standard high school setting. The program was established some years ago and was approved by the State Department of Education. It called for a seven-hour standard education day at the same time as the normal high school program ran, but at a separate facility. The program was instituted but because the separate facility was not approved by the Department, the petitioner unilaterally modified it to become an after-school program running from 2 p.m. to 7 p.m. This creates obvious difficulties, in that it is very difficult to find instructors to work those hours and it eliminated participants of the program from partaking in extracurricular activities and it allowed the students who are most in need to be unsupervised for the better part of the day. Because of new construction, students in one of the district's buildings were able to be moved to a section of another building and their vacation allowed the Second Chance Program to be run in that vacated facility. The program could then become a seven-hour-a-day program like the regular high school and run during the day simultaneously with the regular high school programs as was previously approved by the Department. Dr. Figgs testified Vineland's after-school program that was in existence in the 2002-2003 school year does not comply with the program that was approved by the Department. Using the new facility, however, will bring the program into compliance by making it a full-day matriculated program. Currently, students who attend the program full-time can only earn 30 credits a year and the modified program will allow students to earn 35 credits a year. This will allow them to graduate with the required 140 credits in 4 years. Dr. Figgs testified that to bring the program from where it currently is to what was previously approved would require an art teacher whose salaries and benefits will total $52,267, a full-time secretary whose salary and benefits will total $28,674 and a custodian whose salary and benefits

will total $29,602. The total for these positions would be $110,543. Dr. Figgs further testified that modifying the Second Chance Program from an after-school program to a full-day program is most important for the students who need it the most. It will allow the disaffected students to assimilate into the student population, participate in extracurricular activities, remove them from being unsupervised until 2 p.m. and provide them with a matriculated program so that they can either enter the regular high school program or graduate in a timely manner or do both.

The Department takes the position that although these are worthy goals, the regulations do not provide that the program has to be in a separate facility or exist for any given number of hours. Nor does it say that it cannot be an after-school program. The Department takes the position that any increase in funding for this program is violative of the "maintenance" standard, in that it is an expansion of the existing program and not the same as the one that was previously provided.

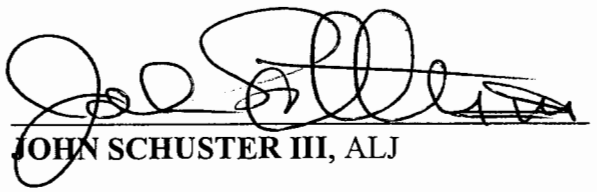
I **FIND** that there is a substantial difference in value to the students affected and society in general between an alternative program that provides the bare minimum to its participants and one which is likely to make a substantial impact on the educational progress of those students. I further **FIND** that the aforesaid regulation implies that the implementation of a department-approved plan means an effective department-approved plan. In this case, the Department approved a full-day program and Vineland would have same but for the fact that the facility it proposed was not satisfactory to the Department. As an interim measure, Vineland then modified its program to an after-school program which has obvious disadvantages. Now Vineland is requesting that its Second Chance Program previously approved and provided be modified to a minor extent so that it become an effective department-approved plan to satisfy the needs of the disaffected and disruptive students within its district. I **CONCLUDE** that this minor adjustment in implementing the previously Department-approved plan does not violate the Supreme Court "maintenance" standard since providing an effective plan is mandated by regulation and there is no mandate that the "maintenance" standard required total inflexibility when implementing its provisions.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within the time allowed under the existing orders of the New Jersey Supreme Court and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Notwithstanding the provisions of any rule to the contrary, exceptions to Initial Decisions of the Office of Administrative Law in *Abbott* District budget appeal matters shall be filed within five (5) days of the date of mailing of the Initial Decision, and reply exceptions shall be filed within two (2) days of receipt of exceptions. File written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 25, 2003
DATE



JOHN SCHUSTER III, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

9-25-03
DATE

E-mailed Initial Decision to the parties on:

9-25-03
DATE

jh

WITNESSES

For the petitioner:

Kevin J. Franchetta

Joseph P. Kirchon

Marie M. Adair

Joseph D. Callavini

Quinten J. Phillips, Jr.

Dr. Keith Figgs

Edward J. Rochetti

Dr. Clarence C. Hoover, III

For the respondent:

Joseph P. Kirchon

EXHIBITS

For the petitioner:

P-1 State of New Jersey, Determination Letter, August 27, 2003

P-2 DOE calculation of Supplemental Aid

P-3 Petitioner's calculations of Supplemental Aid

P-4 Auditors Schedule G 2003 Projected Surplus

P-5 Synopsis of petitioner's calculations for excess fund balance

P-6 No Child Left Behind packet

P-7 Statute 18A:33-9 and 18A:33-10

P-8 Summary of need for six new bus drivers

P-9 Summary of non-discretionary additions

P-10 Petitioner's adjusted 2003-2004 Supplemental Funding calculations

P-11 Resignations for 2002-2003 year

P-12 Retirements 2002-2003 year

P-13 Leave of Absence without Pay 2002-2003 year

P-14 Petitioner's summary of unexpended funds

P-15 *N.J.A.C.* 6A:24-1.4

P-16 Department (Mr. Kirchon) Worksheet for CPI

For the respondent:

R-1 Revised 2003-2004 Budget for Vineland Board of Education, March 17, 2003

R-4 2002-2003 Approved Budget for Vineland Board of Education, July 31, 2002

R-13 Audit Report of Menzoni-Preziosi and Company, CPA, August 18, 2003

Joint exhibit:

J-1 Supporting documents 7B of District Budget

OAL DKT. NO. EDU 4156-03
AGENCY DKT. NO. 190-6/03

BOARD OF EDUCATION OF THE CITY OF VINELAND, CUMBERLAND COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

The record of this local "Abbott" District's appeal of the Department of Education's (Department) decision on its supplemental funding request for the 2003-04 school year, and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Both the Vineland School District's (District) exceptions and the Department's exceptions were duly submitted in accordance with the schedule established in response to the Court's order for expedition and were considered by the Commissioner in reaching this decision.[1]

Upon careful and independent review of the record, the Commissioner concurs with the Administrative Law Judge (ALJ), that the OAL does not have jurisdiction to determine directly or indirectly the validity of *N.J.A.C.* 6A:10-1.2, as such determination is solely within the jurisdictional purview of the Appellate Division or the Supreme Court. R. 2:2-3(a); *see, also,*

[1]In its exceptions, the Department points out that the procedural history set forth in the Initial Decision does not include an essential component to this matter in that there is no reference to the August 27, 2003 determination letter in which the Department issued the District's preliminary maintenance discretionary Additional *Abbott v. Burke* State Aid for the 2003-04 school year. (Department's Exceptions at 2-3) In its exceptions, the District also includes a copy of a letter to the ALJ in which it points out that the District is located in Cumberland County, rather than Gloucester County, and that the Initial Decision makes no mention of the District's appeal of the August 27, 2003 determination letter. (Letter of September 30, 2003 to ALJ Schuster submitted with the District's Exceptions)

Pascucci v. Vagott, 71 *N.J.* 40, 51-52 (1976); *Wendling v. N.J. Racing Com'n*, 279 *N.J. Super.* 477, 485 (App. Div. 1995). However, to the extent that he may appropriately do so in an administrative proceeding, the Commissioner opines that the regulation at issue is fully consistent with the language and intent of the Court. Thus, like the ALJ, the Commissioner finds the regulatory definition controlling herein, with no conflict between it and the underlying Court order. Accordingly, the Department's application of such regulatory definition in its review and approval of the District's 2003-04 budget is appropriate.

Moreover, upon a thorough review of the record and the parties' exceptions, the Commissioner concurs with the ALJ's determination denying the District's request for funding to modify its No Child Left Behind Program (NCLB) in that the District's proposed NCLB improvement plan, which involves the addition of new materials and additional staffing, is beyond the "maintenance" standard set forth in *N.J.A.C.* 6A:10-1.2. The Commissioner also concurs that the addition of six bus drivers at a cost of $74,349 is an allowable, nondiscretionary item in that the District is required to provide for the transportation of its students in accordance with regulations, union contracts and State civil service regulations. Additionally, the Commissioner points out that the parties stipulated at hearing that the sum of $1,370,581 is to be included in the District's proposed budget as a nondiscretionary addition for "out-of district tuition, residential placements and Bayada nurses." (Initial Decision at 6 and Letter on Behalf of the Department of September 22, 2003) With respect to these issues, therefore, the Commissioner accepts and adopts the ALJ's factual findings and determines that his analysis and legal conclusions are consistent with the Supreme Court's Order of July 23, 2003, as well as the Department's regulatory amendments adopted on August 22, 2003.

However, the Commissioner does not concur with the ALJ's finding that the Department erred in calculating the District's projected general fund balance by including encumbered funds in the amount of $3,041,818. The Commissioner believes that the ALJ's

analysis reflects a fundamental misunderstanding of the differentiation between the terms "encumbrances" and "accounts payable." In the context of close out procedures for the 2002-03 budget year, an encumbrance is an accounting tool that permits a school district to set aside funds for purchase orders that were issued during the 2002-03 school year for goods or services that were *not* received as of June 30, 2003. Unpaid purchase orders reserved as encumbrances on the June 30 general fund balance sheet, therefore, reflect liabilities to be honored in the next fiscal year for goods and services not received by June 30. For goods and services received and/or provided by June 30, 2003, the encumbrances become accounts payable on the general fund balance sheet. Thus, encumbrances should not be deducted from a district's fund balance as of June 30, 2003, because the underlying goods and services *were not actually received* in the 2002-03 school year. *See N.J.A.C.* 6A:10-1.2, defining a maintenance budget as "a budget funded at a level such that the district can implement 2002-2003 approved and provided programs, services, and positions***."

The Commissioner points out that, in the matter entitled *Board of Education of the City of Burlington v. New Jersey State Department of Education*, Commissioner Decision No. 581-03, decided October 20, 2003, Keith Costello, Budget Manager/Examiner for the Department of Education, Office of Abbott Implementation, testified that, by memo dated September 16, 2003 to all school districts, Assistant Commissioner Richard Rosenberg addressed the procedures to be followed for open purchase orders and encumbrances on the school district's books as of June 30. The September 16, 2003 memo states, in pertinent part:

> Open purchase orders at June 30, 200X should be classified into the following two categories for review and reclassification:
>
> 1. Category one represents purchase orders for which the goods have been received or the services have been rendered at June 30th that have not been paid. These purchase orders must be expensed in the current audit period, the related encumbrances reversed, and a liability (accounts payable) established. If the invoice has not been received the amount

must be estimated. In accordance with GAAP, an expenditure is recorded when goods are received or services are rendered.

2. Category two represents purchase orders which will be honored in the subsequent year. These purchase orders will be rolled over into the next fiscal year and will be shown in the June 30th general fund balance sheet as a reserve for encumbrances. Per NCGA Statement 1, paragraph 91 "encumbrances outstanding at year-end represent the estimated amount of the expenditures ultimately to result *if unperformed contracts in process at year-end are completed. Encumbrances outstanding at year-end do not constitute expenditures or liabilities."* (emphasis in text) (Exhibit R-1, in evidence) (*Board of Education of the City of Burlington v. New Jersey State Department of Education*, slip opinion at 17)

Accordingly, category one purchase orders and the related encumbrances are to be considered 2002-03 fiscal year expenditures in applying *N.J.A.C.* 6A:10-1.2, but category two purchase orders are considered expenditures in the 2003-04 fiscal year and, thus, are not to be included in development of a "maintenance budget" for the 2003-04 school year pursuant to *N.J.A.C.* 6A:10-1.2.

Assuming the District properly complied with the procedures set forth in the above-mentioned Assistant Commissioner Richard Rosenberg's letter of September 16, 2003, encumbrances for goods and services received by June 30, 2003 were to be reversed and a liability (accounts payable) established. The District's encumbrances outstanding at year-end, therefore, represent the estimated amount of the expenditures ultimately to result if unperformed contracts in process at year-end are completed, and, thus, encumbrances outstanding at year-end do not constitute expenditures or liabilities. In its exceptions, the Department avers that:

> Petitioner's Assistant Superintendent for Business and Board Secretary, Kevin J. Franchetta, testified that the projected encumbrance amount is an estimate and that the true amount will not be determined until the [Comprehensive Annual Financial Report] CAFR is issued. In fact, Mr. Franchetta testified that it is

likely that the projected encumbrance amount will be reduced once the CAFR is issued.[2] (Department's Exceptions at 4)

Although there is no dispute that expenditures for goods and/or services received by June 30, 2003 should be deducted from the District's fund balance, based on Mr. Franchetta's statement that the encumbrance amount is an estimate and the proofs brought to *this* record,[3] the Commissioner is unable to determine which, if any, of the District's encumbrances have become accounts payable by virtue of the receipt of the encumbered goods or services on or before June 30, 2003 so as to be considered 2002-03 expenditures. The Commissioner, therefore, concludes that it was entirely appropriate and consistent with general accounting practices, the procedures provided to school districts in Assistant Commissioner Richard Rosenberg's letter of September 16, 2003 for the processing of year-end purchase orders, and *N.J.A.C.* 6A:23-2.2 and *N.J.A.C.* 6A:10-1.2 to include the encumbered funds in the fund balance calculation. Any adjustments to be made will be based on updated information with respect to the June 30, 2003 encumbrances and accounts payable for the 2002-03 school budget year in the course of the review of the CAFR scheduled to begin in November 2003.

The Commissioner also finds that the District, which has the burden of proof in this matter, failed to demonstrate on the record that inventory reserves in the amount of $518,986 and $153,576 in the capital reserve account[4] represent actual District obligations. The Commissioner, therefore, concludes that the Department appropriately included these reserve funds in the fund balance calculation. As with the encumbrances, any adjustments to be made will be based on updated information in the course of reviewing the CAFR in November 2003.

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[2] The Commissioner notes that the District did not file a reply to these exceptions and, thus, apparently does not dispute the Department's representation of Mr. Franchetta's testimony.

[3] The Commissioner acknowledges that the presentation of such evidence may have been disadvantaged by both a Court Order to expedite proceedings and the unavailability of the CAFR until November 2003.

[4] Although districts are required to establish a capital reserve account, there is no fund balance requirement. *See N.J.A.C.* 6A:26-9.1.

As a result of the Commissioner's conclusions with respect to the appropriateness of the Department's inclusion of encumbrances and reserves in its fund balance calculation, the Department's determination that the District's excess fund balance is $8,817,650 remains unaltered, subject to adjustment following the CAFR.

The Commissioner also does not agree with the ALJ's conclusion that, since District positions affected by leaves of absences, retirements and resignations, as well as four unfilled positions, were approved positions and the services were provided in the 2002-03 budget year, although through the use of substitutes and temporary hires, those positions meet the maintenance standard so that the District's fund 11 and 15 accounts should be reduced by $1,863,652, which increases the District's base 2002-03 program budget from 132,392,778 to $134,256,430. (Initial Decision at 5-6) The Commissioner finds that the ALJ's conclusion is inconsistent with the Court's directive and the maintenance standard which required the Department to consider only *actual* expenditures stemming from goods and services provided in 2002-03 so as to establish a maintenance budget for 2003-04.

Notwithstanding the District's assertion at hearing that, in the 2002-03 school year there were an inordinate number of leaves of absences without pay, retirements, resignations and a higher than normal number of pregnancies which resulted in one-time costs savings in salaries and benefits, the Commissioner points out that teachers take leaves of absences for pregnancies or other reasons every year and that resignations and retirements[5] are also a common occurrence every year. Moreover, although the District provided a lengthy list of individuals who took leaves of absence, retired or resigned during the 2002-03 school year, the District did not bring information to the record to substantiate its claim that the numbers in these various categories and the cost savings resulting therefrom substantially differed from previous

[5] The Commissioner notes that, with the advent of the "baby boomers" reaching retirement age, the number of retirements may actually increase in the 2003-04 budget year.

years, nor did it explain how it reached the conclusion that the number of pregnancies experienced by the District during 2002-03 could not be expected to continue into the 2003-04 school year. The ALJ states that his conclusions are based, in part, on the fact that "the Department presented no evidence to dispute the testimony of Mr. Phillips that this was an unusual event resulting in part from a higher than normal number of pregnancies." (Initial Decision at 5) However, pursuant to *N.J.A.C.* 6A:24-9.6(c), the District bears the burden of proving that the Department's calculations were unreasonable or otherwise improper and the Commissioner finds that the District failed to meet its burden.

In this regard, the Commissioner emphasizes that the Department's charge in this matter was to determine the level of 2003-04 funding that would enable the district to continue in a "maintenance" mode, that is, to implement in 2003-04 the programs, services and positions provided in 2002-03. While it is true that dollar amounts paid out prior to June 30, 2003 will not necessarily reflect the actual costs of the positions provided that year, nor can they perfectly predict the actual cost of providing them in the next, it is *equally* true that originally budgeted amounts and other similar projections are no less imprecise. Thus, in the Commissioner's view, a methodology which preliminarily establishes the 2003-04 cost of providing funding for positions by determining, as nearly as possible without benefit of audit, the actual approved cost of providing them in 2002-2003 and then allowing for reasonable, nondiscretionary adjustments, is a uniform, fair and rational method for estimating future expenditures, such as the costs associated with salaries and benefits, which cannot otherwise be determined with any degree of precision. To the extent that results may be imperfect, even after adjustment following audit, *N.J.A.C.* 6A: 10-3.1(g) provides a mechanism to obtain additional supplemental funding where unanticipated expenditures or unforeseen circumstances warrant. Thus, the Commissioner wholly endorses the Department's fundamental methodology and determines that the Department

acted appropriately in deducting $1,863,652 from the 2002-03 base budget so as to establish the District's 2003-04 maintenance budget.

Finally, turning to the District's request for $110,543 in additional funding for its Second Chance Program, the Commissioner concludes that any increase for this program to expand its hours of operation, notwithstanding the merits of doing so, does not comport with the maintenance budget standard set forth in *N.J.A.C.* 6A:10-1.2. In so determining, the Commissioner points out his disagreement with the ALJ's conclusion that "the implementation of a department-approved plan means an *effective* department-approved plan" (emphasis in text) (Initial Decision at 10), noting that the District, which has the burden in this matter, did not present any evidence that the existing Second Chance Program, which was approved by the Department as a standard education day of seven hours but has been in existence for some time as a five-hour program, has been ineffective. The District, instead, claims that the students in the program would be better served by an expanded program. The Commissioner, therefore, concludes that the Department was correct in rejecting the $110,543 request in additional funding for the Second Chance Program.

Accordingly, the Commissioner adopts in part and rejects in part the ALJ's findings and conclusions in the Initial Decision as set forth herein.[6]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 10/20/03

Date of Mailing: N/A

[6] Pursuant to *P.L.* 2003, *c.* 122, "*Abbott*" determinations are final agency actions appealable directly to the Appellate Division of the New Jersey Superior Court.

578-03

BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning "Abbott" District appealed the Department's determination of its 2003-04 preliminary "maintenance budget," alleging that the Department's review was not in accordance with the July 23, 2003 order of the Supreme Court.

The ALJ found that the Department appropriately applied the duly promulgated rule implementing the Court's order for "maintenance," and that, accordingly, programs, services and positions must have been actually provided or filled in 2002-03 in order to be aided for 2003-04. On this basis, the ALJ rejected District claims for inclusion of approved and budgeted, but unfilled, 2002-03 positions, and textbook purchases approved as part of the District's long-range curriculum plan but eliminated from the 2002-03 budget. The ALJ also found, however, that, under the Court-ordered exception for "non-discretionary expenses," the Department erred in excluding certain expenses associated with salary increases and contractual bonuses.

The Commissioner concurred with the ALJ's general conclusions, as well as his findings with respect to the unfilled staff positions and textbooks. However, the Commissioner rejected the Board's claims for salary increases over 5% and monies to cover employee/retiree bonuses for which no evidence of contractual or other obligation was brought to the record.

October 20, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 05495-03

Agency Dkt. No. 192-6/03

BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON,

Petitioners,

v.

STATE OF NEW JERSEY, DEPARTMENT OF EDUCATION,

Respondent

Ronald C. Hunt, Esq., for petitioner
(Hunt, Hamlin & Ridley, attorneys)

Francine Kaplan, Deputy Attorney General, for respondent
(Peter C. Harvey, Attorney General of New Jersey, attorney)

Record Closed: September 10, 2003 Decided: September 24, 2003

BEFORE **BARRY N. FRANK**, ALJ

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The Irvington Board of Education is one of the twenty-eight (28) "special needs" school districts. It serves children in financially disadvantaged communities and has been designated as Abbott districts. Accordingly, pursuant

to an Order of the New Jersey Supreme Court and pursuant to *Abbott v. Burke* 153 *N.J.* 480 (1998) (*Abbott* V), the State Department of Education ("DOE) has been ordered to increase funding to these districts so that the ability to achieve and adhere to the core curriculum contents standards.

On March 24, 2003, the Commissioner of Education moved before the New Jersey Supreme Court for relief from some of the mandates of *Abbott v. Burke*, 153 *N.J.* 480 (1998) (*Abbott* V). Essentially, the relief sought for the fiscal 2003-2004 school year which was processed was a request that a maintenance standard be adhered to for the coming year. Essentially, this maintenance standard means that state aid eliminate in the fiscal 2003-2004 school year support for the programs, positions, services and other items that were not in the district's approval budget for fiscal year 2002-2003.

The motion was responded to by the Education Law Center which also cross-moved requesting an expedited schedule with regard to the review and approval of the *Abbott* school district budgets and the appeals that arose from said budgetary process. Various parties were ordered into mediation before the Hon. Philips Carchman, J.A.D. All issues were resolved during this mediation with the exception of the issues revolving around the fiscal year 2003-2004 budgetary process.

On May 30, 2003, the Department of Education rendered decisions in all of the *Abbott* budgets using the maintenance standard and requested these decisions be approved by the court. Twenty-three districts including the petitioner, Irvington School District, filed appeals from those decisions and ultimately the appeals were transmitted to the Office of Administrative Law ("OAL").

An issue essential to all of the appeals was that of the proper standard for approving the 2003-2004 fiscal year budget.

The New Jersey Supreme Court on June 24, 2003, rendered an Order adopting the terms of the mediation agreement and scheduled oral argument for July 10, 2003 on the remaining issues as to whether or not the maintenance issue would be applied to the fiscal year 2003-2004 budget. On July 23, 2003, the Supreme Court rendered a final Order served upon the Commissioner, granting the application for the *Abbott* file remedies as applied to the 2003-2004 fiscal year budgetary process. In that Order, the New Jersey Supreme Court stated:

> The DOE shall have the authority to treat the 2003-2004 school fiscal year as maintenance year for purposes of calculating additional *Abbott v. Burke* state aide for the *Abbott* districts. During 2003-2004, K through 12 programs provided for in the 2002-2003 school year will be continued, subject to continuance and conditions set forth in this Order.
>
> (July 23 Order at p. 4)

The New Jersey Supreme Court Order went on to state:

> A maintenance budget shall mean that a district will be funded at a level such that the district can implement current approved programs, services, and positions and therefore includes documented increases in nondiscretionary expenditures. Examples of nondiscretionary expenditures are increases in contracted in salaries, health benefits, and special education tuition. Maintenance does not include the restoration of programs, positions, or services that were reduced in 2002-2003, or any programs, positions, or services, except in respect of paragraph 2c of the court's Order of June 24, 2003 (pertaining to those elementary schools without a whole school reform developer in place in 2002-2003 and permitting whole school reform contracts in certain circumstances), irrespective of the timing for the promulgation of regulations governing that provision
>
> (July 23 Order at p. 5)

The New Jersey Supreme Court also ordered that:

> For purposes of calculating additional *Abbott v. Burke* state aid and in furtherance of its pre-existing duty to relent administrative

> controls, the DOE shall promulgate an emergency regulation establishing the standard for evaluating the effectiveness and efficiency of the district's noninstructional programs.
>
> (July 23 Order at pp. 5-6)

In response to the New Jersey Supreme Court's Order, the Commissioner created regulations pursuant to an Order of August 22, 2003 and created *N.J.A.C.* 6A:10-1.2 which states and defines the maintenance budget for the 2003-2004 school year as follows:

> For the 2003-2004 school year, a budget funded at levels such as the district can implement 2002-2003 approved and provided programs, services and positions and includes documented increases and nondiscretionary expenditures and adjustments for actual 2002-2003 expenditures. Examples of nondiscretionary expenditures or increases in contracted salaries, health benefits and special education tuition. Maintenance does not include the restoration of programs, positions or services that were provided in previous years or new programs, positions, or services unless necessary to meet paragraph 2c of the Supreme Court's Order of June 24, 2003 in *Abbott v Burke*. Maintenance also does not include nonrecurring 2002-2003 expenditures. (*N.J.A.C.* 6A:10-1.2)

Ultimately on August 27, 2003, the DOE forwarded a letter to the Irvington school district reducing its 2003-2004 budget from $137,639,687.00 to $118,292,283.36. The district appealed this determination and said appeal was before the trial court which reduced it to central issues, namely whether or not all instructional and noninstructional staff positions which had been budgeted and fully approved in the 2002-2003 school budget but not filled during that school year but should be rebudgeted into the 2003-2004 school year under the definition of a maintenance standard.

The secondary issue is that of whether or not the district's long range curriculum for 2003-2004 which essentially consists of funding for textbooks constitute part of the maintenance budget even though no textbooks were purchased during the 2002-2003 school year under this program.

Hearings on the above stated issues were conducted as a result of the appeal of the school district pursuant to *N.J.S.A.* 18A:7f-3 and in accordance with *N.J.A.C.* 6A:10-1.1 *et seq.* on August 29, 2003 and September 3, 2003. Subsequent to these two hearing dates, the record was held open for post-hearing submissions and was ultimately closed with the receipt of these post-hearing submissions on September 10, 2003.

TESTIMONY

Respondent presented its case first putting on its witness, Mr. Michael Arizechi who is the budget manager for the DOE and is charged with reviewing among other district budgets those of the petitioner.

Mr. Arizechi went through the various numbers utilized in arriving at the $118,292,283.36 and presented various Exhibits explaining his calculations. Mr. Arizechi testified that he used certain set percentages to standardly reduce certain requests made by petitioner and that these percentages were applied to monies actually spent by petitioner's school board as opposed to monies that were actually budgeted and approved in the 2002-2003 school year. Mr. Arizechi further testified and cross-examination confirmed that if monies had been budgeted and not expended for 2002-2003 school year, as far as Mr. Arizechi was concerned, the position was taken that monies not spent constituted a surplus. Any monies not expended in the previous budgetary year including monies that had been budgeted and approved applicable to the positions that were not filled or only partially filled, then any funds not spent and allocated to these positions were seen as surplus and as far as Mr. Arizechi was concerned would not be deemed to be included in the maintenance budget for the following school year. Essentially, this witness testified that such numbers were reduced on unexpended funds deemed surplus and this would also include the five year textbook program which has been ongoing since 1999 but apparently showed no expenditures made in 2002-2003 and therefore he would not honor the request

for full funding of same for the 2003-2004 budget as he deemed this not to be a maintenance item.

At the completion of respondent's case, petitioner pled his case and the first witness to testify was Victor R. Demming who was employed by the Irvington Board of Education as an assistant supervisor for business and was also the Board's secretary. This witness apparently handles all fiscal issues for the Board of Education and develops its budgets and so forth.

Mr. Demming testified as to the difficulties the school district was having due to the reduced budget provided for by the DOE. More specifically, Mr. Demming testified that administrative and teaching positions that had been fully funded and approved in the 2002-2003 school year were not provided for in the 2003-2004 school year. Mr. Demming testified that apparently the reason this was not done by the DOE was that certain positions could not be filled during the 2002-2003 school year because the appropriate individuals could not be found. Mr. Demming further testified certain individuals quit in the middle of the year mandating temporary replacements and that in those situations where a position had not been filled, certain temporary individuals were hired; part-time individuals were hired to take up the slack. In any event, Mr. Demming introduced into evidence Exhibits P-1A – E which list in detail the various professional and nonprofessional positions for the 2002-2003 school year and indicated those that had been filled during that year, the salary paid and any differential in said salary.

Mr. Demming testified that the need for the various positions that had been fully approved in 2002-2003 school year had not changed and indeed were more acute for the upcoming 2003-2004 school year. Mr. Demming testified that he felt that under the maintenance standard, since these positions had been fully funded for the 2002-2003 school year, they should once again be fully funded in the 2003-2004 school year. Therefore, he was requesting all funds that had been deducted as a result of monies not spent for these positions in the

approved new budget be fully restored. Mr. Demming further testified that the reduction of the budget had directly impacted the school district's ability to hire for the coming school year and fill its vacancies as the money is not there.

Mr. Demming also testified with regard to the textbooks that needed to be purchased by the district. Mr. Demming testified that the district has a five year program or plan to put into effect to revise the curriculum and purchase textbooks. This plan began in 1999 and was to be completed by 2004. He indicated that the acquisition of textbooks was designed to meet the "curriculum" standards and that the Irvington school district is level II state monitoring district and in order to get out of this position, certain improvements had been made including upgrading the curriculum and of course included in that upgrading would be the purchase of new textbooks needed to replace outdated textbooks or needed to be used in appropriate upgrading of school programs for the benefit of the students. Mr. Demming testified that under this five year program purchases were not made in 2002-2003 because the budget approved during that year precluded such purchases but they have been budgeted by the school district before being reduced by the DOE and excluded. Mr. Demming asserted that in his opinion such purchases given the five year program that was in effect were covered by the maintenance budget and should be restored in the 2003-2004 school year.

I **FIND** the testimony of both witnesses involved to be fully credible and believable. The issue is not the credibility of the testimony of the witnesses but rather the monetary amounts requested by the school district and denied by the Department of Education. Appropriate funding according to the maintenance standards is defined by the New Jersey Supreme Court in which regulations promulgated by the DOE are set forth.

DISCUSSION

Petitioner is arguing essentially two issues. The Irvington school district submits that only instructional and noninstructional staff positions which were budgeted and approved in the 2002-2003 school budget, hence, fully funded should once again be fully funded under the maintenance standard for the 2003-2004 school year even if those positions were unfilled or were vacant or were somehow abandoned by individuals leaving the school district during the 2002-2003 school year. Petitioner quotes the language of the New Jersey Supreme Court in the Order dated July 23, 2003 relating to the *Abbott* cases which states in paragraph 2 as follows:

> The Statewide aggregate amount of additional *Abbott v. Burke* state aid shall be presumptively calculated as the total amount of additional *Abbott v. Burke* state aid approved for *Abbott* district for fiscal year 2002-2003, subject to adjustments as required for maintenance budget. The maintenance budget shall mean that the district will be funded at the level such that the district can implement current approved programs, services and positions and therefore includes documented increases in nondiscretionary expenditures or increases in contracted salaries, health benefits and special education tuition . . .(emphasis added)
>
> *See Abbott* Order of July 23, 2003, pp. 4-5. Also *See* pp. 4-5 of Briefs submitted by petitioner

Petitioner argues that the language set forth in the New Jersey Supreme Court's case is clear. Petitioner argues that the phrase "current approved programs" means all programs that were fully funded during the 2002-2003 school year. If that interpretation is accepted, then even though positions were not filled, those positions were provided for and fully budgeted and agreed upon, the same amount of money should be fully restored and reimplemented under a maintenance standard during the 2003-2004 school year.

This issue was addressed by the Hon. Joseph F. Martone in *Neptune Twp. BOE v. State of New Jersey*, Dep't. of Educ., OAL Dkt. No. EDU 4096-03 (decided September 11, 2003). In this case, Judge Martone wrestled with the issue of whether or not the New Jersey Supreme Court wrote a definition of maintenance standard which conflicted with the rules promulgated by the DOE under the New Jersey Supreme Court's Order, namely, *N.J.A.C.* 6A:10-1.2 *et. seq.* Judge Martone had to deal with how one interpreted the DOE regulations in the New Jersey Supreme Court's Order with regard to how the term "current" approved programs are defined. If petitioner's interpretation is accepted, then obviously any program, services, or positions that were fully funded and approved in 2002-2003 school year would be deemed maintenance programs and would have to be fully funded and approved for the 2003-2004 school year even though those positions were not filled. Judge Martone, however, in analyzing the New Jersey Supreme Court's language and the language set forth in the DOE regulation concluded that "use of the adjective 'current' rather than the adverb 'currently' implies that the program, services, and positions must be in existence in order to be funded." In other words, if as was the case in the 2002-2003 school budget, the positions were not filled or remained vacant in the 2003-2004 school year, these positions would effectively be no longer in existence as they are not being implemented. This being the case, then the DOE is quite correct in reducing the Irvington district's school budget by the unspent amount and then adding on their just percentage to arrive at the maintenance budget which is standard for the 2003-2004 school year.

Judge Martone in his decision at p. 9 also goes on to state:

> The language ultimately adopted by the Supreme Court to define "maintenance budget" is also reflected in the language contained in the DOE's proposal which is attached to the report of the *Abbott* mediation (April 29, 2003). The language proposed by the DOE is as follows: maintenance means that a district will be funded at a level that will enable it to **continue implementing the current approved program, services and positions and therefore includes actual documenting increases and nondiscretionary expenditures**. (emphasis added)

Judge Martone in reviewing the above cited language concludes that under the maintenance standard any programs that had been approved along with any services and positions that had been approved had to be currently in existence for their funding to be continued under the maintenance standard. I fully concur with Judge Martone and believe that based on that definition, petitioner's argument cannot stand. If positions were not filled during the 2002-2003 school year, any funds not expended do become surplus and were appropriately subtracted from the 2003-2004 school budget with a percentage then added on to make up for the increased funding that might be required. There are certainly mechanisms available to the school district for emergency funding should they deem it necessary with regard to staffing needs.

The school district also is seeking to recover monies that were deducted from its budget arguably for "negotiated contract and salary increases for several of the district's bargaining units as well as payments through retirees, contracts and bonuses for transportation employees." Specifically, funds which were earmarked for the district's paraprofessional and secretary's bargaining units representing salary increases for 2002-2003 were reduced by the Department's "adjustments" of budget. As per the court's order of July 23, 2003, maintenance budget included . . . "examples of nondiscretionary expenditures or increases in contract and salaries." (*See* p. 6 of petitioner's Brief).

The issues regarding contractual increases for ongoing employees as well as contracted bonuses to retirees and a contract bonus for transportation employees is a totally different issue. In this instance, the petitioner is seeking to recover monies needed for salary increases for paraprofessional and secretaries who are currently employed as well as contracted bonuses for members of the district's transportation unit. It is also the amount of monies that are contractually due retirees. These monies involve vacation, sick time and personal days. Petitioner submits that all of these payments are mandatory and protected by the

maintenance budget standard and analysis. The sum of monies involved here is a total of $300,000.00 with regard to salary increases for the paraprofessionals and secretaries and $295,118.00 in outstanding payments for the retirees.

I totally concur with petitioner's analysis and find it 100% in line with the Supreme Court's July 23, 2003 Order. Under that Order and the maintenance standard defined by said Order, and under the DOE's emergency regulations, the total of $595,118.00 involved was improperly subtracted from the budget. Salary increases and outstanding essentially contracted payments due retirees is mandatory and not discretionary. The result is the figures and mandatory payments are applicable to petitioner's said existing budget for the 2002-2003 school year as well as outstanding obligations that were in existence in 2002-2003 school year. Consequently, these items under the maintenance standard analysis as payable in the new budget, namely, the 2003-2004 school year budget and should not have been deducted from that budget. Therefore, I **FIND** and **CONCLUDE** that the $300,000.00 representing salary increases for the paraprofessionals and secretaries concurrently employed by the school district must be returned to 2003-2004 school year budget under the maintenance standard analysis. I further **CONCLUDE** that the $295,118.00 in outstanding payments due to retirees is contractual in nature, existed during the 2002-2003 school year budget and must be fully restored to the 2003-2004 school year budget under the maintenance standard.

Petitioner argues that it has been managing money in the long range 5 year curriculum program which commenced in 1999 and stayed until 2004. Petitioner argues that the program itself should be viewed as a "current" program in 2002-2003 for purposes of the maintenance budget analysis. In accordance with Exhibit P-3, petitioner is seeking $637,000.00 for the textbooks that were purchased and included in the requested 2003-2004 school year budget.

Petitioner's witness testified that these textbooks are critical items and are needed for the school district to meet the state's core curriculum content standard. Petitioner also argues that in a disadvantaged community, the need for improved textbooks and replaced updated textbooks is fundamental to the operation of any school district, especially those school districts in the disadvantaged communities that are meant to be served and benefited by the *Abbott* decisions.

The issue is then whether or not these textbooks fall within the maintenance standard. Unfortunately, I must **CONCLUDE** that they do not. Petitioner admits in the testimony before me that the request for these items were eliminated from the 2002-2003 agreed upon school budget and was not provided for in that budget. Under any definition of maintenance standard, the fact that the textbooks were excluded from the 2002-2003 school year budget means that they cannot be included in the maintenance standard definition during the 2003-2004 school year. Clearly, there are other mechanisms that the school district can pursue and other applications that the school district can make should the need for these books be deemed critical for the operation of the school district itself. Therefore, I must **CONCLUDE** that funding for the textbooks do not fall within the maintenance standards as defined by the July 23, 2003 Order of the New Jersey Supreme Court and education regulations for $637,000.00 sought for textbooks in the 2003-2004 school year and the Department of Education properly removed them from the 2003-2004 proposed budget as not adhering to the maintenance standard. That is not to say that there might not be any other emergency programs or applications that can be made to recover this funding but this court has no authority to do so under maintenance standard and rules and definitions handed down to it by the New Jersey Supreme Court and the DOE regulations.

Based upon my review of the foregoing, I in summary **CONCLUDE** that the DOE's figures provided as the budgetary amounts for the Irvington school

district are appropriate in all respects with the exception of the $300,000.00 which was deducted for salary increases for the paraprofessionals and secretaries which should be restored with the DOE district's budget together with the $295,118.00 in outstanding payments to retirees which also should be restored to the district's budget as both amounts are contractual and under the maintenance standard should be included in the 2003-2004 school year budget and were improperly subtracted from same.

ORDER

Based upon the foregoing, it is hereby **ORDERED** that the maintenance standard set forth in the July 23, 2003 Order of the New Jersey Supreme Court and as defined by the Department of Education regulations set forth in *N.J.A.C.* 6A:10-1.2 *et seq.*, to be properly followed mandates that the $300,000.00 pertaining to salary increases for paraprofessionals and secretaries as well as contracted bonuses for the districts be restored to the 2003-2004 budget and that in addition, it is further **ORDERED** that the $295,118.00 in outstanding payments contractually due retirees which was removed by the DOE and reduced pertaining to vacation and sick time which is also contractual in nature should be fully restored and placed back into the 2003-2004 school year budget as maintenance items included under the maintenance standard.

It is further **ORDERED** that the budget handed down and returned to the Irvington Board of Education school district should remain intact subject to the above described modifications.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within the time allowed under the existing orders of the New Jersey Supreme Court and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Notwithstanding the provisions of any rule to the contrary, exceptions to Initial Decisions of the Office of Administrative Law in *Abbott* District budget appeal matters shall be filed within five (5) days of the date of mailing of the Initial Decision, and reply exceptions shall be filed within two (2) days of receipt of exceptions. File written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 24, 2003
DATE

BARRY M. FRANK, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

9/24/03
DATE

E-mailed Initial Decision to the parties on:
(and faxed to Ronald Hunt, Esq.)

9/24/03
DATE

APPENDIX

Witnesses:

For Petitioner

Victor R. Demming
Michael J. Steele

For Respondent

Michael Arizechi

Exhibits:

Petitioner

P-1 Irvington BOE Retail Appropriations Budget 2003-2004

P-1
a-b Irvington BOE Selected Salary Budget 2003-2004

P-1c Irving BOE Analysis of State Program Spending

P-1d Irvington BOE Analysis of State Program Spending

P-1e Irvington BOE Retail Appropriations Budget 2003-2004

P-2 Irvington BOE Current and Revised Renewal Rates Health Benefits 2003-2004

P-3 Rationale for Textbook Purchases

Respondent

R-1 Letter from Gordon MacInnes, dated August 27, 2003

R-2 Irvington BOE *Abbott* District Budget Review

R-3 Irvington BOE Budget 2002-2003

R-4 Irvington BOE School Budget Statement 2002-2003

OAL DKT. NO. EDU 5495-03
AGENCY DKT. NO. 192-6/03

BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The Department's exceptions with respect to salary increases and retiree/employee bonuses were duly submitted in accordance with the schedule established in response to the Court's order for expedition, and no reply was filed by the Board.[1]

Initially, the Commissioner concurs with the Administrative Law Judge (ALJ) that the "maintenance" standard established by the Court, and embodied in implementing regulation, requires programs, services and positions to have been actually provided or filled in 2002-03 in order to be aided for 2003-04. Thus, the Commissioner agrees that amounts attributable to approved and budgeted, but unfilled, 2002-03 positions were properly deducted from the District's 2003-04 "maintenance" budget, as were funds for the purchase of textbooks approved as part of the District's long-range curriculum plan but eliminated from the 2002-03 school budget.

[1] The Board attempted to submit, on October 14, 2003, exceptions to the Initial Decision, briefly reiterating the Board's position and bearing a face date of October 10, 2003. However, pursuant to the ALJ's direction and a telefaxed notice from the Bureau of Controversies and Disputes, exceptions in this matter were due on October 1, 2003; indeed, they would have been due on October 8, 2003 even under normal OAL rules, *N.J.A.C.* 1:1-18.4. Accordingly, they are not considered herein.

With respect to increases for salaries, however, the Commissioner does not agree with the ALJ's analysis. The Department's overall charge in this matter was to determine the level of 2003-04 funding that would enable the District to continue in a "maintenance" mode, that is, to implement in 2003-04 the programs, services and positions provided in 2002-03. While it is true that dollar amounts actually paid out for staffing prior to June 30, 2003 will not perfectly predict the cost of providing comparable staffing in the next, it is *equally* true that originally budgeted amounts and other similar projections are no less imprecise. Thus, in the Commissioner's view, a methodology which preliminarily establishes the 2003-04 cost of providing positions at "maintenance" levels by determining, as nearly as possible without benefit of audit, the actual approved cost of providing them in 2002-03 and then allowing for reasonable, nondiscretionary adjustments, is a uniform, fair and rational method for estimating future expenditures which cannot otherwise be determined with any degree of precision.

In the present instance, the Commissioner finds that applying the District's highest currently contracted increase percentage of 5% to actual salary expenditures for 2002-03 was a reasonable method of projecting preliminary salary costs for 2003-04. The Commissioner is unpersuaded by the Board's argument that this method does not take into account vacancies, retirements, substitutes and positions filled for only part of the year, since variances of these types occur every year and a preliminary district-wide salary budget is appropriately based on the assumption that staffing is a flexible and continuous process, with ebbs and flows that, absent specific evidence to the contrary, generally permit the projection of one year's experience onto the next. To the extent that results may be imperfect, even after adjustment following audit, *N.J.A.C.* 6A:10-3.1(g) provides a mechanism to obtain additional supplemental funding where unanticipated expenditures or unforeseen circumstances warrant.

Additionally, although the record is not entirely clear on this point, to the extent that the Board is seeking funding levels allowing for increases greater than the currently contracted 5% in anticipation of upcoming collective negotiations, such increase cannot properly be considered a "non-discretionary" cost appropriate for State support in a "maintenance" year occasioned in significant part by the need for fiscal austerity.

Finally, the Commissioner cannot agree with the ALJ that additional amounts claimed by the Board to be contractually due for retirees and certain transportation employees must be included within the District's maintenance budget. As correctly noted by the Department, the record lacks "even a scintilla of documentary evidence" to support the Board's claims in this regard, for which it bears the burden of proof. (Department's Exceptions at 4) To the extent that such obligations do, in fact, exist and payment of them in 2003-04 may result in fiscal need, the Commissioner again notes that *N.J.A.C.* 6A:10-3.1(g) provides a mechanism for the Board to obtain additional supplemental funding where unanticipated expenditures or unforeseen circumstances warrant.

Accordingly, for the reasons set forth herein, the Initial Decision of the OAL is adopted except insofar as it recommends inclusion of salary increases and retiree/employee bonuses in the District's maintenance budget. The Petition of Appeal, therefore, is dismissed in its entirety.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 10/20/03

Date of Mailing: N/A

* Pursuant to *P.L.* 2003, *c.* 122, "*Abbott*" determinations are final agency actions appealable directly to the Appellate Division of the New Jersey Superior Court.

5 19-03

579-03

BOARD OF EDUCATION OF THE CITY OF ORANGE, ESSEX COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning "Abbott" District appealed the Department's determination of its 2003-04 preliminary "maintenance budget," alleging that the Department's review was not in accordance with the July 23, 2003 order of the Supreme Court. The District further contended that the Department miscalculated its fund balance (surplus).

The ALJ found that the rule duly promulgated to implement the Court's order for "maintenance" controlled in this proceeding, and that the Office of Administrative Law (OAL) lacked jurisdiction to determine its validity. The ALJ ordered correction of the District's fund balance and adjustment of the District's "maintenance budget" to allow for salary and health benefit increases and funding for certain costs associated with Whole School Reform (WSR).

The Commissioner adopted the ALJ's decision with respect to OAL jurisdiction and error in calculation of the Board's fund balance, but rejected the Board's claims for increases in salary and health benefit accounts, as well as its claims that the Department based its calculations on erroneous figures and improperly excluded the unpaid balance on the District's WSR contract.

October 20, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5498-03
AGENCY DKT. NO. 194-6/03

BOARD OF EDUCATION THE CITY OF ORANGE, ESSEX COUNTY,
Petitioner,

v.

THE NEW JERSEY STATE DEPARTMENT OF EDUCATION,
Respondent.

Chandra L. Rainey Cole, Esq., for Petitioner
(Love and Randall, attorneys)

Deborah Gnatt, Deputy Attorney General, for Respondent
(Peter C. Harvey, Attorney General State of New Jersey, attorney)

Record Closed: September 17, 2003 Decided: September 24, 2003

BEFORE **SANDRA ANN ROBINSON**, ALJ:

STATEMENT OF THE CASE

The City of Orange Board of Education (Petitioner/Orange), an urban special needs *"Abbott"* school district, appeals the Notice of Preliminary Maintenance Budget Figure for 2003-2004 and Estimate of Discretionary Additional *Abott v. Burke* State Aid Award issued by the New Jersey State Department of Education (Respondent/DOE) via letter dated August 27, 2003. *N.J.S.A.* 18A: 7F-3; *see also N.J.A.C.* 6A: 10-1.1 *et seq.*

PROCEDURAL HISTORY AND STATEMENT OF FACTS

On March 24, 2003, the Commissioner of Education (Commissioner) moved before the Supreme Court for an order modifying the decision in *Abbott v. Burke,* 153 *N.J.* 480 (1998) *(Abbott V). See also Abbott v. Burke,* 172 *N.J.* 294 (2002) (*Abbott IX*). The Commissioner requested that the discretionary Additional *Abbott v. Burke* State Aid (supplemental aid) be limited in *Abbott* districts in 2003-2004 to provide an amount sufficient to support those programs, positions and services in the districts' approved budgets for 2002-2003. On April 8, 2003, the Education Law Center cross-moved for an order setting an expedited schedule for the Department of Education (DOE) decision on each district's budget, related appeals and requiring the DOE to conduct a formal evaluation of the implementation of Whole School Reform. On April 29, 2003, the Supreme Court ordered the DOE and the Educational Law Center to participate in mediation before the Honorable Philip S. Carchman, J.A.D., in an attempt to resolve issues raised by their motions. During the mediation, the parties resolved all issues except the 2003-2004 budget process. The parties agreed to an expedited schedule for approvals and appeals, which started with a May 30, 2003 deadline for the DOE review and approval of school district budgets. Districts' appeals from the DOE's reviews were to be transmitted to the Office of Administrative Law, and administrative law judges were to issue initial decisions within 50 days of the appeal. The Commissioner was to issue final decisions within 25 days of the initial decisions. On May 20, 2003, the Supreme Court issued an order incorporating the parties' mediation agreement and providing that the schedule would remain in effect until further order of the Court.

On May 30, 2003, the DOE issued decisions on the *Abbott* districts' budgets using the maintenance standard on which the DOE had requested court approval. Twenty-three *Abbott* districts filed appeals on the budget decisions and all appeals were transmitted to the Office of Administrative Law. Each of the twenty-three appeals raised the issue of the proper standard for approving the budgets for 2003-2004.

The Orange school district, Petitioner in this case, received a May 30, 2003 letter from the DOE's Assistant Commissioner Division of Abbott Implementation, which

provided notice that the DOE had completed its initial review of the district's 2003-2004 expenditure budget dated April 5, 2003, that the expenditure budget was approved except as noted in the letter. On June 6, 2003, the Orange district's verified petition of appeal was filed with DOE. *N.J.S.A.* 18A:6-9. The DOE transmitted the contested case to the Office of Administrative Law, where it was filed on June 9, 2003. *N.J.S.A.* 52:14B-2(b). On June 12, 2003, the Department's answer was filed in the Office of Administrative Law. The case was originally scheduled for August and mid-September hearing dates, and thereafter rescheduled for September 2, 3, 8, and 9 to comply with modified Supreme Court orders. Prehearing conferencing for the purpose of identifying issues and witnesses was completed on September 2 and 3, and hearings were held on September 8 and 9, 2003. The record was closed on September 17, 2003 upon receipt of the parties' posthearing briefs.

On June 24, 2003, the Supreme Court issued an order approving the mediated agreement and scheduling argument for July 10, 2003 on the remaining issue of the 2003 - 2004 budget process. On July 1, 2003, the DOE moved for an order amending the schedule for processing the appeals to allow the Court to rule on the standard in the appeals to the Office of Administrative Law before hearings and issuance of initial decisions. On July 10, 2003, the Supreme Court heard oral argument on the budget process. The Supreme Court granted the DOE's motion and relaxed *Abbott v. Burke,* 153 *N.J.* 480 (1998) *(Abbott V)* remedies as applied to the 2003-2004 budget process. On July 23, 2003, the Supreme Court issued an order, stating the following:

> 1. The DOE's application to extend the relaxation of remedies granted in *Abbott V* is granted as follows: The DOE shall have the authority to treat the 2003-2004 school fiscal year as a maintenance year for purposes of calculating Additional *Abbott v. Burke* State Aid for the *Abbott* districts. During 2003-2004, K-12 programs provided for in the 2002-2003 school year will be continued, subject to conditions set forth in this Order.
>
> 2. The Statewide aggregate amount of Additional *Abbott v. Burke* State Aid shall be presumptively calculated as the total amount of Additional *Abbott v. Burke* State Aid approved for the *Abbott* districts for Fiscal Year 2002-2003, subject to adjustment as required for a maintenance budget. A maintenance budget shall mean

that a district will be funded at a level such that the district can implement current approved programs, services, and positions and therefore includes documented increases in non-discretionary expenditures. Examples of non-discretionary expenditures are increases in contracted salaries, health benefits, and special education tuition. Maintenance does not include the restoration of programs, positions, or services that were reduced in 2002-2003, or new programs, positions, or services, except in respect of Paragraph 2c of the Court's Order of June 24, 2003 (pertaining to those elementary schools without a whole school reform developer in place in 2002-2003 and permitting whole school reform contracts in certain circumstances), irrespective of the timing for the promulgation of regulations governing that provision.

3. For purposes of calculating Additional *Abbott v. Burke* State Aid and in furtherance of its pre-existing duty to implement administrative controls, the DOE shall promulgate an emergency regulation establishing the standard for evaluating the effectiveness and efficiency of the districts' non-instructional programs. (Non-instructional programs are defined as office/administrative expenditures and programs, positions, services and/or expenditures that are not school based or directly serving students.) Insofar as any *Abbott* district has not been informed of its total amount of last year's approved Additional *Abbott v. Burke* State Aid, the DOE shall provide written notice of that amount within two weeks of the date of this Order. The DOE's application of the effective and efficient standard in its review of a district's maintenance school budget may result in a reduction to a district's presumptive amount of Additional *Abbott v. Burke* State Aid.

4. Within 30 days of the issuance of this Order, the DOE shall provide in a Notice to each district preliminary maintenance budget figures for the 2003-2004 school year consisting of the 2002-2003 approved budget and an estimate of the supplemental funding that will be needed to support that currently approved budget. If the DOE deletes an expenditure from a district's 2002-2003 budget related to the district's non-instructional programs and based on the effective and efficient standard, the DOE must include in the written notice to the district the expenditure deleted along with a specific statement explaining why the program or part thereof is no longer effective and efficient.

5. *Abbott* districts may appeal any reductions to their maintenance budgets by the DOE's application of the effective and efficient standard, which appeals shall be heard by the [OAL]. In those appeals, the DOE shall bear the burden of moving forward to establish the basis for any proposed reductions to the district's maintenance budget based on the effective and efficient standard set forth in the DOE's emergency regulations. If that initial burden is met, the district shall bear the burden of demonstrating that any budgetary reductions are not justified under that standard.

6. The Order of the Court dated July 7, 2003, modifying the Court's scheduling Order of May 20, 2003 in order to provide the [OAL] thirty days within which to determine and issue initial decisions in the twenty-three pending budget appeals, is hereby superseded by this Order. The [OAL] shall issue initial decisions on district appeals from the DOE's preliminary maintenance budget figures for the 2003-2004 school year within 30 days of the dates of those decisions as set forth in Paragraph 4 of this Order.

7. To the extent that monies are deleted by the DOE in the districts' non-instructional programs based on the effective and efficient standard, those monies shall be made available to the districts as follows: an *Abbott* district may apply for and the State may award such aid for demonstrably needed programs or services. The allocation of such available funds shall not be viewed as inconsistent with this Court's approval of use of a maintenance budget for Fiscal Year 2003-2004.

Paragraph three of the July 23, 2003 Supreme Court order specifically sets forth that the DOE is to promulgate an emergency regulation for the purpose of setting the standard for evaluating the effectiveness and efficiency of the districts' non-instructional programs - office/administrative expenditures and programs, positions, services and/or expenditures that are not school-based or directly serving students. In the same paragraph, the Supreme Court advises districts that the DOE's application of the effective and efficient standard in its review of a district's maintenance school budget may result in a reduction to a district's presumptive amount of Additional *Abbott v. Burke* State Aid.

On August 22, 2003, the DOE, relying on the Fiscal Year 2004 Appropriations Act and paragraph three of July 23, 2003 Supreme Court order, promulgated emergency regulations amending *N.J.A.C.* 6A:10, including *N.J.A.C.* 6A:10-1.2, -3.1, -4.2, and -4.7. The regulations became effective August 22, 2003, and will expire June 30, 2004. *N.J.A.C.* 6A:10-1.2 of the emergency regulation states:

> "Maintenance budget" means, for the 2003-2004 school year, a budget funded at a level such that the district can implement 2002-2003 approved and provided programs, services, and positions and includes documented increases in non-discretionary expenditures and adjustments for actual 2002-2003 expenditures. Examples of non-discretionary expenditures are increases in contracted salaries, health benefits, and special education tuition. Maintenance does not include the restoration of programs, positions, or services that were provided in previous years or new programs, positions, or services unless necessary to meet paragraph 2c of the Supreme Court's order of June 24, 2003 in *Abbott v. Burke.* Maintenance also does not include non-recurring 2002-2003 expenditures.

On August 27, 2003, the Commissioner issued decision letters establishing a preliminary maintenance budget figure and the amount of additional supplemental funding needed to support Petitioner's school district budget. In summary the Commissioner's letter advised Petitioner that instructional and non-instructional programs were approved, but reductions would be made in the general fund surplus and outstanding 2002-2003 Account Receivables in Additional *Abbott v. Burke* State Aid to determine the new amount of the budgeted fund balance.

ISSUES

1. Does the Office of Administrative Law have jurisdiction to challenge the validity and applicability of the emergency regulation definition of Maintenance budget, as set forth in *N.J.A.C.* 6A:10-1.2?

2. Does the DOE's Maintenance budget definition for maintaining a funding level in 2003-2004 which will support approved and provided programs, services and positions from 2002-2003, disturb previously approved

appropriations which cannot be disbursed until the completion of WSR Developer Contracts?

3. Was an error made by the independent auditor's use of the original budget number, instead of the revised budget number, when computing Petitioner's maintenance budget in preparation for issuance of the Notice of Preliminary Maintenance Budget Figure for 2003-2004 and Estimate of Discretionary Additional *Abbott v. Burke* State Aid Award?

4. Was there a miscalculation by the independent auditors of Petitioner's fund balance?

5. Are salary and health benefits increases subject to the conditions for non-discretionary expenditures, as set forth in *N.J.A.C.* 6A:10-1.2?

6. Is reinstatement of non-instructional positions for the purpose of complying with Whole School Reform subject to the Maintenance budget definition set forth in *N.J.A.C.* 6A:10-1.2?

LEGAL ANALYSIS AND FINDINGS

The DOE presented a global argument against Petitioner's pursuit of this contested case. The DOE contends that the August 27, 2003 letter contains figures which are preliminary and subject to review pursuant to *N.J.S.A.* 18A: 23-1, *et seq.* which mandates the completion of a Comprehensive Annual Financial Report (CAFR) for the period ending June 30, 2003. CAFR is an audit, performed by a registered municipal accountant or a certified public accountant who is licensed as a public school accountant for New Jersey. The DOE contends that the numerical discrepancies in calculations which ultimately was the cause for subsequent inaccuracies in budget surplus and supplemental fund figures should be left unresolved until November 2003 when the CAFR is scheduled for completion.

Petitioner argued the appropriateness of proceeding with a full hearing to protect all claims of the school district. Petitioner contends that the right to an appeal in the Office of Administrative Law is for the purpose of establishing a complete record of the facts and relevant evidence regarding inaccuracies in calculations in the district's Maintenance budget. Making the record is crucial for preserving claims of which budget categories are inaccurate and what impact the inaccuracies have on the fund budget. Petitioner refuted the DOE's "wait and see after the CAFR" approach and argued that the Office of Administrative Law must conduct a thorough hearing on all issues raised throughout the entire budget, both factual and legal. *See* 26 *New Jersey Practices, Administrative Law and Practice*, Section 3.8 (2d. ed. 2000), regarding the jurisdiction of the Office of Administrative Law to hear and determine constitutional questions when necessary to decide hearing issues.

OFFICE OF ADMINISTRATIVE LAW JURISDICTION TO DETERMINE VALIDITY AND APPLICABILITY OF REGULATIONS

Petitioner contends that the *N.J.A.C.* 6A:10-1.2 "maintenance budget" definition is contrary to the New Jersey Supreme Court's Order; that its maintenance budget should be considered its approved 2002-2003 budget; and that it is not limited to expenditures for programs, services and positions, approved and actually provided, and documented increases in non-discretionary expenditures and adjustments for actual 2002-2003 expenditures. Petitioner contends that to the extent the regulation's definition is contrary to the Supreme Court's order, it is inapplicable in the Office of Administrative Law.

The Respondent contends that the *N.J.A.C.* 6A:10-1.2 "maintenance budget" definition is consistent with the Supreme Court's order. It argues that the school district's contention is essentially a challenge to the regulation, and that, consistent with *R.* 2:2-3(a)(2), such a challenge must be brought in the Appellate Division of the Superior Court.

In *Board of Education of the City of Asbury Park v. New Jersey Department of Education,* OAL Dkt. EDU 4095-03, the Honorable John R. Tassini, ALJ, entered an Order dated September 4, 2003, relative to the maintenance budget. Judge Tassini

concluded that the school district's contention is essentially a challenge to the validity of the above-cited regulation, and based his finding on *R.* 2:2-3(a)(2). In *Board of Education of the Township of Neptune v. New Jersey Department of Education,* OAL Dkt. EDU 4096-03, the Honorable Joseph F. Martone, ALJ, entered an Order dated September 10, 2003 and concurred with Judge Tassini's findings on the maintenance budget. In *Wendling v. New Jersey Racing Commission,* 279 *N.J. Super.* 477, 485 (App. Div. 1995), the court held that the Appellate Division and not the Office of Administrative Law has jurisdiction for a challenge to the validity of a rule; in *In re 1999-2000 Abbott Implementing Regulations, N.J.A.C.* 6:19A-1.1 *et seq.,* 348 *N.J. Super.* 382 (App. Div. 2002), the Appellate Division heard a challenge to rules implementing *Abbott* decisions.

Prior to this hearing, Petitioner Orange school district had not challenged the regulation in the Superior Court Appellate Division to determine validity, as per *R.* 2:2-3 (a)(2). The Rule provides that an appeal to challenge the validity of any regulation promulgated by a state administrative agency should be brought in the Superior Court, Appellate Division. Therefore, I **FIND** that the Office of Administrative Law has no jurisdiction to rule on the issue of validity or applicability of a regulation and that *N.J.A.C.* 6A:10-1.2 is the applicable standard in this case.

WHOLE SCHOOL REFORM DEVELOPER CONTRACTS

The Maintenance Definition in *N.J.A.C.* 6A:10-1.2 does not alter the exceptions in paragraph two of the July 23, 2003 Supreme Court order in regard to the continued implementation of paragraph 2c of the June 24, 2003 Supreme Court order which permits Whole School Reform contracts in certain circumstances, irrespective of the timing for the promulgation of regulations governing that provision. Petitioner's Whole School Reform contract was ongoing during the 2002–2003 school year and has not been completed. Petitioner's concern is that the encumbrance not be reduced by the amount of the outstanding contract balance. The balance of the contract cannot be paid until the work is complete. I **FIND** that the exception for Whole School Reform as set forth in the July 23, 2003 Supreme Court order and *N.J.A.C.* 6A:10-1.2 provide a safeguard for the situation presented by Petitioner.

INDEPENDENT AUDITOR'S ERROR

The testimony was uncontested regarding a mistake made by the independent auditors assigned to review Petitioner's records for the purpose of establishing the preliminary maintenance budget.

Adekunle James, Business Administrator and School Board Secretary for the City of Orange Board of Education, previously worked in the district for nine years as an accountant and fifteen months as the Assistant Business Administrator. He prepared Petitioner's budgets for 2001-2002 and 2002-2003 **(Exhibits P-1, P-2, P-3)**. The Business Administrator testified that when the independent auditors prepared recalculations for the Preliminary Maintenance Budget Figure for 2003-2004 they used several original budget numbers instead of the revised budget numbers. He presented a letter from the DOE dated February 24, 2003, which showed the previous years general fund surplus of $1,723,965 deducted from the district's Abbott Aid for that year **(Exhibit P-7)**. The sum of $1,723,965 is the surplus amount which the DOE wants to reduce in 2003-2004. The Business Administrator spoke with the DOE's budget examiner regarding the use of the previous years figures and the budget examiner spoke with the independent auditors. The independent auditors acknowledged the error.

Michael Arizechi, the DOE Budget Examiner/Manager, is a CPA with an MBA in finance and a BA in accounting. He has served as senior accountant with the Newark Board of Education for three years, and as Budget Manager with the DOE for five years. He is responsible for reviewing the initial budgets of the school districts which are received February 25th of every year, for revision reviews, recommendation for approvals and line item change approvals. The Budget Examiner confirmed his awareness of an error made by the independent auditors and his discussions with them regarding their use of wrong budget figures. The Budget Examiner testified that the auditors acknowledged a $1,723,965 miscalculation, and the occurrence of "double-dipping", since the same surplus amount had been added twice. During the OAL hearing the auditors were contacted and they requested a copy of the February 24, 2003 letter to review before re-confirming the error **(Exhibit P-7)**. Based on the

evidence and testimony presented on the issue of error in fund surplus calculations due to the use of incorrect budget figures by the independent auditor, I **FIND** that the Petitioner's budgeted fund balance is inaccurate and therefore Petitioner's need for discretionary Additional *Abbott v. Burke* State Aid should be reassessed.

SUBSTANTIATION OF NON-DISCRETIONARY EXPENDITURES FOR SALARY AND HEALTH BENEFITS

Adekunle James, Petitioner's Budget Administrator, testified that the DOE did not take into account Retirements, Vacant positions and Substitute teacher pay rates when determining the dollar amount to be used when calculating the contracted five-percent "across the board" **salary increase**. Petitioner argued that where positions were not held last year for the entire year, there will be no money to fund a full year's position in 2003-2004. Petitioner restated the argument for use of the Supreme Court definition of the "maintenance budget" when finding it apparent that the district's budget will be reduced if the DOE's Maintenance Budget definition in *N.J.A.C.* 6A:10-1.2, approved and provided service budget figure for the 2002-2003 year, is used to calculate the budget need for 2003-2004. Testimony disclosed Petitioner's violation of Whole School Reform requirements with second graders and teachers in Parker Avenue School, because of an inability to currently comply with the mandates for achieving a plan for class size reduction, as per *N.J.A.C.* 6A:24-4.1(j)9. Regarding **health benefits**, the Budget Administrator testified that the benefits have increased for the last three years, inclusive of 2002-2003 when a 21-percent increase was insufficient to cover employee benefits. A line item change was approved in 2002-2003 to enable the district's payment of health and dental benefits.

Health Benefit Increases
(Exhibits P-8, P-9, P-10)

Year	Budgeted Benefits	Approved/Provided (Actual Expenditure)	Percentage Increase From Actual Expenditure In Previous Year
2002-2003	4,692,232	5,665,147.47	15.4%
2001-2002	4,618,665	4,793,304.81	22.13%
2000-2001	2,904,300	3,732,155.93	

Michael Arizechi, Respondent's Budget Examiner/Manager testified that the calculation for **salary increases** was accomplished by taking the actual expenditure from the previous year and increasing it by the 5% contracted percentage rate. *N.J.A.C.* 6A:10-1.2 "Maintenance budget" provides for a 2003-2004 school budget funded at a level such that the district can implement 2002-2003 approved and *provided* programs, services, and positions and includes documented increases in non-discretionary expenditures (contracted salaries, health benefits, and special education tuition) and adjustments for actual 2002-2003 expenditures. In regard to **health benefits**, the Budget Examiner/Manager testified that 14.5% was used to calculate all health benefits.

Based on the requirements of the governing regulation *N.J.A.C.* 6A: 10-1.2, I **FIND** with respect to **salary increases** that Petitioner must specifically identify its right to an exception under paragraph 2c of the June 24, 2003 Supreme Court order, as well as explicitly document the inability to currently comply with the mandates of Whole School Reform in achieving a plan for class size reduction, as per *N.J.A.C.* 6A:24-4.1(j)9:

> A plan shall be in place to continue to reduce class size by September 2002 to 1:21 for grades K-three and 1:23 for grades four to eight, and 1:24 for grades nine through twelve.

I further, **FIND**, in regard to **health benefits** that based on the "Maintenance budget" definition of maintenance non-discretionary expenditure funding levels, at the same levels approved and provided in 2002-2003, as per *N.J.A.C.* 6A: 10-1.2, that an adjustment in Petitioner's health benefits budgetary increase, so as to reflect what was approved and provided in 2002-2003, is warranted.

REINSTATEMENT OF NON-INSTRUCTIONAL POSITIONS TO MEET WHOLE SCHOOL REFORM AS PER *N.J.A.C.* 6A: 10-1.2

The July 23 Supreme Court order requires in part, in paragraph three and paragraph seven:

> 3. For purposes of calculating Additional *Abbott v. Burke* State Aid and in furtherance of its pre-existing duty to implement administrative controls, the DOE shall promulgate an emergency regulation establishing the standard for evaluating the effectiveness and efficiency of the districts' non-instructional programs. (Non-instructional programs are defined as office/administrative expenditures and programs, positions, services and/or expenditures that are not school based or directly serving students.) ... [Emphasis added.]
>
> 7. To the extent that monies are deleted by the DOE in the districts' non-instructional programs based on the effective and efficient standard, those monies shall be made available to the districts as follows: an *Abbott* district may apply for and the State may award such aid for demonstrably needed programs or services. The allocation of such available funds shall not be viewed as inconsistent with this Court's approval of use of a maintenance budget for Fiscal Year 2003-2004.

The DOE promulgation is the emergency regulation set forth in *N.J.S.A.* 6A:10-1.2, and to the extent that paragraph 2c of the June 24, 2003 Supreme Court order requires reinstatements to comply with Whole School Reform, the necessary non-instructional programs, positions and services should be restored; also funding for non-instructional programs should be applied for by Petitioner and awarded by the DOE upon a showing of need, as instructed per Supreme Court order of July 23, 2003 at paragraph 7.

Based on the foregoing, I **FIND** that the issue of reinstatement of non-instructional positions to meet Whole School Reform is governed by the terms in *N.J.A.C.* 6A:10-1.2 and paragraph seven of the July 24, 2003 Supreme Court order and will be determined in accord with and upon Petitioner's showing of need to effectuate Whole School Reform or other needed programs and services.

CONCLUSIONS

Based on the evidence, testimony presented and the findings set forth hereon, I make the following **CONCLUSIONS**:

1. New Jersey Court Rules - *R.* 2:2-3(a)(2) provides that an appeal to

challenge the validity of any regulation promulgated by a state administrative agency should be made in the Superior Court Appellate Division; and therefore the Office of Administrative Law does not have jurisdiction to challenge the validity and applicability of the emergency regulation definition of Maintenance budget, as set forth in *N.J.A.C.* 6A:10-1.2.

2. *N.J.A.C.* 6A:10-1.2 provides for the protection of previously approved appropriations which can not be disbursed until the completion of WSR Developer Contracts.

3. An error was made by the independent auditor's use of the original budget number, instead of the revised budget number when computing Petitioner's maintenance budget in preparation for issuance of the Notice of Preliminary Maintenance Budget Figure for 2003-2004 and Estimate of Discretionary Additional *Abbott v. Burke* State Aid Award.

4. There is a miscalculation made by the independent auditors' of Petitioner's discretionary fund balance.

5. Salary and health benefits increases are subject to the terms for non-discretionary expenditures, as set forth in *N.J.A.C.* 6A:10-1.2.

6. Reinstatement of non-instructional positions for the purpose of complying with Whole School Reform is subject to the definition set forth in *N.J.A.C.* 6A:10-1.2.

ORDER

Based upon the foregoing, it is hereby **ORDERED:**

1. That the definition of "maintenance budget" set forth in *N.J.A.C.* 6A:10-1.2 is applicable in this matter.

2. That Petitioner's previous approved funding allocation for programs, positions and services provided under Whole School Reform contracts and pursuant to paragraph 2c of the Supreme Court order of June 24, 2003 in *Abbott v. Burke* (and as stated in *N.J.A.C.* 6A:10-1.2) shall not be added, to determine fund surplus.

3. That Petitioner's budgeted fund balance error be corrected and a reassessment of Petitioner's need for discretionary Additional *Abbott v. Burke* State Aid be made using the corrected fund balance.

4. That Petitioner's salary increases incident of Whole School Reform and non-discretionary salary expenditures be complied with insofar as the increases meet the exception requirements of paragraph 2c of the Supreme Court order of June 24, 2003 in *Abbott v. Burke* (and as stated in *N.J.A.C.* 6A:10-1.2).

5. That Petitioner's health benefits budget be adjusted so as to reflect the amount, which was approved and provided in 2002-2003.

6. That Petitioner's request for reinstatement of non-instructional positions to meet Whole School Reform be complied with insofar as the reinstatements meet the exception requirements of paragraph 2c of the Supreme Court order of June 24, 2003 in *Abbott v. Burke* (and as stated in *N.J.A.C.* 6A:10-1.2).

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within the time allowed under

the existing orders of the New Jersey Supreme Court and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Notwithstanding the provisions of any rule to the contrary, exceptions to Initial Decisions of the Office of Administrative Law in *Abbott* District budget appeal matters shall be filed within five (5) days of the date of mailing of the Initial Decision, and reply exceptions shall be filed within two (2) days of receipt of exceptions. File written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 24, 2003
DATE

Sandra Ann Robinson
SANDRA ANN ROBINSON, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

9/24/03
DATE

E-mailed Initial Decision to the parties on:

9/24/03
DATE
cml

APPENDIX

WITNESSES

For Petitioner:

Adekunle James, Business Administrator/School Board Secretary
Orange Board of Education

For Respondent:

Michael Arizechi, Budget Examiner
New Jersey Department of Education

EXHIBITS

For Petitioner:

P-1 Budget Orange Board of Education July 11, 2001

P-2 Budget Orange Board of Education March 20, 2002

P-3 Budget Orange Board of Education March 11, 2003

P-4 New Jersey Department of Education Budget Breakdown August 27, 2003

P-5 State Auditors Report Orange Township Public Schools Abbott District Budget Review

P-6 Notice of Preliminary Maintenance Budget Figure for 2003-2004 and Estimate of Discretionary Additional *Abott v. Burke* State Aid Award August 27, 2003

P-7 Revision Letter from Assistant Commissioner to Orange Township Interim School Superintendent February 24, 2003

P-8 Total Benefits 2002-2003

P-9 Total Benefits 2001-2002

P-10 Total Benefits 2000-2001

P-11 Dental Benefits Invoices

P-12 State Health Benefits Plan Enrollment

P-13 Account Balances For Benefits

P-14 New Positions Re-installment Non-Instructional Positions May 20, 2002

P-15 Required Justification for2003-2004 Budgeted Instructional FTE May 5, 2003

P-16 Original approved Budget Orange Board of Education 2002-2003

For Respondent:

None

OAL DKT. NO. EDU 5498-03
AGENCY DKT. NO. 194-6/03

BOARD OF EDUCATION OF THE CITY OF ORANGE, ESSEX COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions were filed by both the Board of Education (Board) and the Department of Education (Department), as was a reply by the Board to the Department's exceptions, and all were considered by the Commissioner in reaching his decision herein.

As a preliminary matter, the Commissioner concurs with the Administrative Law Judge (ALJ) that hearing of this matter need not have awaited completion of the District's Comprehensive Annual Financial Report (CAFR), as argued by the Department. Within the appeal framework established by the Court, the Board was clearly entitled to make, prior to the school year in question, the factual and legal record necessary to preserve the substance of its claims, with final adjustments made following audit.

The Commissioner also concurs with the ALJ that *N.J.A.C.* 6A:10-1.2, the regulation duly promulgated to implement the Court's July 23, 2003 order, must control in the instant proceeding, and that the OAL does not have jurisdiction to determine its

validity, such determination being solely within the purview of the Appellate Division or the Supreme Court. R. 2:2-3(a); *see, also, Pascucci v. Vagott,* 71 *N.J.* 40, 51-52 (1976); *Wendling v. N.J. Racing Com'n.*, 279 *N.J. Super.* 477, 485 (App. Div. 1995). However, even if the Commissioner were to accept, *arguendo*, the Board's contention that a "choice of law" may be made without passing on the validity of the rule itself, the Commissioner here opines, to the extent that he may do so in an administrative proceeding, that the Department's definition of "maintenance budget," as set forth in *N.J.A.C.* 6A:10-1.2, is entirely consistent with the language and intent of the Court, with no conflict between it and the underlying order.

The Commissioner rejects, however, the ALJ's apparent acceptance of the Board's contention that the Department erroneously used "original" rather than "revised" budget figures in calculating the District's maintenance budget. Although the ALJ appears to have confused and conflated this issue with a more specific error in surplus calculation, as discussed below, the Commissioner agrees with the Department's position that, in making the determination under appeal herein, in the absence of precise information of the type only available through the CAFR, it was appropriate to use the approved Revised School District Budget Statement for 2002-03, dated July 12, 2002, rather than the *unapproved* Revised School District Budget Statement for 2003-04, dated April 5, 2003.

In this regard, the Commissioner observes that the Department's charge in this matter was to determine the level of 2003-04 funding that would enable the District to continue in a "maintenance" mode, that is, to implement in 2003-04 the programs, services and positions provided in 2002-03. While it is true that dollar amounts paid out prior to June 30, 2003 will not necessarily reflect the actual costs of the programs, services and

positions provided that year, nor can they perfectly predict the actual cost of providing them in the next, it is *equally* true that originally budgeted amounts and other similar projections are no less imprecise. Thus, in the Commissioner's view, a methodology which preliminarily establishes the 2003-04 cost of providing programs, services and positions by determining, as nearly as possible without benefit of audit, the actual approved cost of providing them in 2002-03 and then allowing for reasonable, non-discretionary adjustments, is a uniform, fair and rational method for estimating future expenditures which cannot otherwise be determined with any degree of precision. To the extent that results may be imperfect, even after adjustment following audit, *N.J.A.C.* 6A: 10-3.1(g) provides a mechanism to obtain additional supplemental funding where unanticipated expenditures or unforeseen circumstances warrant. Thus, the Commissioner wholly endorses the Department's fundamental methodology, subject to the correctness of its application based on the evidence presented in any particular instance where its results are disputed.

Turning, then, to the more specific issues raised by the Board, the Commissioner initially rejects the ALJ's conclusion that the Board is entitled to include the balance of its Whole School Reform (WSR) contract amount as part of its maintenance budget. Contrary to the ALJ's finding, the exception provided by the Court in Paragraph 2c of its June 24, 2003 order, which expressly refers to *reinstatement* of WSR in certain schools *not having a WSR contract in 2002-03*, cannot apply to the Board's claim herein, which is manifestly based on the existence of an ongoing WSR contract under which services were provided in 2002-03. Since no evidence was presented by the Board that any portion of that contract for services actually provided in 2002-03 remains unpaid so as to

qualify as a 2002-03 expenditure, the Department correctly excluded the contract balance, as reflecting services not yet provided, from its maintenance budget calculation.

The Commissioner does concur, however, that an error in calculation of the District's surplus was made. It is clear on record and uncontested by the Department that $1,723,965 already deducted from the Board's 2002-03 additional State aid should not have been reflected in the Department's calculation of excess surplus for 2003-04, so that the fund balance to be appropriated in the District's 2003-04 revised budget should be adjusted downward from $5,813,312 to $4,089,347. However, this error in itself results in no entitlement to additional *Abbott v. Burke* State aid, since the Board's excess surplus is still well above the level that would entitle it to such aid.

With respect to increases for salaries and health benefits, the Commissioner does not agree with the ALJ that an increase should be granted to the Board. The Commissioner is unpersuaded by the fact that increases in the cost of health benefits in 2001-02 and 2002-03 were 22.13% and 15.4% respectively, since this alone is insufficient to warrant the conclusion that the 14.5% increase allowed by the Department will not maintain benefits at 2002-03 levels and that an increase of 21% is necessary for this purpose. Similarly, the Commissioner finds, for the reasons more generally set forth above, that applying the District's highest contracted teacher salary increase percentage of 5% to actual salary expenditures for 2002-03 was a reasonable method of projecting preliminary salary costs for 2003-04. The Commissioner is unpersuaded by the Board's argument that this method does not take into account vacancies, retirements, substitutes and positions filled for only part of the year, since variances of these types occur every year and a preliminary district-wide salary budget is appropriately based on the assumption

that staffing is a flexible and continuous process, with ebbs and flows that, absent specific evidence to the contrary, generally permit the projection of one year's experience onto the next.[1]

Finally, with regard to the Board's contention that it requires a further percentage increase in salary amounts to accommodate addition of new positions or restoration of positions eliminated in 2002-03 based on WSR and other regulatory requirements, the Commissioner finds that the "maintenance" standard established by the Court, and embodied in the implementing regulation, requires programs, services and positions to have been actually provided or filled in 2002-03 in order to be included in the maintenance budget for 2003-04, and that, as indicated above, the exception provided by the Court in Paragraph 2c of its June 24, 2003 order does not apply to the Board herein. Additionally, the Commissioner finds that the Board has made no demonstration on the present record that the level of funding provided through the Department's calculations will not support the staff necessary to implement required programs and services. The fact that a particular position, such as a teacher added for reasons of class size, was not included in the maintenance budget does not mean that the position cannot exist; rather, the need for it is expected to be met within existing levels of resources, subject to the ability to seek additional funds under requisite circumstances.[2] [3]

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[1] In this context, the Commissioner reiterates the above-noted availability of a mechanism for Abbott districts to address a need for additional resources pursuant to *N.J.A.C.* 6A:10-3.1(g).

[2] See note 1 above.

[3] To the extent that the ALJ's discussion at pages 12-13 of the Initial Decision might suggest otherwise, the Commissioner notes that no reductions were made to the Board's budget on the basis of ineffectiveness or inefficiency.

Accordingly, for the reasons set forth herein, the Initial Decision of the OAL is rejected except insofar as it concludes that the present matter was appropriately heard prior to audit; that the OAL lacks jurisdiction to determine the validity of the rule promulgated to implement the order of the Court; and that an error occurred in calculation of the Board's surplus so as to reduce the amount applied by the Department to support the 2003-04 budget. However, in light of the Commissioner's determinations on the Board's specific claims above, no recalculation of additional *Abbott v. Burke* State aid is directed as a result of the incorrect allocation, since the error does not, in itself, alter the Board's eligibility for such aid.[4]

IT IS SO ORDERED.[5]

COMMISSIONER OF EDUCATION

Date of Decision: 10/20/03

Date of Mailing: N/A

[4] The Board's claim to the contrary is based on its contention that, taken together, use of "revised" figures and proper calculation of salaries, health benefits, *etc.*, as requested herein, will substantially reduce the Board's alleged "surplus" so as to render the Board eligible for additional *Abbott v. Burke* State aid. (Board's Reply to Department's Exceptions at 4)

[5] Pursuant to *P.L.* 2003, *c.* 122, "*Abbott*" determinations are final agency actions appealable directly to the Appellate Division of the New Jersey Superior Court.

580-05

BOARD OF EDUCATION OF THE TOWN OF HARRISON, HUDSON COUNTY,

PETITIONER,

V.

NEW JERSEY STATE DEPARTMENT OF EDUCATION,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning "Abbott" District appealed the Department's determination of its 2003-04 "maintenance budget," alleging that the regulatory definition of "maintenance budget" is invalid because it is inconsistent with the terms of the Supreme Court's July 23, 2003 Order. The District further challenged the exclusion from its maintenance budget of the cost of two positions, approved but not filled in the 2002-03 school year, and the cost of providing health care coverage to 20 additional hourly paid cafeteria aides.

The ALJ initially determined that the OAL does not have jurisdiction to determine the validity of *N.J.A.C.* 6A:10-1.2, as such determination is solely within the jurisdictional purview of the Appellate Division or the Supreme Court. The ALJ next found the Department's quantitative method of implementing its regulatory definition of "maintenance budget" to be inconsistent with the literal language of the regulation and that in the Supreme Court's Order; he, therefore, denied Department adjustments reducing the District's 2002-03 budget. With respect to salaries for two positions budgeted in 2002-03 but not filled, the ALJ concluded that, pursuant to the "maintenance" standard, programs, services and positions must have been actually provided or filled in 2002-03 in order to be funded in 2003-04. The ALJ, likewise, denied the District's claim of funding for health care coverage for hourly cafeteria aides as the record did not contain documentation in support of such need.

The Commissioner adopted in part and rejected in part the Initial Decision. First, he concurred with the ALJ that the OAL does not have jurisdiction to determine the validity of the Department's regulation. Next, however, the Commissioner, specifically found that the Department's implementation of its regulation was proper. He recognized that, while it may be technically correct that merely looking at dollar amounts paid prior to June 30, 2003 may not necessarily reflect the actual costs of programs, *etc.*, it is, likewise, true that budgeted amounts do not necessarily reflect the costs of programs, *etc.*, provided. The Commissioner concluded that a methodology which begins by estimating the 2003-04 cost of providing the same programs, services and positions by looking at the actual cost of providing these for 2002-03 and then adds the projected costs of reasonable, nondiscretionary expenditures and adjustments is a reasonable method for estimating future costs which cannot otherwise be determined with any degree of precision. The Commissioner, therefore, restored the Department's adjustments reducing the District's spending funds by $1,165,331 and $889,380, respectively. The Commissioner concurred with the ALJ that sums budgeted for positions not filled in 2002-03 and health care coverage for hourly cafeteria aides were properly deducted from the District's 2003-04 "maintenance" budget.

October 20, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5494-03
AGENCY DKT. NO. 195-6/03

BOARD OF EDUCATION OF THE
TOWN OF HARRISON,
HUDSON COUNTY,
Petitioner,
v.
NEW JERSEY STATE DEPARTMENT
OF EDUCATION,
Respondent.

Michael R. Pichowicz, Esq., for petitioner

Pamela N. Ullman, Deputy Attorney General, for respondent
(Peter C. Harvey, Attorney General of New Jersey, attorney)

Record Closed: September 23, 2003 Decided: September 24, 2003

BEFORE **RICHARD McGILL**, ALJ:

The Board of Education of the Town of Harrison ("petitioner") has various responsibilities related to the Harrison School District ("District") including preparation and submission of a K-12 budget for the 2003-04 school year and an application for Additional

Abbott v. Burke State Aid ("supplemental aid") for programs, positions and services needed for the District's students. The District is an Abbott district as defined in *N.J.S.A.* 18A:7F-3 and *N.J.A.C.* 6A:24-1.2. After receipt of a decision dated May 30, 2003, by the New Jersey State Department of Education ("respondent") related to the District's 2003-04 K-12 budget and application for supplemental aid for the 2003-04 school year, petitioner filed a verified petition of appeal with the Commissioner of Education. As the result of additional proceedings as described below, respondent denied petitioner's request for supplemental aid. Petitioner now challenges that denial.

BACKGROUND AND PROCEDURAL HISTORY

On March 24, 2003, the Commissioner moved before the New Jersey Supreme Court for relief from some of the mandates of *Abbott v. Burke*, 153 *N.J.* 480 (1998) ("*Abbott V*"). Specifically, the Commissioner requested that discretionary supplemental aid be limited in 2003-04 to providing support for those programs, positions and services in the districts' approved budgets for 2002-03.

On April 8, 2003, the Education Law Center responded to that motion and also cross-moved for relief including a request for an expedited schedule for the review and approval of Abbott district budgets and appeals therefrom. As the result of mediation, the parties agreed to an expedited schedule for budget approvals and appeals. In accordance with the schedule, respondent was to issue its determinations in regard to district budgets by May 30, 2003. The agreement further provided for a review process with hearings before the Office of Administrative Law and final decision by the Commissioner. On May 20, 2003, the Court entered an order incorporating the agreement.

On May 30, 2003, respondent rendered decisions with respect to all of the Abbott districts using the maintenance standard for which it had requested approval from the Court. Twenty-three districts including petitioner filed appeals from those determinations. Petitioner's appeal

was transmitted to the Office of Administrative Law on June 9, 2003, for determination as a contested case.

Petitioner's appeal along with all of the others raised the issue of the proper standard for approving the budgets for the 2003-04 school year. On June 24, 2003, the Supreme Court issued an Order scheduling oral argument for July 10, 2003, concerning the standard to be used in the 2003-04 budget process. On July 23, 2003, the Supreme Court issued an Order approving a maintenance standard as set forth therein for the 2003-04 budget process. The Court also directed the promulgation of emergency regulations and established a schedule for further proceedings.

On August 22, 2003, the Commissioner promulgated emergency regulations as directed in the Court's Order. A key provision of the emergency regulations is a definition of "maintenance budget" as the standard for reviewing the applications of Abbott districts for supplemental aid for the 2003-04 school year.

On August 27, 2003, respondent issued decisions establishing a preliminary maintenance budget figure and the amount of additional supplemental funding needed to support that budget for each of the twenty-three appealing districts including petitioner. The determination with respect to petitioner was that it did not have a need for additional supplemental aid. By letter dated August 28, 2003, to the undersigned, petitioner requested a prehearing conference in effect indicating an intention to continue with the appeal.

After a prehearing conference on September 4, 2003, a hearing was conducted on September 10 and 11, 2003, at the Office of Administrative Law in Newark, New Jersey. The briefs of the parties were received on September 15, 2003. On September 16, 2003, the Education Law Center filed a motion to participate as *amici curiae*. A brief was attached to the motion, which was unopposed and was granted by Order dated September 23, 2003.

ISSUES

The issues in this proceeding are whether petitioner should receive supplemental aid for 2003-04 school year and, if so, the amount thereof. Petitioner's main contention relates to the standard to be utilized to establish a maintenance budget in this proceeding. According to petitioner, the regulations adopted by the Commissioner on August 22, 2003, including in particular the definition of a "maintenance budget" are invalid because they are inconsistent with the terms of the Supreme Court's Order dated July 23, 2003. The parties also differ as to the inclusion of various expenditures in a maintenance budget for the 2003-04 school year.

SUMMARY OF EVIDENCE

Each party to this proceeding presented one witness. Business Administrator Peter Higgins testified for petitioner, while respondent called Stanley J. Ferdinand, whom it employs as a budget examiner, as its witness. While petitioner proceeded first at the hearing, the differences between the positions of the parties will be more readily understandable with respondent's evidence summarized first.

Mr. Ferdinand first explained the budget process as applied to the 2002-03 school year. During the prior school year, each school district submits its budget in two parts. The two parts include the district budget and the school-based budget. The latter is a component of the former. The budget was fully approved in May 2002. In November 2002, a Comprehensive Annual Financial Report (CAFR) provided an analysis of the prior school year. The analysis did not show a need for additional supplemental aid.

The review of petitioner's budget for the 2003-04 school year began in March 2003. Respondent reviewed petitioner's budget applying the maintenance concept meaning that the same level would be allowed for the 2003-04 budget year as for the 2002-03 school year. A determination dated May 30, 2003, approved petitioner's budget with the following three exceptions: (1) requested new restored positions in the school-based budget and at the district

level in the amount of $387,620, (2) health benefits, and (3) special education tuition. Petitioner appealed this determination.

Subsequent to the issuance of the Supreme Court's Order on July 23, 2003, the budgets were reviewed again applying a different standard. The key difference was that respondent looked at the actual spending level by the school district as the base line amount for the maintenance budget. This review led to a new determination which voided the letter dated May 30, 2003. The determination dated August 27, 2003, did not include any new positions which were not part of the expenditures for the 2002-03 school year.

The need for supplemental aid equals expenditures minus available revenues. Petitioner's adjusted 2002-03 budget was $25,434,867. This amount was reduced by $1,165,331 and $889,380 to reflect the actual level of expenditures in spending funds eleven and fifteen, respectively. The net effect is to reduce the base 2002-03 budget to $23,380,156. Various adjustments increasing the budget include $1,122,829 for contracted salaries, health benefits at $421,822, special education at $575,559, and the Consumer Price Index (CPI) at 2.1 percent for $134,967. The subtotal of the adjustments including various items not mentioned above was $2,620,739. Addition of the subtotal to the base 2002-03 budget produced a total maintenance budget of $26,000,895. In comparison, the total budgeted revenues available for the 2003-04 school year were $26,992,469. The difference indicates that the need for supplemental aid amounted to a negative $991,574.

The calculation of the maintenance budget does not limit petitioner's expenditures to that amount. However, petitioner's expenditures cannot exceed it revenues. Petitioner can achieve savings by means other than cutting positions, programs or services.

Mr. Higgins testified that the respondent's determination dated May 30, 2003, approved petitioner's budget for the 2003-04 school year with three exceptions. One of the exceptions related to the sum of $387,620 for several new positions which were approved by respondent but were not included in the budget for 2002-03 at the time of preparation of the budget for the 2003-

04 school year. Another major adjustment is necessary for health benefits. Respondent used $421,822 as the adjustment for health benefits. This figure must be increased by $213,756 to $635,578 to reflect health benefits for additional workers.

In terms of respondent's analysis, petitioner accepts the amount of $25,434,867 as the adjusted 2002-03 budget. However, petitioner strenuously opposes the reductions of $1,165,331 and $889,380 to reflect sums approved but not spent in funds eleven and fifteen, respectively.

Mr. Higgins explained that respondent relied on a document known as the Board Secretary's Report, which contains numerous line items from the budget. For each line, the Board Secretary's Report shows the amount of unspent funds, which is the difference between the figure approved in the budget and the actual expenditure. Respondent derived its adjustments by taking the total of these columns for funds eleven and fifteen.

The largest component of the reduction relates to contracted salaries for teachers who took leaves for various reasons. The teachers were not paid while on leave and were replaced by substitutes at a substantially lower cost. However, there were no reductions in positions, programs or services as a result of those leaves. Moreover, there is no assurance whatsoever that teachers will take the same number of leaves or that there will be equal savings during the 2003-04 school year.

Another major component of the unspent funds relates to grants. During the school year, the school district typically receives grants from various sources. To the greatest extent possible, expenditures are charged to grants rather than the school district budget. This practice results in unspent funds relative to the budgeted amounts. However, because the school district does not know whether it will receive any grants at the time that the budget is prepared, grants are not included therein. By reducing the 2003-04 budget to the level of actual expenditures in the 2002-03 school year, respondent assumes in effect that petitioner will receive grants in the same amounts during the 2003-04 school year. According to Mr. Higgins, this assumption is unsound since there is no assurance that petitioner will receive grants in the same amounts.

The Board Secretary's Report contains numerous lines with unspent funds. Mr. Higgins addressed only the larger amounts. Other unspent funds reflected utility costs which were lower than the budgeted amounts. Mr. Higgins could not explain the lower amounts and opined that it would be unsound to assume that the same savings would occur during the 2003-04 school year.

Mr. Higgins acknowledged that there was one position that was approved but not filled during the 2002-03 school year. That position was for an athletic trainer at a cost of $50,750. In addition, after the position went unfilled, petitioner budgeted $9,000 for a per-event athletic trainer. This position also was not filled by petitioner.

To summarize petitioner's position, the adjusted 2002-03 budget would be $25,434,867. Petitioner would not reduce this figure for unspent funds in the amounts of $1,165,331 and $899,380 in spending funds eleven and fifteen, respectively. With respect to the other adjustments for which respondent determined a subtotal of $2,620,739, petitioner would differ only with respect to health benefits. In addition to respondent's adjustment of $421,822, petitioner would add $213,756 to reflect coverage for twenty additional hourly-paid cafeteria aides. These are not new hires but rather existing employees who will begin to receive coverage. The total adjustment for health benefits would be $635,578. With this adjustment, the subtotal is $2,834,495, and the total expenditures under a maintenance budget for 2003-04 would be $28,269,362. Net of all revenues, petitioner's request supplemental aid is $436,265 for the 2003-04 school year.

LAW AND ANALYSIS

Supplemental aid is a component of the relief ordered by the Supreme Court in *Abbott v. Burke*, 153 *N.J.* 480, 525-26 (1998) ("*Abbott V*"). Respondent obtained approval from the Court to provide Abbott districts with a maintenance budget for the 2002-03 school year. *Abbott v. Burke*, 172 *N.J.* 294 (2002). As noted above, respondent sought approval from the Court to extend the relaxation of remedies and to continue to provide a maintenance budget for the 2003-

04 school year. By Order dated July 23, 2003, the Court granted respondent's application. In the second numbered paragraph of that Order, the Court defined a maintenance budget as follows:

> A maintenance budget shall mean that a district will be funded at a level such that the district can implement current approved programs, services, and positions and therefore includes documented increases in non-discretionary expenditures. Examples of non-discretionary expenditures are increases in contracted salaries, health benefits, and special education tuition. Maintenance does not include the restoration of programs, positions, or services that were reduced in 2002-2003, or new programs, positions, or services, except in respect of Paragraph 2c. of the Court's Order of June 24, 2003 (pertaining to those elementary schools without a whole school reform developer in place in 2002-2003 and permitting whole school reform contracts in certain circumstances), irrespective of the timing for the promulgation of regulations governing that provision.

On August 22, 2003, the Commissioner filed amendments to certain regulations pertaining to Abbott districts. As amended, *N.J.A.C.* 6A:10-3.1(c) provides in part as follows:

> The Department shall review the district-wide budget to determine if all available resources, reallocations and other factors have been incorporated and that the budget is a maintenance budget that contains only those programs, positions and services approved and provided in 2002-2003. The Department shall review the maintenance budget to ensure that all non-instructional expenditures are effective and efficient.

An amended definition of "maintenance budget" states as follows:

> "Maintenance budget" means, for the 2003-2004 school year, a budget funded at a level such that the district can implement 2002-2003 approved and provided programs, services, and positions and includes documented increases in non-discretionary expenditures and adjustments for actual 2002-2003 expenditures. Examples of non-discretionary expenditures are increases in contracted salaries, health benefits, and special education tuition. Maintenance does not include the restoration of programs, positions, or services that were provided in previous years or new programs, positions, or services unless necessary to meet Paragraph 2c of the Supreme Court's order of June 24, 2003 in Abbott v. Burke. Maintenance also does not include non-recurring 2002-2003 expenditures. [*N.J.A.C.* 6A:10-1.2.]

Petitioner's main argument is that the definition of "maintenance budget" in the new regulations is inconsistent with the Supreme Court's Order dated July 23, 2003, and therefore invalid. The key difference relates to a provision of the Court's Order which refers to "current approved programs, services, and positions." According to petitioner, the regulation modifies this language to read "2002-2003 approved *and provided* programs, services, and positions." [Emphasis supplied.]

Respondent contends that the Office of Administrative Law does not have jurisdiction to invalidate a regulation. According to respondent, jurisdiction is vested in the Appellate Division of Superior Court pursuant to New Jersey Court Rule 2:2-3(a), which provides in pertinent part as follows: "appeals may be taken to the Appellate Division as of right ... (2) to review the validity of any rule promulgated by an agency ...."

It is well established that the Appellate Division rather than the Office of Administrative Law is the proper forum in which to challenge the facial validity of an administrative regulation. *E.g., Wendling v. N.J. Racing Com'n*, 279 *N.J. Super.* 477, 485 (App. Div. 1995). Therefore, petitioner's challenge to the validity of the new regulations will not be considered in this proceeding.

Nonetheless, there are two related issues concerning the new regulations which must be considered in this proceeding. One issue involves the proper interpretation of the definition of "maintenance budget" in the new regulations. The other issue is whether the quantitative methodology employed by respondent in establishing maintenance budgets is consistent with the verbal standards contained the regulation and the Supreme Court Order. It seems evident that the language in the new regulation could readily be interpreted in a manner consistent with the Supreme Court's Order. The important questions are whether the new regulation will be interpreted to require or permit use of the quantitative methodology employed by respondent and, if so, whether that method is consistent with the verbal standard in the new regulation and in the Supreme Court Order.

As described above, respondent reduced the approved budget for the 2002-03 by the amount of unspent funds. This quantitative approach in effect means that the maintenance budget for the 2003-04 school year will be limited to funds approved and actually spent during the 2002-03 school year. Thus, the quantitative method differs from the verbal standards in two key respects. First, the expression "programs, services, and positions" contained in the Supreme Court Order and in the new definition of "maintenance budget" in the amended regulations is in effect replaced by "funds." Second, the expressions "current approved" from the Supreme Court Order and "approved and provided" from the regulations are in effect replaced with "approved and actually spent."

There are two main difficulties with a quantitative methodology which equates to standard which could be stated as "funds approved and actually spent during the 2002-2003 school year." First, there is no support for this standard in the language of the Supreme Court Order or in the definition of "maintenance budget" in the new regulation. Second, this quantitative approach provides no assurance that a school district will be able to implement its current approved programs, services, and positions. It follows that the quantitative methodology used by respondent in this proceeding is inconsistent with the applicable verbal standards, and therefore, its utilization in this proceeding is impermissible. With respect to the specific changes made by respondent to petitioner's maintenance budget for the 2003-04 school year, this conclusion means that the adjustments reducing spending funds eleven and fifteen by $1,165,331 and $889,380, respectively, should not be approved in this proceeding.

Before addressing the other issues raised by the parties, it is appropriate to summarize the proper interpretation of the definition of "maintenance budget" in the new regulation and the Supreme Court Order. The starting point is that the maintenance budget will include expenditures at a level such that the school district can implement current approved programs, services and positions in the 2002-03 budget. The base amount will be reduced by the costs of programs, positions and services that were not in fact provided during the 2002-03 school year. The base amount will be adjusted for documented increases in non-discretionary expenditures such as contracted salaries, health benefits and special education tuition. Further, any new

programs, positions or services will be eliminated with limited exceptions not applicable to this proceeding. Finally, the base amount will be reduced by the costs of any non-instructional programs which lack effectiveness and efficiency.

The parties agree that the starting point for analysis is a budget in the amount of $25,434,867. As noted above, the adjustments reducing the 2002-03 budget by $1,165,331 and $889,380 should not be made in this proceeding.

The next step is to reduce this amount by the costs of programs, positions and services that were not in fact provided during the 2002-03 school year. In its budget for the 2002-03 school year, petitioner included the sum of $50,750 as the salary of an athletic trainer. This position was not filled by petitioner. Later in the school year, petitioner budgeted $9,000 for a per-event athletic trainer. This position also was not filled by petitioner. It follows that the sum of $59,750 should be excluded from petitioner's maintenance budget for the 2003-04 school year.

The next step is to increase the base amount by documented increases in non-discretionary expenditures such as contracted salaries, health benefits and special education tuition. The item in dispute concerns health benefits. Respondent increased health benefits by $421,822. Petitioner would increase health benefits by an additional $213,756 to reflect the cost of providing health coverage for hourly cafeteria aides. Petitioner maintains that it is required by federal law to provide this coverage.

The difficulty with this item is that petitioner has not provided any documentation. In fact, petitioner provided no citation to federal law, no determination by any authority that coverage was required or any analysis supporting its position. It follows that the additional increase of $213,756 in health benefits as proposed by petitioner cannot by approved due to a lack of documentation.

Petitioner originally proposed new restored positions at a total cost of $387,620. Those positions were not approved in respondent's letter dated May 30, 2003. These positions should not be approved under the standard for a maintenance budget. It is the undersigned's understanding that this amount is not included in the maintenance budget for the 2003-04 school year.

The final step involves a reduction by the costs of any non-instructional programs which lack effectiveness and efficiency. In order to implement this type of reduction, respondent must follow procedures set forth in *N.J.A.C.* 6A:10-3.1.

During the hearing, there was testimony concerning expense items which could be viewed as ineffective or inefficient. However, respondent did not follow the appropriate procedures or propose any specific adjustments. Under the circumstances, no adjustments will be made to petitioner's maintenance budget to eliminate ineffective or inefficient expenditures.

In this regard, it is noteworthy that the parties devoted a substantial portion of the limited time available for this proceeding to argument concerning the appropriate standard for a maintenance budget. It may well be that with additional time petitioner could document a need for additional health benefits or that respondent could demonstrate that petitioner has made expenditures on ineffective or inefficient non-instructional programs.

Petitioner requested supplemental aid in the amount of $436,265. Based on the above analysis, this amount must be reduced by $59,750 and $213,756, leaving a net amount of $162,759.

During the hearing, petitioner contended that it would have to cut programs, positions or services if it did not receive approval of the full amount of its request for supplemental aid. However, as the result of cross-examination, it became apparent that there are sources of potential savings such that a reduction in petitioner's request for supplemental aid will not require elimination of currently approved programs, positions or services.

Based upon the above, I **FIND** and **CONCLUDE** that petitioner should receive supplemental aid in the amount of $162,759 for the 2003-04 school year. Accordingly, it is **ORDERED** that petitioner's application for supplemental aid is approved in a reduced amount of $162,759.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within the time allowed under the existing orders of the New Jersey Supreme Court and unless such time limit is otherwise extended, this recommendation decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Notwithstanding the provisions of any rule to the contrary, exceptions to Initial Decisions of the Office of Administrative Law in *Abbott* District budget appeal matters shall be filed within five (5) days of the date of mailing of the Initial Decision, and reply exceptions shall be filed within two (2) days of receipt of exceptions. File written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Sept. 24, 2003
DATE

RICHARD McGILL, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

9/24/03
DATE

E-mailed Initial Decision to the parties on:

9/24/03
DATE

cml

APPENDIX

WITNESS LIST

For petitioner:

Peter Higgins

For respondent:

Stanley J. Ferdinand

EXHIBIT LIST

P-1	Letter dated May 30, 2003, from Gordon MacInnes to O. John DiSalvo	Evidence
P-2	School District Budget Statement for School Year 2003-2004	Evidence
P-3	School District Budget Statement for School Year 2002-2003	Evidence
P-4	Letter dated August 27, 2003, from Gordon MacInnes to O. John DiSalvo	Evidence
P-5	Maintenance and Supplemental Aid Determination	Evidence
P-6	Board Secretary's Report for school year ended June 30, 2003	Evidence

P-7	Maintenance and Supplemental Aid Determination revised by Harrison Board of Education	Evidence
P-8	Schedule entitled "Salaries"	Evidence
P-9	Order of Supreme Court of New Jersey Dated July 23, 2003	Identification
P-10	Work papers	Identification
P-11	Work papers	Identification
P-12	School District Budget Statement for School Year 2003-2004 Revenues	Evidence
R-1	Letter dated February 24, 2003, from Gordon MacInnes to O. John DiSalvo	Evidence

OAL DKT. NO. EDU. 5494-03
AGENCY DKT. NO. 195-6/03

BOARD OF EDUCATION OF THE TOWN OF HARRISON, HUDSON COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

The record of this local "Abbott" District's appeal of the Department's decision on its supplemental funding request for the 2003-2004 school year, and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions of Harrison and those of the Department, along with the Department's reply exceptions were duly submitted in accordance with the schedule established in response to the Court's order for expedition and were considered by the Commissioner in reaching this decision.

Upon careful and independent review of the record, the Commissioner determines to adopt in part and reject in part the Initial Decision of the OAL. Initially, the Commissioner notes that the Administrative Law Judge (ALJ) correctly recognizes that the OAL does not have jurisdiction to determine the validity of *N.J.A.C.* 6A:10-1.2, as such determination is solely within the jurisdictional purview of the Appellate Division or the Supreme Court. R.2:2-3(a); *see, also, Pascucci v. Vagott*, 71 *N.J.* 40, 51-52 (1976); *Wendling v. N.J. Racing Com'n.*, 279 *N.J. Super.* 477, 485 (App. Div. 1995).

The ALJ next undertakes to address the issue of whether the Department's quantitative method of implementing its regulatory definition of "maintenance budget" is inconsistent with the literal language contained in the regulation and in the Supreme Court's Order of July 23, 2003. The ALJ concludes that the Department's methodology has, in effect, inappropriately substituted the phrase "funds approved and actually spent during the 2002-2003 school year" for the Supreme Court language authorizing funding for "current approved" programs, services and positions and for the regulatory language "approved and provided." The Commissioner observes that while it may be technically correct that merely looking at dollar amounts paid out prior to June 30, 2003 will not necessarily reflect actual costs of programs, services and positions provided, *i.e.*, payment for items actually provided prior to June 30 may not actually have been made by June 30, it is also true that the budgeted amount, likewise, does not necessarily reflect actual costs of programs, *etc.*, provided. Therefore, the ALJ's abrupt conclusion that the budgeted amounts for lines 11 and 15 must be reinstated does not follow from his analysis. Those services, programs and positions, which were provided and which are reflected on lines 11 and 15, were provided at an actual cost which was less than the budgeted cost. The Commissioner concludes that a methodology which begins by estimating the 2003-2004 cost of providing the same programs, services and positions by looking at the actual cost of providing these for 2002-2003 and then adds the projected costs of reasonable, nondiscretionary expenditures and adjustments is a reasonable method for estimating future costs which cannot otherwise be determined with any degree of precision.

In light of the above, the Commissioner finds the Department's implementation methodology entirely consistent with both the verbal standards articulated in the regulation and the Court's order. The ALJ's interpretation of "maintenance budget" on pages 10-11 of his

decision is hereby clarified to so reflect. It must also be remembered, that if funds provided pursuant to the Department's utilized methodology prove to be insufficient because of unforeseen circumstances arising during the budget year, *N.J.A.C.* 6A:10-3.1(g) provides a mechanism for addressing the need for additional supplemental funding. The Commissioner, therefore, restores the Department's adjustments reducing spending funds for lines 11 and 15 by $1,165,331 and $889,380, respectively.

With respect to the sums budgeted in 2002-2003 for the salary of an athletic trainer ($50,750) and that of a per-event athletic trainer ($9,000), positions which were not filled in that year, the Commissioner concurs with the determination of the ALJ. Pursuant to the "maintenance" standard, programs, services and positions must have been actually provided or filled in 2002-2003 in order to be aided for 2003-2004, so that the $59,750 approved and budgeted for these unfilled positions was properly deducted from the District's 2003-2004 "maintenance" budget.

Turning to the last issue in dispute herein, health coverage for hourly cafeteria aides, the Commissioner is in agreement with the ALJ that this item must be denied for lack of documentation in the record to support the District's assertion that this represents a non-discretionary expenditure.[1]

Accordingly, the Initial Decision of the OAL is adopted in part and rejected in part. The Commissioner directs that the District's need for supplemental aid be recalculated in

[1] It is noted that the District, for the first time in its exceptions, attempted to submit supplementary documentation in support of this item. Submission of new evidence not presented at hearing in a party's exceptions is specifically prohibited by *N.J.A.C.* 1:1-18.4 and, consequently, the District's materials in this regard were not considered herein.

accordance with the above determinations. The instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 10/20/03

Date of Mailing: N/A

[2] Pursuant to *P.L.* 2003, *c.* 122, "Abbott" determinations are final agency actions appealable directly to the Appellate Division of the New Jersey Superior Court.

573-03

BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning Abbott district claimed the Department erroneously calculated its presumptive supplemental funding award for the 2002-03 school year and wrongfully reduced aid by the amount of the district's surplus in excess of 2%, which the Department prevented it from expending for additional supplemental programs or services. District also sought aid above presumptive level based on claims that loss of unfunded programs and services impaired core elements and essential enhancements of whole school reform.

The ALJ found that, with one exception, the Department correctly calculated district's presumptive aid award in accordance with Court directives and that the district did not meet the burden necessary to establish on appeal that further funding was necessary. ALJ sustained the Department's actions with respect to excess surplus, but found that the Department erred in not providing additional aid for the district's actual and documented expenditures for the second half-day of kindergarten. The ALJ directed the parties to calculate this amount and ordered the Department to disburse the requisite aid.

The Commissioner adopted the ALJ's decision, with clarification, in all respects except funding for the second half-day of full-day kindergarten. Commissioner agreed with the Department that aid was to be calculated on the basis of an underlying budget which must provide for full-day kindergarten, not increased by the dollar amount of second half-day kindergarten expenditures. Petition was dismissed.

October 9, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NOS. EDU 727-03 and
EDU 728-03
AGENCY DKT. NOS. 46-2/03 AND
122-4/02

BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,

Petitioner,

v.

NEW JERSEY DEPARTMENT OF EDUCATION,

Respondent.

James T. Hundley, Esq., co-counsel for petitioner (Hundley Parry, attorneys)

Richard E. Shapiro, Esq., for petitioner

Michael C. Walters, Deputy Attorney General, for respondent (Peter C. Harvey, Attorney General of New Jersey, attorney)

Record Closed: June 4, 2003 Decided: June 25, 2003

BEFORE **JOSEPH F. MARTONE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In the first of these matters, assigned OAL Dkt. No. EDU 727-03, petitioner appeals the determination of respondent made by Assistant Commissioner MacInnes in his letter of January 6, 2003, which identifies a general fund surplus in excess of two percent in the amount of $817,018 and, in accordance with fiscal year 2002-2003 Appropriations Act, reduced petitioner's *Abbott* State Aid Award by that amount. Petitioner also challenges the action taken by respondent by Assistant Commissioner MacInnes in his letter of January 15, 2003, refusing to approve any additional expenditures of undesignated general fund balance exceeding two percent for use in supplemental programs and/or services, based on the fiscal year 2002-2003 Appropriations Act.

In the second of these matters, assigned OAL Dkt. No. EDU 728-03, petitioner appeals respondent's actions of March 26, 2002, which certifies petitioner's fiscal year 2002-2003 line 00284 *Abbott v. Burke* Budget fiscal year 2001-02 funding level of $6,518,318 and the action of Assistant Commissioner MacInnes in his letter of June 17, 2002, further reducing the funding to $5,844,432.

The matters were assigned to me on April 17, 2003, and after a number of telephone conferences and settlement conferences, the matter was scheduled for hearing and was heard on April 17, May 1 and May 5, 2003. At the conclusion of the hearings, the record remained open at the joint request of the parties in order to afford them the opportunity to provide post hearing briefs. After these were received following some brief extensions, the record was closed on June 4, 2003.

FACTUAL DISCUSSION

The following is not intended to be a verbatim recitation of the testimony. It is intended to identify and summarize relevant portions of the testimony of the witness and the evidence presented in this matter.

Abbott ex rel. Abbott v. Burke, 172 N.J. 294 (2002)

By way of background, it is noted that on April 18, 2002, the New Jersey Department of Education (DOE), with the consent of the Education Law Center, filed a motion for relaxation of the *Abbott IV* and *Abbott V* remedies for the 2002-2003 school year. By order dated June 11, 2002, the Supreme Court denied the DOE's request for authorization to preclude any district appeals seeking supplemental funding for 2002-2003 in excess of 2001-2002 funding,

> . . . subject to the DOE's authority presumptively and preliminarily to establish districts' supplemental funding for 2002-2003 at the level of expenditures contained in the 2001-2002 K-12 DOE approved district budget, as increased by actual and documented 2001-2002 expenditures for the second half of kindergarten, as modified by DOE to take into account 2001-2002 actual expenditures and available revenues based on the district annual audits; . . .
>
> *Abbott ex rel. Abbott v. Burke,* 172 *N.J.* 294, 297 (2002). (*Abbott IX)*

The Court did grant the DOE's request for one year to afford districts flexibility to eliminate, reduce or limit growth of certain specified whole school reform enhancements, and to eliminate, modify and make educationally appropriate decisions about staffing and positions subject to the *Abbott* districts "right of appeal based on educational need related to impairment of the core elements of whole school reform and essential enhancements thereof . . . " *Id.* at 298.

Testimony of David A. Mooij, School District Business Administrator

The first witness to testify for petitioner was David A. Mooij, Business Administrator for the Neptune Township School District (Neptune). Mr. Mooij testified that Neptune became an *Abbott* school district in 1999. He was involved in the preparation of the school district's 2001-2002 and 2002-2003 budgets. He identified a school district budget statement for the school year 2002-2003 which set forth the various categories of *Abbott v. Burke* Aid (P-1). He testified that in 2000-2001 there was no *Abbott v. Burke* supplemental aid because the school district was preparing whole school reform and, therefore, no request was made. He was involved in

preparation of the application for supplemental aid for 2001-02 and he explained that the DOE established a minimum tax levy.

In the winter of 2001-02, Mooij was involved in the preparation of the 2002-2003 budget. He attended a meeting with an assistant commissioner in March 2002, and was told that nothing had been determined yet with respect to the level of *Abbott v. Burke Aid*. He identified a letter of March 11, 2002, which suggested that school district assume the same level of funding of the current school year for the 2002-03 school year (P-2, Exhibit 12). However, as of that date, the school district was about to finalize the budget containing additional *Abbott v. Burke Aid* in the amount of $8,402,328. This was approximately two million dollars more than the prior year. Neptune took no action to change its application because there had been nothing definite received from the DOE.

Neptune received correspondence from the DOE concerning *Abbott* preschool expansion aid funding (P-2, Exhibit 14). Neptune also received a memo of March 18, 2002 (P-2, Exhibit 15) setting forth emergency procedures to adjust the school district's budgets. In this memo, it was stated that the Department has determined that *Abbott* districts will receive additional *Abbott v. Burke* State Aid (Supplemental Funding) capped up to 2001-2002 levels with the actual amount determined following Department review of district budgets in collaboration with districts. Because there is no specific funding level determined by this items of correspondence, no action was taken by Neptune on line 00284 of its budget until there were definitive amounts announced by the DOE.

A public hearing on the budget was held on March 26, 2002, and the school board approved the proposed budget for submission to the voters at the annual school election (P-1, Exhibit 17). This budget was submitted to the voters and was narrowly approved.

On March 27, 2002, Neptune received a faxed memo from the DOE (P-2, Exhibit 18) directing that Neptune submit a second and balanced budget by April 1, 2002. As a result of this, Neptune reduced funding to the 2001-2002 level and prepared a second budget. (P-3). This anticipated additional *Abbott v. Burke* aid on line 00284 in the amount of $6,518,318, is the same amount as provided in the prior school year. Based on the instructions by the DOE, Neptune's

business division advised the superintendent to reduce programs commensurate with the reduction in appropriations. As a result of the school district revision, a reduction of 1.9 million dollars in *Abbott v. Burke* state aid was required and no procedures existed to make-up the loss of this aid. There were no additional opportunities for the board of education to meet.

It was only as a result of a letter of June 17, 2002 (P-4) that Neptune was placed on some type of official notification that not only was the funding level not the same as the prior year, but was further reduced by an additional $860,000 to $5,844,432. Mr. Mooij testified that there was no official communication from the DOE concerning this figure prior to June 17, 2002. There is also no understanding as to how this figure was arrived at. It was understood that there was a $250,000 fund balance carry-over which Neptune applied in both of its budget submissions (P-1 and P-3).

As a result of the June 17, 2002 letter (P-4), further reductions were made in the appropriations by Dr. Lake. This is contained in the August 13, 2002 revised school district budget (P-5) and this matches the letter of June 17, 2002 (P-4). This was approved by the DOE by letter dated September 30, 2002 (P-6).

Mr. Mooij reported a further reduction in *Abbott* funding as a result of the school district's Comprehensive Annual Financial Report (CAFR) or annual audit, which identified a general fund surplus of $817,018 in excess of two percent. Based on the fiscal year 2002-03 Appropriations Act, the Commissioner is permitted to reallocate a school district's undesignated general fund balances in excess of two percent. Thus, the *Abbott v. Burke* State Aid was reduced by this amount. Mr. Mooij explained that *Abbott* districts can only carry two percent and this two percent cap was started in fiscal year 2001-2002. As a result, the *Abbott* funding was reduced to $5,027,000. Mr. Mooij explained that the cause of this surplus was the result of having received notification in March 2002 of *Abbott* Parity Aid Payback of $862,000 which had been returned to Neptune. However, because Neptune was unaware of its receipt, the Parity Aid was not expended and was included in surplus. As a result, the DOE reduced Neptune's 2002-2003 *Abbott* funding. In March 2002, Neptune requested a hardship appeal seeking relief from this further reduction. There was no communication from the DOE as to this appeal and as a result, expenditures were stopped, and Neptune had a serious cash flow problem.

Mr. Mooij testified that the actual and documented costs of the half-day of kindergarten in 2001-2002 could have been readily determined by Neptune at the end of school in June 2002 without the need to wait for the CAFR in November 2002. Since the DOE never requested this information from Mr. Mooij, the DOE never determined the actual expenditures for the half day of Neptune's kindergarten program in the 2001-02 school year or increased 2002-2003 supplemental funding by that amount.

Testimony of Dr. Michael T. Lake, Neptune Superintendent of Schools

Dr. Michael T. Lake, Neptune's Superintendent of Schools, testified to the preparation of the 2002-2003 school year budget. Neptune has one early childhood center, five elementary schools, one middle school and one high school. It used a centralized approach to budget preparation as recommended by the DOE. It has an elaborate budgeting process with school-based budgets proposed by school management teams. As the Superintendent, Dr. Lake works closely with the school principals who generate a budget document from each school site. Neptune considers the needs of the children as sacrosanct. He coordinates these budgets with the DOE's *Abbott* advisers.

With respect to the budget in question, Dr. Lake indicated it was a very difficult time and he received mixed messages from the DOE. However, if budget guidance from the DOE was not in writing, Neptune would not follow that guidance, and the Superintendent would not be guided by rumor or hearsay. Thus, Neptune prepared an initial school budget calling for additional or supplemental *Abbott v. Burke* Aid of $8,400,000. He indicated that this was arrived at after he made significant cuts in the management team proposals. The DOE subsequently notified Neptune of the reduction of available funds to $6.5 million, and the school district was again required to reduce expenditures. There were extensive reductions in whole school reform budgets. There were reductions in personnel, computers, textbooks, parent training, etc. The cuts were from the trivial to the major. There was a wide range of cuts and Neptune ended up with a rather bare bones approach to the needs of the children. He noted that the DOE's letter of June 17, 2003 (P-4), also only gave estimated figures. When he received this, he could not believe that he would receive this letter giving estimated revenues and requiring reductions by June 24,

2002. It would take longer than the minimal number of days the district was provided to make these reductions, and he advised Assistant Commissioner MacInnes by letter dated June 21, 2002, that this could not be accomplished by June 24, 2002.

As a result of Dr. Lake's review of the budget and making significant reductions, Neptune's budget was brought into compliance with DOE's spending levels. He outlined the personnel reductions in a letter dated July 22, 2002 (P-10). The personnel reductions involved 17 paraprofessional positions, seven teaching positions, including one at the middle school, one at the high school, and five elementary, one career counselor in the middle school, one substance abuse counselor in the high school, two social workers and two special education teaching positions.

Dr. Lake testified that the impact of these reductions was disastrous. The school district had totally embraced whole school reform, but as a result of this, there was a quantum leap backwards. He was at wit's end to prepare this revised budget, and it reduced the educational mission of the school district

Dr. Lake testified to the specific reductions. Under the Comer Model, each school is required to have two paraprofessional positions. He explained that the classes are large. Neptune continues to employ paraprofessionals but there are 17 less than last year, even though the enrollment has increased by 200 pupils. The average class size has gone up, and *Abbott* requires an average class size of 18 in grades K through 2 and 21 in grades 3 through 5, but the school district has gone backwards. The seven teachers are Comer facilitators, but there are seven less teachers this year than last year. Career counselors in the middle schools are also required *Abbott* positions. Last year, there were two and this year there is only one. One social worker per school is required, but this was reduced to five in total. Substance abuse counselors are recommended to be one at the middle school and one at the high school, but this was reduced to a total of one. With regard to resource room and special education teachers, the school district was attempting to reduce class sizes, but had to cut back. Resource room class sizes now comply with the special education code requirements.

The effect on the education program was that the school district rolled back to pre-*Abbott* days. Classes are oversized and children are not getting services. Kindergarten through twelfth grade children have suffered.

Dr. Lake testified that as a result of the DOE's June 17, 2002 determination as to supplemental aid, Neptune was required to eliminate the following positions in the 2002-03 budget: 17 paraprofessionals; seven teaching positions; one career counselor; one substance abuse counselor; two social workers; and two special education teachers (P-10). Neptune also had to cancel orders for replacement science books for grades 7-8 and for a new K-5 spelling program in order to replace a 15-year old program that does not conform to the New Jersey Core Curriculum Content Standards (CCCS) (P-11). Neptune also was not able to make the final payment on the lease/purchase of obsolete, seven-year-old computer hardware used for computer-assisted instruction . (P-11) Dr. Lake testified that the payoff of the lease/purchase agreement would have reduced the need for State funding.

Dr. Lake testified that Neptune did not become aware of the reduction in DOE funding until after the local tax share had been approved by the board of education and submitted for placement on the ballot. Thus, there was no opportunity to make up any shortfall.

Dr. Lake also testified concerning the specific reductions in the budget that resulted from the DOE's determination as to supplemental funding. He testified that Neptune determined that there was an educational need for those positions, programs and services, and they were all part of the 2001-2002 budget. However, Neptune was required to eliminate them in 2002-2003 because of the reduction in additional *Abbott v. Burke* State Aid.

Dr. Lake's testimony as to the effect of the reduction in additional *Abbott v. Burke* State Aid may be broken down into nine categories as follows:

Elimination of 17 Paraprofessionals. Dr. Lake testified that 10 of the 17 paraprofessionals are required by the Comer Model and were to assist with early literacy classes in grades 1-3. Neptune's early literacy program consisted of 90-minute blocks of time for reading instruction, and the paraprofessionals were to assist the teacher by providing small group

and individualized instruction. Dr. Lake testified that the district and the Comer developer had determined that these positions were needed to deliver the educational services necessary to address literacy problems in Neptune's elementary schools. As a result of the unavailability of these aides, Neptune has abandoned the grades 1-3 reading groups in the 2002-03 school year. The other seven paraprofessionals were to be assigned to the full-day kindergarten program to provide individualized support with readiness skills and other individualized instruction. Dr. Lake stated that the principals at each of the elementary schools have reported the adverse impact on the development of kindergarten students as a result of the elimination of these positions, an increase in referrals to the child study teams and an increase in discipline problems because of the loss of paraprofessional assistance in kindergarten classes.

Apparently, when Dr. Lake was questioned about the facilitators by the DOE's representative, Ms. Fair-Davis, he responded to the effect that they had been retained by Neptune. Dr. Lake explained that he understood the question to be whether facilitators-teachers had been retained, not the distinct position of facilitators. He did not indicate to Ms. Fair-Davis that the retained facilitators/teachers were solely performing teaching functions. Ms. Fair Davis then noted in her checklist that facilitators/teachers had been maintained in each elementary school. (R-17).

Elimination of Seven Teaching Positions. Dr. Lake testified that five instructional facilitators at the elementary schools, one at the middle school and one at the high school were eliminated. Petitioner asserts that the elementary school facilitators are required by the Comer Model and, under the DOE's directives, are a core element of whole school reform (P-4 page 2). The facilitators receive special training to assist classroom teachers in the implementation of the Comer Model and work closely with the staff, parents and community to establish a climate for academics. They also provide early intervention for students with social, personal and academic difficulties. Dr. Lake stated that without these facilitators, a core element of the Comer Model is not being properly implemented in Neptune. Because of funding cuts, these individuals were assigned to classroom teaching responsibilities. Dr. Lake also testified about the need for facilitators in the middle school and high school. They worked closely with the social workers and guidance counselors on interventions for at risk students and with parents on problems that interfered with a student's educational progress. If the problems of these students are not

addressed, the problems escalate and the students eventually spin out of control. Because these facilitators are no longer available, there is a reduction in staff to respond to students who are experiencing difficulties.

On cross-examination, Dr. Lake was asked why the August 13, 2002 budget (R-12) contains the same number of teaching positions for the 2002-2003 school year as the 2001-2002 school year. He indicated that while the positions may have remained in the budget there was no funding for the positions.

Career Counselor. Dr. Lake testified that this is also a required position under the Comer Model implemented in the middle school. Dr. Lake testified that only 56% of students in the school system advance to a two-four-year college. Most of the other students require early preparation for various workplace vocations. The career counselor would cycle through middle school classrooms to provide necessary vocational and career information, to assist students to explore career opportunities, and to help students develope job-seeking skills.

Substance Abuse Counselor. Dr. Lake testified that Neptune previously had full-time substance abuse counselors at both the middle school and the high school. This was a certificated staff member who is needed to deal with students who are substance abusers. Neptune has a large population of students that are medically and emotionally troubled and the substance abuse counselor meets with these students individually or in groups on a daily basis. There is now only one substance abuse counselor who must divide time between the middle school and the high school.

Two Social Workers. Dr. Lake testified that social workers are certificated staff members required under the Comer whole school reform model. One of their principal responsibilities is to work in the community after regular school hours to address student needs and to strengthen the connections between the community and the school. They also assist parents who need help and address student problems that impair student attendance and learning readiness.

Two Special Education Teaching Positions. Dr. Lake testified that although Neptune's resource room class sizes comply with applicable requirements, these positions were necessary to

properly serve students with special education needs. There is a diminished level of individual services provided to special education students in the 2002-2003 school year which impedes Neptune's ability to implement properly the Individualized Educational Program (IEP) for all the high school students with special education needs and places Neptune at risk of violating special education laws.

Textbooks. Dr. Lake testified that Neptune is currently utilizing a fifteen-year-old spelling program for grades K-6 which does not conform to the CCCS. Neptune also requested funding for a new science program for grades 7-8, and the current science textbook does not conform to the requirements of the CCCS. Dr. Lake indicated that the replacement textbooks are needed for the proper instructional implementation of the CCCS in the district.

Lease-Purchase Payment. Dr. Lake testified that Neptune also requested funding to make the pay-out on a five-year lease purchase for computer hardware. He explained that by making this payment now, Neptune can not only save the State money and be more efficient, but also it will be able to initiate the necessary steps to replace out-dated computer equipment for classroom instructional purposes.

Reallocation of general fund surplus from 2001-2002 in excess of two percent. After the DOE received Neptune's CAFR, the DOE required the District to reallocate the general fund surplus from 2001-2002 which exceeded two percent, or $817,018 to the 2002-03 budget. The DOE correspondingly reduced the award of Additional *Abbott v. Burke* State Aid for 2002-2003 by that amount. (P-7)

Neptune's annual audit or CAFR revealed $817,018 in general fund surplus in excess of two percent for the school year ending June 30, 2002. (R-10). By letter dated November 19, 2002, (P-11), Neptune requested approval to permit it to transfer $750,000 from its 2001-2002 free balance audit account to the school district's budget. (P-11). On January 6, 2003, the DOE notified Neptune that Neptune must appropriate the $817,018 in general fund surplus in excess of two percent into the 2002-2003 district budget, and the DOE would reduce Neptune's Additional *Abbott v. Burke* State aid by that same amount because Neptune's educational program contained in the August 13, 2002 budget "was evaluated to ensure all the core components required by the

Court had been included." (Verified Petition of Appeal, dated February 3, 2003, Exhibit D). By separate letter dated January 6, 2003, the Department modified Neptune's estimated Additional *Abbott v. Burke* State aid, and directed Neptune to appropriate the $817,018 in General Fund surplus into the 2002-2003 district budget. (P-7). At the same time, the DOE notified Neptune that its Additional *Abbott v Burke* State aid would be reduced by $817,018. Thus, there would be no change to the overall amount of the August 13, 2002 budget approved by the DOE. On January 15, 2003, Assistant Commissioner MacInnes rejected Dr. Lake's proposal to use $750,000 of the general fund surplus for programs and services which Neptune claimed were needed in the school district for the 2002-2003 school year. (Verified Petition of Appeal, Exhibit D).

Testimony of Glenn Forney, former DOE Budget Manager to the Neptune School District

Glenn Forney testified for respondent DOE. Mr. Forney was previously assigned as a DOE Budget Manager to the Neptune School District, and now serves as Acting Assistant Director of Fiscal Review and Improvement for Abbott Implementation. He testified that, consistent with the Supreme Court's June 11th Order, the DOE accurately calculated Neptune's estimated Additional *Abbott v Burke* State aid for the 2002-2003 school year as reflected in the Department's June 17, 2002 letter (P-4).

Mr. Forney testified that the DOE's calculation (R-9) presumes that the revenues in Neptune's 2001-2002 K-12 budget must equal expenditures. The DOE used revenues rather than expenditures in its calculation because the calculation occurred before information on actual expenditures was available.

Mr. Forney calculated Neptune's 2001-2002 PreK-12 DOE approved budget based on the budgeted revenues derived from the August 13, 2002 budget (R-9). Based on the budgeted revenues, Neptune's PreK-12 DOE approved budget in 2001-2002 was $60,054,725 (R-9). Mr. Forney then factored out the costs of Neptune's preschool program for three- and four-year olds in order to determine Neptune's 2001-2002 K-12 DOE approved budget. Based on Neptune's DOE approved early childhood plan for 2001-2002, the cost of Neptune's preschool program was $5,852,885. Once this amount was factored out, Mr. Forney determined that Neptune's 2001-

2002 K-12 DOE approved budget was $54,201,840. (R-9) This amount became the targeted amount and Mr. Forney then determined the amount of Additional *Abbott v Burke* State aid necessary to reach Neptune's K-12 budget for 2002-2003 of $54,201,840. He totaled Neptune's budgeted revenues derived from the August 13, 2002 budget with the exception of Additional *Abbott v Burke* State aid, and factored out the costs of Neptune's preschool program for three- and four-year olds in order to determine Neptune's 2002-2003 K-12 DOE approved budget. Based on Neptune's DOE approved early childhood plan for 2002-2003, the cost of Neptune's preschool program was $6,408,810. Once this amount was factored out, the DOE determined that Neptune needed $5,844,432 in Additional *Abbott v Burke* State aid to establish 2002-2003 revenues at the level of expenditures contained in the 2001-2002 K-12 DOE approved district budget.

Mr. Forney testified that, because the DOE's calculation included the full amount of kindergarten costs in the 2001-2002 school year, it was unnecessary to increase the K-12 DOE approved budget for the second half-day of kindergarten.

In response, Neptune made reductions to the budget (P-10), and submitted a budget dated August 13, 2002, incorporating those reductions, that included Additional *Abbott v. Burke* State aid in the amount of $5,844,432 (P-5). The Department contends that the amount of reductions made by Neptune did not coincide with the amount of reductions necessary to be in compliance with DOE's letter of June 17, 2002 (P-4), and the Supreme Court's June 11, 2002 order. The DOE has taken the position that Neptune was required to make reductions in the amount of $673,886, but, according to the testimony of Dr. Lake, Neptune made reductions of approximately $1,209,000.

There is no provision in this calculation (R-9) for the increase in funding for the second half of kindergarten mentioned in *Abbott IX*. In response to questioning why there was no mention of the half-day of kindergarten in the calculation, and the absence of any line item for the second half of kindergarten in the 2002-03 revenue column, Mr. Forney testified that the funding was included in the 2002-2003 budget calculated by the DOE. He assumed that since Neptune had funded the half-day of kindergarten in 2001-2002 out of the revenues available to the school district in that year, the half-day of kindergarten could be funded with the same level

of revenues in 2002-2003. Mr. Forney denied that the DOE was required under *Abbott IX* to increase the amount of supplemental funding in 2002-2003 to include funding from the DOE for the half day of kindergarten. Based on this interpretation, the DOE never requested that Neptune provide to the DOE the actual and documented costs of the half-day of kindergarten in 2001-2002.

Testimony of Jami Fair-Davis, Acting Manager, Program Improvement Regional Center – Central.

Ms. Jami Fair-Davis, Acting Manager, Program Improvement Regional Center – Central, testified to the process by which Neptune's proposed budget was reviewed. First she reviewed Neptune's August 13, 2002 budget to determine whether the budget contained sufficient funds to fully implement the approved early childhood preschool program and the core components of whole school reform (WSR) in compliance with the letter from Assistant Commissioner MacInnes (P-4). After she looked at Neptune's budget submissions, she corresponded with Dr. Lake with any questions and concerns that she had. She identified her first e-mail to Dr. Lake asking about any losses in staff (R-14). She received a response from Dr. Lake (R-15). There was additional correspondence which addressed her concerns but did not clarify the situation. She then contacted Dr. Lake by telephone and worked through the checklist with him on September 26, 2002 (R-16). His responses are in parenthesis on the checklist. As a result of her conversation with Dr. Lake she came away with no concerns about the program being implemented in accordance with the Abbott requirements.

Ms. Fair-Davis also testified that she was aware of the testimony of Dr. Lake, that Neptune had adopted and implemented the Comer Model in all of its schools. Dr. Lake also testified at length on the need for certain programs and services for Neptune students to avoid impairment of the core elements of the Comer Model and the essential enhancements thereof. She testified that she became familiar with the Comer Model and with the School Reform Handbook. She explained that the Comer Model does not require specific positions, but rather requires compliance with principles. For example, the Comer Model requires social services but does not require a social worker. The Comer Model suggests that a half-time district facilitator be provided for each school.

Ms. Fair-Davis testified that she understood from discussions with Dr. Lake that Neptune had in place the core elements and essential enhancements that the DOE determined should be funded in 2002-2003. She admitted that she never discussed with the Comer developer what components Comer considered to be the core elements and essential enhancements of their whole school reform models at the elementary, middle and high school levels. Ms. Fair-Davis testified that the DOE determined the components that would be funded in the 2002-2003 school year. She filled out a checklist to determine that the core elements and essential enhancements had been adequately funded in Neptune. She admitted that she did not inquire of Dr. Lake whether the Comer Model had been customized by the developer in Neptune to meet the school district's particular needs or whether other core elements and essential enhancements were part of the Comer Model adopted by the District. Ms. Fair-Davis also did not assess whether Neptune had an educational need under *Abbott IX* for any programs and services that were outside the components listed by the DOE in its directives to Neptune.

Ms. Fair-Davis' testimony is that after a careful review of Neptune's budget, which included several communications with Dr. Lake, she confirmed that each of the core components and essential enhancements of WSR set forth in P-4 were maintained (R-16). Based on this, the DOE conditionally approved Neptune's budget. (P-6).

Ms. Fair-Davis testified that when she questioned Dr. Lake as to whether the facilitators had been retained by Neptune, he responded in the affirmative. Ms. Fair Davis then noted in her checklist under "Maintain WSR Facilitators" that "facilitators/teachers maintained in each elementary school." (R-17). She admitted that she made no effort to follow-up on her inquiry to determine how the "facilitators/teachers" could function as facilitators, nor did she take any action after she was notified in writing that the facilitators were functioning solely as teachers. (R-5).

Yut'Se Thomas, the Director of the DOE's Office of School Funding, was also called as a witness. However, her brief testimony was not relevant to the issues before me in this matter.

ISSUES TO BE DECIDED

Based on the arguments of the parties at the hearing and their respective post-hearing submissions, I believe that the issues in this matter are:

1. As a preliminary matter, does *Abbott ex rel. Abbott v. Burke,* 172 *N.J.* 294 (2002) (*Abbott IX*) utilize a different legal standard in school district appeals from the denial of funding for positions, programs and services "related to" the core elements of whole school reform (WSR) and essential enhancements thereof, and that if the school district is able to demonstate that programs and services address social and personal problems that impair learning, those programs and services must be funded?

2. Did Neptune establish its entitlement to additional *Abbott v. Burke* State Aid for or during the 2002-2003 school year?

3. Whether *Abbott IX* requires that districts receive funding from the DOE for the second half-day of kindergarten?

4. Whether the DOE's denial of Neptune's request to use its general fund surplus in excess of two percent for various purposes violated the legal standard established in *Abbott IX,* and is also arbitrary and capricious because it was based on a fundamental misreading of the fiscal year 2003 Appropriations Act.

LEGAL DISCUSSION AND ANALYSIS

I will now attempt to address the issues raised by the parties in this matter.

Issue 1: Does Abbott IX extend the school district's appeal right so as to require the funding of programs or services whose elimination or reduction damages, weakens or diminishes the core elements and essential enhancements of the whole school reform model?

Attorney for petitioner argues that in *Abbott ex rel. Abbott v. Burke,* 172 *N.J.* 294 (2002), or *Abbott IX,* the Supreme Court established a new legal standard for consideration of supplemental funding appeals. He asserts that the Court ruling held that *Abbott* districts had the right to appeal K-12 supplemental funding decisions "based on educational need related to impairment of the core elements of whole school reform and essential enhancements thereof..." (*Abbott IX* at 298). He argues that in deciding the DOE's motion to stay further increases in *Abbott v. Burke* funding, the Court refused to accept the DOE's narrow formulation and it held that a district could appeal the denial of funding for positions, programs and services "related to" and not limited to the core elements of whole school reform and essential enhancements thereof. He additionally argues that by including "impairment" in the standard, the Court indicated that the appeal right extends to programs or services whose elimination or reduction damages, weakens or diminishes the core elements and essential enhancements of the whole school reform model. Therefore, he contends that a school district's appeals rights in such proceedings are significantly broader.

Attorney for the DOE argues that such a standard would be contrary to previous *Abbott* decisions as well as the regulations implementing the *Abbott* decisions. He argues that the Supreme Court has clearly stated that *Abbott* districts must be able to demonstrate a need for supplemental programs, relying on *Abbott V*, 153 *N.J.* at 517, and that this standard is articulated in the regulations implementing the *Abbott* decisions. He asserts that petitioner herein must provide evidence demonstrating that the programs and positions were effective and efficient in addressing the particularized needs of Neptune's students, and relies on the fiscal year 2003 Appropriations Act which requires the Commissioner to ensure that all *Abbott* funds are used in an effective and efficient manner. He contends that Neptune must demonstrate that any particularized needs cannot be addressed through existing programs and positions, referring to *N.J.A.C.* 6A:24-5.2(a)(6) and (7) which require *Abbott* districts to demonstrate that a supplemental program or service does not duplicate or overlap with existing programs and services. He also asserts that an *Abbott* district must also demonstrate that the positions and programs, in previous school years, effectively addressed any particularized needs of its students, referring to *N.J.A.C.* 6A:24-5.2(a)(4) which requires *Abbott* districts to demonstrate that a supplemental program or service is documented by evidence that the program or service for success in the school and/or in other schools with similar characteristics and is proven to address

the identified need. Finally, respondent argues that an *Abbott* district must provide documentary evidence such as a "needs assessment" demonstrating that its students had particularized needs, referring to *N.J.A.C.* 6A:24-5.1 *et seq*. Respondent relies on *Board of Education of the City of Elizabeth v. New Jersey Department of Education,* OAL Dkt. NO. EDU 5574-01, decided November 19, 2001, in support of its position

I agree with the position being taken by respondent DOE as to this issue. The purpose of the Supreme Court's decision in *Abbott IX* was to address fiscal concerns raised by the State of New Jersey, not to deal with the substance of *Abbott* appeal procedures. There is no discussion in *Abbott IX* which may be construed as changing the regulatory framework established by the DOE for dealing with *Abbott* appeals. To construe *Abbott IX* to change the focus or framework for *Abbott* appeals would be contrary to the entire purpose and intent of *Abbott IX.* Its clear intent was to deal with fiscal exigencies in a manner that would not only permit the Department to deal with those exigencies, but also provide to school districts the right to appeal in order to deal with their individual needs. I **FIND** that the Supreme Court's order in *Abbott IX* does not relieve the appealing school district of its obligation and responsibility to comply with the requirements of duly adopted regulations in order to establish its entitlement to additional funding. In such cases, the determinations of the school district as to the particularized needs of its students are entitled to deference as long as such determinations are supported by the data or assessments required by the regulations. See, *Board of Education of the City of Elizabeth v. New Jersey Department of Education, supra.,* OAL Dkt. NO. EDU 5574-01, decided November 19, 2001.

Issue 2: Did Neptune establish its entitlement to additional Abbott v. Burke State Aid for the 2002-2003 school year?

Attorney for petitioner framed the issues related to funding as whether the DOE erroneously and unconstitutionally deprived Neptune of adequate Additional *Abbott v. Burke* State Aid to address critical needs of Neptune's disadvantaged students during the 2002-2003 school year?

The only witness to testify in support of the educational need for the requests that are

under consideration in this matter was Dr. Michael T. Lake, Neptune's Superintendent of Schools. He testified that the school district fully embraced whole school reform and that the school district prepared its initial budget through management team proposals. As a result of the DOE funding at a level equal to the prior year, the school district was required to make extensive reductions in WSR budgets in personnel, computers, textbooks, parent training and other related areas. Personnel reductions involved 17 paraprofessional positions, seven teaching positions, including one at the middle school, one at the high school and five elementary teachers, one career counselor in the middle school, one substance abuse counselor in the high school, two social workers, and two special education teachers.

Dr. Lake testified that the impact of these reductions on Neptune was disastrous and amounted to a step backwards. The paraprofessionals had been intended to assist regular education teachers with implementation of reading programs. The inability to hire special education teachers resulted in resource room class sizes increasing, but still being in compliance with regulations implementing the federal Individuals with Disabilities Education Act. The school district was also required to cancel orders for replacement science books for grades seven and eight, and a new K-5 spelling program to replace an existing 15-year-old program that he asserts does not conform to New Jersey's CCCS. The school district was also unable to make a final payment on the lease purchase of obsolete computer hardware and if such payment had been made, it would have reduced the need for State funding.

Dr. Lake testified that 10 of the 17 eliminated paraprofessionals are required by the Comer Model to address literacy problems in Neptune's elementary schools by providing small group and individualized instruction. As a result of the unavailability of these aides, Neptune has abandoned the grades 1-3 reading groups in the 2002-2003 school year. The other seven paraprofessionals were to be assigned to provide individualized support with readiness skills and other individualized instruction to the full-day kindergarten program, and that the principals at each of the elementary schools have reported the adverse impact on the development of kindergarten students as a result of the elimination of these positions, an increase in referrals to the Child Study Teams and an increase in discipline problems.

On cross-examination, Dr. Lake was questioned why the August 13, 2002 budget (R-12)

contains the same number of teaching positions for the 2002-2003 school year as the 2001-2002 school year. He indicated that while the position may remain in the budget there was no funding for the positions.

Dr. Lake testified that Neptune was required to eliminate five instructional facilitators at the elementary schools, one at the middle school and one at the high school. He testified that the elementary school facilitators are required by the Comer Model and are a core element of whole school reform (P-4 page 2). They are specially trained to assist classroom teachers and work closely with the staff, parents, social workers, guidance counselors and community, and provide early intervention for students with social, personal and academic difficulties. Without these facilitators, a core element of the Comer Model is not being properly implemented in Neptune.

However, when Dr. Lake was questioned about the facilitators, he responded that they had been retained by Neptune. He later explained that he understood the question to be whether the individuals who were to be assigned the duties of facilitators had been retained, not the positions of facilitators. He did not explain to Ms. Fair-Davis that the retained facilitators/teachers were solely performing teaching functions. However, Ms. Fair Davis then noted in her checklist under "Maintain WSR Facilitators" that "facilitators/teachers maintained in each elementary school." (R-17).

Respondent contends that Ms. Fair-Davis made no effort to follow-up on her inquiry to determine how the "facilitators/teachers" could function as full-time facilitators, as required by the Comer Model and the DOE, nor did she take any action after she was notified in writing that the facilitators were functioning solely as teachers. (R-5). Dr. Lake testified that career counselor is a required position under the Comer model, to provide necessary vocational and career information, to assist students to explore career opportunities, and to help students develop job-seeking skills.

Dr. Lake testified that Neptune previously had full-time substance abuse counselors at both the middle school and the high school to deal with students who are troubled and are substance abusers. There is now only one substance abuse counselor who must divide time between the middle school and the high school.

Dr. Lake testified that social workers are required under the Comer Model to address student needs, strengthen the connections between the community and the school, assist parents who need help and address student problems that impair attendance and learning readiness.

Dr. Lake testified to the need for two special education teachers, even though Neptune's resource room class sizes comply with the applicable requirements of the regulations implementing the IDEA.

Dr. Lake testified that Neptune's fifteen-year-old spelling program for grades K-6 and the current science textbook does not conform to the requirements of the CCCS, and that replacement textbooks are needed to implement the CCCS.

Dr. Lake testified that Neptune also requested funding to pay off a five-year lease purchase for computer hardware. He explained that by making this payment now, Neptune can not only save the State money and be more efficient, but also it will be able to initiate the necessary steps to replace out-dated computer equipment for classroom instructional purposes.

Despite the extensive detail provided in the testimony of Dr. Lake, I **FIND** that his testimony, while credible, was anecdotal and conclusory, and that petitioner supplied no specific facts or documentary evidence as required by the applicable regulations.

N.J.A.C. 6A:24-7.1(b) provides that an application for additional *Abbott v. Burke* State aid is required to include a demonstration that resources are insufficient to support all programs required by *Abbott V* or *Abbott VI,* and further reallocation would weaken the district's foundational education programs; and/or the board has determined that resources are insufficient to support Department-approved supplemental program(s) or service(s) and further reallocation would weaken the district's foundational education programs.

N.J.A.C. 6A:24-5.1(b) requires a determination whether a particularized need exists by first undertaking a needs assessment including:

1. An assessment of student achievement in meeting CCCS and identification of

particular populations of students not meeting such standards;

2. Where the CCCS are not being met, a determination that failure of those students is caused by particularized needs which are not capable of being addressed by existing WSR or required secondary programs at the school level, and an explanation as to why the existing WSR or required secondary programs are insufficient to meet the identified need(s);

3. An inventory of currently used programs and services targeted to the area(s) of need, together with an assessment of their effectiveness and efficiency in meeting such need, and an explanation as to why they are insufficient to meet the identified need(s); and

4. A review of community resources which could be used to address the identified area(s) of need and an explanation as to how they are being used or why they are not being used.

N.J.A.C. 6A:24-5.1(c) provides that if a particularized need is found, recommended appropriate supplemental programs and services are required to be documented by evidence that the programs and services have worked successfully in the school and/or in other schools with similar characteristics and proven to address the identified need, the proposed plan for the program is to be submitted to the Department for approval in accordance with the provisions of *N.J.A.C.* 6A:24-5.2. If resources are insufficient to support the supplemental programs or services approved pursuant to *N.J.A.C.* 6A:24-5.2 after all possible reallocation at the school and district levels have been made, the board shall apply to the Department for additional State aid in accordance with the requirements of *N.J.A.C.* 6A:24-7.

N.J.A.C. 6A:24-9.6(c) provides that in rendering decisions on such applications, the same standards shall apply as are set forth for Department review in the operative rules for the type of application in dispute. The burden of proof is on the petitioning party to demonstrate that these standards were met by the applicant notwithstanding the Department's determination to the contrary. The record on appeal consists of the documents and information submitted to the Department in support of the application and any additional information relied upon by the Department in making the determination at issue.

In this case, there is conflicting testimony as to the actual requirements of the Comer

Model which was adopted by Neptune. Dr. Lake testified that ten of the eliminated paraprofessionals are required by the Comer Model to address literacy issues. However, there is no indication that literacy issues cannot be addressed in some other manner. Both parties apparently agree that facilitators are required by the Comer Model, but it is entirely unclear to me whether the positions have been budgeted and funded, but not filled, or whether they have been eliminated. Dr. Lake testified that positions such as career counselors and substance counselors are required by the Comer Model, but Ms. Fair-Davis testified that what Comer requires is that social work and counseling be provided, but that specific positions are not required by the Comer Model. Dr. Lake testified that two additional special education teachers were necessary, but there is no justification for this alleged need.

In addition, there is no testimony or documentation of a needs assessment as specified as *N.J.A.C.* 6A:24-5.1(b). There was no evidence of an assessment of student achievement or identification of students not meeting CCCS. There is no evidence that the failure of those students not meeting CCCS is caused by particularized needs which are not being addressed by existing WSR or required programs. There is no documentation that the supplemental programs and services requested by the school district are programs and services that have worked successfully in the district or in other schools as required by *N.J.A.C.* 6A:24-5.19(c). There is no demonstration that existing resources are insufficient to support all programs required by *Abbott V* or *Abbott VI*, and that further allocation would weaken the district's foundation education programs, as required by *N.J.A.C.* 6A:24-7.1(b). As specified by *N.J.A.C.* 6A:24-9.6(c), the burden of proof is on the school district to demonstrate that the standards set forth in the regulations were met by the district notwithstanding the DOE's determination to the contrary. I **FIND** that the Neptune school district has failed to meet its required burden of proof in this matter so as to support its appeal.

ISSUE 3: Whether Abbott IX requires that Neptune receive funding from the DOE for the second half-day of kindergarten?

In *Abbott IX, supra,* 172 *N.J.* at 296, the Court stated that the DOE represented that full-day kindergarten and half-day pre-school programs for three and four-year-olds will be maintained and enhanced. The DOE requested the right to limit additional *Abbott v. Burke* State

Aid (supplemental funding) for 2002-2003 for each Abbott district to the expenditures contained in the 2001-2002 K-12 DOE-approved district budget as increased by actual and documented 2001-2002 expenditures for the second half of kindergarten, as modified by DOE to take into account 2001-2002 actual expenditures and available revenues based on the district's annual audits. The Court then ordered that the DOE's request for authorization to preclude any district appeals seeking supplemental funding for 2002-2003 in excess of 2001-2002 funding was

> . . . denied subject to the DOE's authority presumptively and preliminarily to establish districts' supplemental funding for 2002-2003 at the level of expenditures contained in the 2001-2002 K-12 DOE-approved district budget, as increased by actual and documented 2001-2002 expenditures for the second half of kindergarten, as modified by DOE to take into account 2001-2002 actual expenditures and available revenues based on the district annual audits.
>
> [*Id.* at 297.]

The critical issue is whether this language requires the DOE to assume the entire cost of funding for the second half-day of kindergarten.

There is no question that the DOE did not increase Neptune's 2002-2003 supplemental funding with documented expenditures for the second half of kindergarten as the school district argues it was obligated to do. The school district relies on what it asserts is the clear intent of the language that the DOE is responsible for funding of the second half-day of kindergarten.

In its reply, the DOE takes the position that the purpose of this language was to ensure that all *Abbott* districts would receive sufficient funding for full-day kindergarten. It asserts that while this is not the case in Neptune, the DOE had a concern that other *Abbott* districts' K-12 budget would only contain the cost for a half-day of kindergarten. This was not the case with Neptune because Neptune's K-12 DOE approved budget included the cost of full-day kindergarten. It asserts that the language in the Supreme Court order would ensure that every *Abbott* district receives sufficient funding for full-day kindergarten. It also asserts that the DOE's calculation of Neptune's additional *Abbott v. Burke* State Aid for 2002-2003 included the costs of full-day kindergarten.

The DOE argues that because of the method by which the DOE calculated Neptune's K-12 DOE approved budget, had the DOE increased the K-12 DOE approved budget by the costs of the second half-day of kindergarten, as suggested by petitioner, the DOE would have "double-counted" the costs of Neptune's second half-day of kindergarten. Accordingly, consistent with the Supreme Court's June 11th Order, the DOE accurately calculated Neptune's estimated Additional *Abbott v. Burke* State aid for the 2002-2003 school year as reflected in the Department's June 17, 2002 letter, P-47 Consistent with the Supreme Court's June 11, 2002 Order, the DOE modified Neptune's estimated Additional *Abbott v. Burke* State aid for 2002-2003 by Neptune's 2001-2002 actual expenditures and available revenues based on the district annual audits. *See* P-7.

It is not disputed that the Supreme Court's order of June 11, 2002, requires the DOE to establish districts' supplemental funding for 2002-2003 at the same level of expenditures contained in the 2001-2002 K-12 DOE approved district budget. However, the order also requires that districts' supplemental funding for 2002-2003 be increased by actual and documented 2001-2002 expenditures for the second half of kindergarten. This portion of the order, standing alone, requires that districts receive funding from the DOE for the second half-day of kindergarten, and makes no express or implied reference to the situation where a school district may have provided its own funding for this purpose in the prior school year.

The only question is what is the effect of the final clause of that sentence, ". . . as modified by DOE to take into account 2001-2002 actual expenditures and available revenues based on the district's annual audits; . . ." In my opinion, this additional language is inserted simply to make clear that if actual expenditures were less than the amounts budgeted or appropriated, and if available revenues exceeded the amounts anticipated based on the district's annual audits, the funding level would be reduced to reflect a reduction in actual expenditures or an increase in available revenues. To my mind, and in my interpretation, this additional clause has no effect of the directive of the Supreme Court to the DOE to increase the supplemental funding of school districts for 2002-2003 by an amount required to cover the cost of the second half of kindergarten. The fact that a school district may have budgeted and provided for the second half-day of kindergarten in the 2001-2002 school year is irrelevant. Therefore, I **FIND**

and **CONCLUDE** that the respondent is obligated to pay to the petitioner herein supplemental funding for 2002-2003 in an amount reflecting the actual and documented 2001-2002 expenditures for the second half of kindergarten.

It is noted that neither the DOE nor Neptune supplied the actual and documented amount of expenditures for the second half of kindergarten. Thus, the parties should be required to calculate this amount in order to carry out the directive of the Supreme Court.

ISSUE 4: Whether the DOE's denial of Neptune's request to use its general fund surplus in excess of two percent for various purposes violated the legal standard established in Abbott IX and is also arbitrary and capricious because it was based on a fundamental misreading of the fiscal year 2003 Appropriations Act.

Neptune sought approval to use its general fund surplus in excess of two percent for science textbooks, the rehiring of ten paraprofessionals, the rehiring of two social workers, the purchase of new K-5 spelling programs, and for acceleration of the final payment of the lease/purchase agreement for computer hardware. This request was denied based on language in the Fiscal Year 2003 Appropriations Act.

Neptune argues that the plain language of the Act only requires that, in setting the final amount of *Abbott v. Burke* supplemental aid, the Commissioner "shall consider" among other things, "a reallocation of the district's undesignated general fund balances in excess of two percent." Neptune argues that the Legislature did not require the Commissioner to reallocate the undesignated fund balance if the district needed the funds for educationally needed programs and services under *Abbott IX.* Therefore, Neptune argues that it was not only appropriate, but mandated by *Abbott IX* for the DOE to authorize the district to utilize the general fund excess for the positions, programs, and services needed in Neptune. Thus, Neptune asserts that the DOE's refusal violated the legal standard established in *Abbott IX* and is also arbitrary and capricious because it was based on a fundamental misreading of the fiscal year 2003 Appropriations Act.

I have previously found that *Abbott IX* does not create a new legal standard, and that, as specified by *N.J.A.C.* 6A:24-9.6(c), the burden of proof is on the school district to demonstrate

that the standards set forth in the regulations were met by the district's funding application, notwithstanding the Department's determination to the contrary. I also found that Neptune failed to meet its required burden of proof in this matter. These findings also applies to Neptune's request to utilize the general fund excess over two percent for the positions, programs, and services needed in Neptune.

With respect to Neptune's contention that the DOE's refusal is also arbitrary and capricious because it is based on a fundamental misreading of the fiscal year 2003 Appropriations Act, it is necessary to review that Act. The 2003 Appropriations Act provides:

> The Commissioner of Education shall not authorize the disbursement of funds to any "Abbott district" until the commissioner is satisfied that all educational expenditures in the district will be spent effectively and efficiently in order to enable those students to achieve the core curriculum content standards. The commissioner shall be authorized to take any necessary action to fulfill this responsibility, including but not limited to, the adoption of regulations pursuant to P.L.1968, c.410 (C.52:14B-1 et seq.), related to the receipt and/ or expenditure of State aid by the "Abbott districts" and the programs, services and positions supported thereby. * * * .
>
> The amount appropriated hereinabove for Additional Abbott v. Burke State Aid will provide additional resources to "Abbott districts" and will be distributed by district in an amount that shall not exceed the amount necessary for the district to maintain spending for its K-12 programs at the level authorized and expended by each district in 2001-2002. Before the Commissioner of Education establishes the final district award, he shall first review the budgets and any other financial statements, including the annual audit filed pursuant to N.J.S. 18A:23-1, of each "Abbott district" that has requested Additional Abbott v. Burke State Aid. Any district that fails to submit the required documentation or fails to submit its annual audit by November 15, 2002 may have its State aid withheld upon the commissioner's request to the Director of the Division of Budget and Accounting. In establishing the final award amount, the commissioner shall consider all of the district's available resources and any appropriate reallocations, including, but not limited to, a reallocation of the district's undesignated general fund balances in excess of two percent.

The clear intent of the foregoing statutory language is to require the Commissioner to review all of the resources of Abbott districts and to be satisfied that all educational expenditures in such districts will be spent effectively and efficiently in order to enable students to achieve the CCCS. The Act authorizes the Commissioner to take any necessary action to fulfill this responsibility. This includes taking into consideration all of the district's available resources and making any appropriate reallocations, including a reallocation of the district's undesignated general fund balances in excess of two percent. In this case, I **FIND** that the actions of the DOE in reallocating Neptune's undesignated general fund balances in excess of two percent was entirely consistent with the intent and purpose of the 2003 Appropriations Act, and should be **AFFIRMED**.

DECISION AND ORDER

Based upon the foregoing findings and conclusions, it is hereby **ORDERED** pursuant to *Abbott ex rel. Abbott v. Burke*, 172 *N.J.* 294 (2002), that respondent DOE is obligated to pay to the petitioner herein supplemental funding for the 2002-2003 school year in an amount reflecting the actual and documented 2001-2002 expenditures for the second half-day of kindergarten. In order to implement this determination, the parties are **ORDERED** to calculate the amount of petitioner's actual and documented 2001-2002 expenditures for the second half-day of kindergarten in order to carry out the directives of the Supreme Court. It is further **ORDERED** that, with the exception of the funding for the second half-day of kindergarten, petitioner has failed to meet its required burden of proof to establish its entitlement to additional *Abbott v. Burke* State Aid for the 2002-2003 school year, and its appeal as to this is hereby **DENIED** and **DISMISSED**. It is further **ORDERED** that respondent's denial of petitioner's request to use its 2001-2002 general fund surplus in excess of two percent for various purposes did not violate either *Abbott IX* and is not arbitrary and capricious, but is consistent with the fiscal year 2003 Appropriations Act, and is hereby **AFFIRMED,** and petitioner's appeal is hereby **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 25, 2003
DATE

JOSEPH F. MARTONE, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

6/26/03
DATE

Mailed to Parties:

JUL 1 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE,
OFFICE OF ADMINISTRATIVE LAW

mph

APPENDIX:

LIST OF WITNESSES:

For petitioner:

David A. Mooij
Dr. Michael T. Lake

For respondent:

Glenn Forney
Jami Fair-Davis
Yut'Se Thomas

LIST OF EXHIBITS:

For petitioner:

P-1 Proposed Neptune School District Budget for 2002-2003, page A2

P-2 The following exhibits attached to P-2 were marked in evidence:

Exhibit 12	DOE guidance memo dated March 11, 2002
Exhibit 14	DOE memo dated March 18 2002
Exhibit 15	DOE memo dated March 18, 2002
Exhibit 17	Neptune Board of Education Budget Resolution
Exhibit 18	Memo from Assistant Commissioner MacInnes dated March 26, 2002

P-3 Proposed Neptune School District Budget for 2002-2003, April 22, 2002, page A2

P-4 Letter from Assistant Commissioner MacInnes to Dr. Lake, dated June 17, 2002

P-5 Proposed Neptune School District Budget for 2002-2003, August 13, 2002, page A2

P-6 Letter from Assistant Commissioner MacInnes to Dr. Lake, dated September 30, 2002 – budget approval letter

P-7 Assistant Commissioner MacInnes' letter to Dr. Lake, dated January 6, 2003

P-9 Dr. Lake letter to Assistant Commissioner MacInnes, dated June 21, 2002

P-10 Dr. Lake letter to Assistant Commissioner MacInnes, dated July 22, 2002

P-11 Dr. Lake letter to Assistant Commissioner MacInnes, dated November 19, 2002

P-12 Report of the Secretary to the Board of Education for the period ending February 28, 2003

P-13 SDP Implementation Life Cycle (Comer Model)

P-14 Whole School Reform Budget documents

For respondent:

R-1 Department of Education Expenditure Report, dated April 16, 2003

R-2 Annual Audit, Schedule B3, page 1

R-3 Proposed Neptune School District Budget for 2002-2003, August 13, 2002, page A3

R-4 Supplemental Certification of Michael T. Lake, dated May 23, 2002

R-5 Dr. Lake letter to Ms. Fair-Davis, dated September 23, 2002

R-6 E-mail from Dr. Lake to Ms. Fair-Davis, dated September 13, 2002

R-7 Proposed Neptune School District Budget for 2002-2003, August 13, 2002, page A4

R-8 School District's Supporting Documentation for Technology Lease Purchase Obligation

R-9 Printout of Excel spreadsheet setting forth calculations by DOE implementing *Abbott IX*

R-10 Audit Questionnaire for 2001-02 for Neptune

R-11 Components of school district budget, dated August 13, 2002

R-12 Components of school district budget for 2002-2003

R-13 Face page of report of the secretary to the Board of Education for period ending February 28, 2003

R-14 E-mail from Ms. Fair-Davis to Glenn Forney, dated August 30, 2002

R-15 Letter from Dr. Lake to Ms. Fair-Davis, dated September 4, 2002

R-16 District Budget Review Checklist as of September 26, 2002

OAL DKT. NOS. EDU 727-03 AND EDU 728-03 (CONSOLIDATED)
AGENCY DKT. NOS. 46-2/03 AND 122-4/02

BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. In accordance with *N.J.A.C.* 1:1-18.4 and extensions duly requested and granted, exceptions were filed by both the Board of Education (Board) and the Department of Education (Department), as were replies by each to the other's exceptions.[1]

In its exceptions, the Board first contends that the Administrative Law Judge (ALJ) erred in failing to recognize that the Department was required to "level fund" the district, that is, to establish presumptive and preliminary supplemental funding for 2002-03 at the amount of supplemental funding provided in 2001-02. Had the Department done so, the Board observes, its presumptive aid amount would have been $6,518,318 rather than $5,844,432. (Board's Exceptions/Reply at 6-7)

The Board further argues that the ALJ erred in concluding that *Abbott IX, supra*, did not establish a new legal standard for 2002-03 supplemental funding requests. The ALJ should not, the Board contends, have applied the "particularized need" standards of

[1] The Board, with the consent of the Department, incorporated its exceptions and reply into a single submission.

regulations expressly suspended for 2002-03 school year, since it is impossible both "to have a time-out from the Abbott K-12 regulatory requirements for one year and to assume that those very same requirements are still in place." Moreover, the Board continues, the ALJ failed to recognize that the Court imposed a *more* rigorous burden on Abbott districts for the 2002-03 school year, not less; under the Court's order, districts were *not* permitted to show student need for an unlimited breadth of supplemental programs and services, but were instead restricted to showing an *educational* need related to *impairment of essential aspects of a district's whole school reform model.* There is no basis, the Board avers, for the ALJ to have substituted the suspended regulatory framework of "particularized need" for the Court's clearly expressed standard, and the Commissioner should, with the exception of the Board's claim for grade 7-8 replacement science books and a new K-5 spelling program, which should be granted directly on the present record, remand this matter to the ALJ for findings under the correct standard. (*Id.* at 7-10, quotation at 7-8)[2]

For its part, the Department agrees with most of the ALJ's findings and conclusions, but takes exception to that portion of the Initial Decision holding that the Department is required to provide supplemental funding to the Board in an amount reflecting actual and documented 2001-02 expenditures for the second half of full-day kindergarten. As it did before the ALJ, the Department argues that it based its preliminary supplemental aid calculation on a budget which included full-day kindergarten expenditures, so that it would amount to "double-counting" to give the Board additional aid based on such expenditures. The Department further notes that it modified its preliminary calculation based on the annual audit of the district's K-12 budget, so that actual and documented 2001-02 kindergarten expenses have, in fact, already been taken into account in the district's aid entitlement.

[2] The Board did not take exception to the conclusions of the Initial Decision with respect to the excess surplus question. (Issue 4, Initial Decision at 26-28)

Finally, the Department cites to *Sloan v. Klagholz*, 342 *N.J. Super.* 385, 395-96 (App. Div. 2001) for the proposition that retroactive monetary relief should not be granted where such relief would have no impact on the school year in question. (Department's Exceptions at 1-6)

In reply to the Board's exceptions, the Department first posits that the Supreme Court in *Abbott IX, supra,* explicitly authorized supplemental funding for 2002-03 at the level of *expenditures* contained in the 2001-02 approved K-12 district budget, *not* at the level of 2001-02 *aid*; therefore, "level funding" is not required in the sense claimed by the Board, and the Department's calculation was accurate. (Department's Reply at 1-2)

The Department next addresses the Board's contention that the ALJ used the wrong standard of proof in assessing the Board's claims for increased aid. While agreeing that the regulations incorporating "particularized need" requests were, in fact, suspended for the 2002-03 school year, the Department contends that the burden of proof set forth in those rules is nonetheless relevant to the instant appeal because the more rigorous standard established by the Court requires *at least* as great a showing as was required in prior years. Specifically, under applicable Court and legislative directives, programs and positions to be funded in 2002-03 must be demonstrated effective and efficient in addressing students' educational needs, a showing which requires at a minimum that the requested elements not duplicate or overlap with existing programs and services, N.J.A.C. 6A:24-5.2(a) (6) and (7), and that they be shown to have been successful based on documented prior experience, N.J.A.C. 6A:24-5.2(a)(4). As found by the ALJ, the Department continues, the Board submitted no documentary evidence meeting this standard, offering instead anecdotal and conclusory testimony relying essentially on a belief that positions and programs should continue in 2002-03 because they existed in 2001-02. (*Id.* at 2-4)

The Department finally objects to the Board's request that this matter be remanded to the OAL, contending that such a remand would be a waste of time and resources because a complete factual record has already been developed. The Department then analyzes in turn, under the standard proposed by the Board, four major areas of claimed need--paraprofessionals, social workers, grade 7-8 science and K-5 spelling programs, and a lease purchase payment for computer hardware--and concludes in each case that the evidence presented fails to demonstrate impairment of core components and essential enhancements of whole school reform. Thus, the Department urges, even if the Commissioner were to adopt the Board's suggested standard, the Board cannot meet its burden of proof. (*Id.* at 4-11)

In reply to the Department's exceptions, the Board counters that the Court did not state that expenditures for the second half-day of kindergarten were merely to be included in a district's supplemental funding calculation; rather, it stated that the supplemental funding amount must be increased by actual and documented expenditures for this purpose. Additionally, the Board proffers, *Sloan, supra*, is inapposite in the present matter because the Court has established specific appeal processes for Abbott disputes, which nowhere restrict districts' entitlement to retroactive relief once disputes have been resolved; indeed, accepting the Department's argument would mean that an Abbott district's attempt to secure supplemental funding could be thwarted simply by the Department's extension of the appeal process into the following school year, thereby undermining the entire Abbott appeal framework. (Board's Exceptions/Reply at 10-12)

Upon his own review and consideration, the Commissioner first concurs with the ALJ that the Department correctly calculated the Board's level of presumptive aid. Like the ALJ, the Commissioner finds that the Court in *Abbott IX, supra,* specifically authorized preliminary supplemental funding for 2002-03 at the level of *expenditures* contained in the

prior year's approved K-12 district budget, expressing neither a promise nor an expectation that districts would necessarily receive the same dollar amount of aid as in the preceding year.

The Commissioner further concurs that nothing in *Abbott IX* suggests that the Court intended, as part of its one-year suspension of the overall Abbott regulatory framework, to invalidate the established standard of proof for supplemental funding requests. Rather, as found by the ALJ, the Court agreed to allow a period of maintenance and re-assessment in light of State fiscal exigencies and questions about the efficacy of certain remedial measures embodied in the regulations, but was unwilling completely to foreclose Abbott districts from seeking to demonstrate a need for State funding above presumptive levels:

> And the DOE having further requested the ability to preserve the "core elements" of whole school reform as well as certain enhancements of the Success-for-All (SFA) model of whole school reform "tied directly to improving curriculum and instruction under the [Core Curriculum Content Standards] CCCS,"***but to afford districts flexibility to reduce, eliminate or limit growth of other whole school reform enhancements such as technology coordinators and security coordinators,***to authorize districts to eliminate positions and make staffing modifications in various programs such as technology programs, alternative schools, accountability programs, school-to-work and college transition, and to authorize districts to make educational judgments about retaining certain specified positions such as media/ technology coordinator, technology coordinator and drop-out prevention specialist***;
>
> And the Court, although acknowledging the State's fiscal crisis and the motivation underlying defendants' proposal to strictly limit 2002-2003 supplemental funding to 2001-2002 adjusted levels, and although accepting for 2002-2003 budgetary purposes the discretion of the Commissioner of Education preliminarily to set Abbott Districts supplemental funding at such levels but being unwilling to prejudge the merits of an Abbott district's need-based appeal seeking a higher level of supplemental funding;
>
> It is***ORDERED that DOE's request for one year to afford districts flexibility to eliminate, reduce, or limit growth of certain whole school reform enhancements as specified, to eliminate positions and make staffing modifications in various needs-based programs as specified, and to make educationally appropriate decisions about retention of certain positions as specified be and the same hereby is granted subject to the districts' right of appeal based on educational need related to impairment of the core elements of whole school reform and essential enhancements thereof;

> And it is FURTHER ORDERED that the DOE is authorized to impose educationally-appropriate limits on the categories for which needs-based funding requests may be submitted;
>
> And it is FURTHER ORDERED that the DOE may suspend for one year the regulatory requirement for middle schools and high schools to implement whole school reform models, may permit voluntary implementation of models in such schools, and may suspend for one year formal evaluation of whole school reform.
>
> (*Abbott IX* at 296-98, citations omitted)

As the above passage demonstrates, contrary to the Board's contention, the Court did *not* disavow the principles embodied in the rules governing requests for supplemental funding, but, instead, acted to limit the context within which such requests could be made and granted. Within the framework constructed by the Court, then, the ALJ was correct in applying established standards of demonstrated need, effectiveness and efficiency in judging the proofs presented by the Board. For the reasons stated in the Initial Decision, and for the additional reasons stated in the Department's exceptions and post-hearing brief, the Commissioner finds those proofs insufficient to meet the Board's requisite burden, whether expressed specifically in terms of "particularized need" or recognized as inherent in the Court's requirement for "educational need related to impairment of the core elements of whole school reform and essential enhancements thereof."

The Commissioner also agrees with, and adopts in its entirety, the ALJ's discussion on allocation of surplus in excess of 2%. Like the ALJ, the Commissioner finds it entirely proper and appropriate for the Department to have directed reallocation of such funds to support core purposes, rather than permit the Board to seek additional aid for such purposes while using excess surplus for supplemental services not meeting requisite standards of demonstrated need, efficacy and efficiency.

In one area, however, the Commissioner does differ with the analysis and conclusion of the ALJ. On the question of additional State aid for the second-half of full-day kindergarten, so as to cover its entire cost, the Commissioner reads the controlling language of the Court to require not that a district's presumptive amount of aid will be increased by the dollar amount of prior-year expenditures, but that these expenditures must be included in the base budget on which aid is reckoned. The Court directed:

> [T]he DOE's request for authorization to preclude any district appeals seeking supplemental funding***is denied subject to the DOE's authority presumptively and preliminarily to establish districts' supplemental funding for 2002-2003 at the level of expenditures contained in the 2001-2002 K-12 DOE approved district budget, as increased by actual and documented 2001-2002 expenditures for the second half of kindergarten, as modified by DOE to take into account 2001-2002 actual expenditures and available revenues based on the district annual audits***. (*Abbott IX* at 297)

To read this language in the manner suggested by the Board and the ALJ would, as claimed by the Department, result in "double-counting" full-day kindergarten costs for aid purposes, a result surely not intended by the Court. As the Commissioner has found elsewhere, the Court has not held that required Abbott programs must be funded *exclusively* by the State, but rather that the State must ensure that sufficient monies are available to fully fund required programs; thus, in the present context, the State's clear obligation is to provide additional funds so as to bring district revenues to the level necessary to support expenditures, including expenditures for full-day kindergarten, at 2001-02 levels as required by the Court. While the Commissioner, like the Court, recognizes adequate funding as critical to achievement of a thorough and efficient system of public education in Abbott districts, he also recognizes, as did the Court, that such funding is a shared responsibility between the State and the local district, and that he has an obligation to ensure that State and local resources are allocated as efficiently and effectively as possible in meeting that responsibility. *Board of Education of the Town of Phillipsburg, Warren County v. New Jersey State Department of Education*,

decided September 25, 2003; *Board of Education of the Township of Pemberton, Burlington County v. New Jersey State Department of Education*, decided September 25, 2003; *Board of Education of the Township of Neptune, Monmouth County v. New Jersey State Department of Education*, decided September 25, 2003; *Board of Education of the City of Millville, Cumberland County, v. New Jersey State Department of Education*, decided September 25, 2003; and *Board of Education of the City of Passaic, Passaic County v. New Jersey State Department of Education*, decided September 25, 2003.

Accordingly, for the reasons expressed herein, the Initial Decision of the Office of Administrative Law is adopted except insofar as it finds that additional aid is required to fund the second half-day of kindergarten. The Petition of Appeal, therefore, is dismissed in its entirety.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 10/09/03

Date of Mailing: 10/10/03

[3] Pursuant to *P.L.* 2002, c. 38, "*Abbott*" determinations are final agency actions appealable directly to the Appellate Division of the New Jersey Superior Court.

574-03

C.J.N. AND D.W.N., on behalf of minor child, C.N.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning parents sought reversal of the NJSIAA's decision not to allow their son, who attends private school, to play on a high school tennis team in the Cherry Hill Public School District. Petitioners sought waiver of the provisions of Article V, Section 1, of the NJSIAA Bylaws.

The NJSIAA determined that petitioners' son, C.N., who has been diagnosed with Attention Deficit Disorder (ADD), was not eligible to play tennis at Cherry Hill West since petitioners, without involvement by the Cherry Hill Child Study Team, unilaterally determined to place their child in a private school that was neither a Department of Education approved school nor a member of NJSIAA.

The Commissioner found that petitioners were provided the due process to which they were entitled; that the NJSIAA made every effort to provide a full, fair and timely hearing by the Eligibility Appeals Committee; and that NJSIAA's rule was not applied in an inconsistent manner. Since no student, nonpublic or public, attending one school is permitted to play sports for another school, unless assigned by that school to a vocational/technical school, or as a result of the Child Study Team designation of Individualized Educational Plan, the exception requested could affect all NJSIAA member schools and, thus, create situations where proper oversight and administration of NJSIAA rules would be impossible. Moreover, the Greenberg Academy, where C.N. is enrolled, has no relationship whatsoever to the NJSIAA or the Cherry Hill Child Study Team or the Cherry Hill School District. The Commissioner found that the NJSIAA's decision to deny C.N.'s request for waiver of the provisions of Article V, Section 1, of the NJSIAA Bylaws was not arbitrary, capricious or unreasonable. Petition was dismissed.

October 9, 2003

AGENCY DKT. NO. 210-6/03

C.J.N. AND D.W.N., on behalf of minor child, C.N.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	
RESPONDENT.	:	

For Petitioners, Frank P. Cavallo, Jr. (Parker, McCay & Criscuolo, P.A.)

For Respondent, Michael J. Herbert, Esq. (Herbert, Van Ness, Cayci & Goodell)

This matter came before the Commissioner of Education on June 9, 2003, by way of a Petition of Appeal seeking reversal of the final decision of the New Jersey Interscholastic Athletic Association (NJSIAA) not to allow petitioners' son, who attends private school at the Center for Education, to play on a high school tennis team in the Cherry Hill public school district. Briefs and the underlying record of proceedings before the NJSIAA were duly submitted in accordance with the provisions of *N.J.A.C.* 6A:3-7.1 *et seq.*, and the record on appeal closed on August 1, 2003.

The material facts and procedural history of this matter are as follows: C.N. is domiciled in the Cherry Hill School District and attended the public schools of the district from Kindergarten through grade nine. By his parents' account, his attendance and interest began to deteriorate in eighth grade, and worsened through ninth grade. C.N.'s pediatrician and a Neuro-Cognitive Learning Consultant referred by the

pediatrician concluded that C.N. suffered from Attention Deficit Disorder (ADD)[1] and recommended that C.N. be provided with modifications and accommodations under Section 504 of the Rehabilitation Act of 1973 (Section 504). Petitioners met with school district officials to discuss C.N.'s situation, but were dissatisfied with the results, which petitioners state were limited to seating C.N. in the front row of class when he did attend school and suspending him when he did not. Accordingly, at the beginning of tenth grade, in the fall of 2002, petitioners unilaterally decided to place C.N. at the Center for Education (Center), where the ADHD students were being educated in a small-class, individualized environment and the Section 504 accommodations recommended for C.N. were available, and where C.N. has completed eleventh grade and reportedly improved substantially in both attendance and attainment; at no time did petitioners seek to have C.N. placed by the school district, in the Center or elsewhere, since they believed C.N.'s situation required immediate resolution. When C.N. then sought to participate on the Cherry Hill High School West Tennis Team during the 2002-03 school year, his request was denied by the local school district based on its obligation to abide by operative rules of the NJSIAA. On or about March 3, 2003, a request for eligibility waiver was made to NJSIAA, supported by a letter from the principal of Cherry Hill High School West, and its denial was unsuccessfully appealed to the NJSIAA Eligibility Appeals Committee. The Committee ruled at its meeting of March 5, 2003 and memorialized its decision in a written document on March 13, 2003, which constitutes the final decision now before the Commissioner on appeal.

[1] The record is not entirely clear as to whether C.N.'s diagnosis was Attention Deficit Disorder (ADD) or Attention Deficit Hyperactivity Disorder (ADHD), but that distinction is immaterial to the determination herein.

PETITIONERS' POSITION

Initially, petitioners assert that the NJSIAA acted arbitrarily and capriciously when it denied C.N.'s request to participate on the tennis team at Cherry Hill West High School. (Petitioners' Brief in Support of Appeal at 6-7) Citing *Florence County School District Four v. Carter*, 510 *U.S.* 7, 12 (1993); *Bernardsville Board of Education v. J.H.*, 42 *F.*3d 149 (3rd Cir. 1994); and *School Comm. of Burlington Mass. v. Department of Education,* 471 *U.S.* 359 (1985), and pointing to *N.J.A.C.* 6A:14-2.10 and the Individuals with Disabilities Education Act (IDEA), 20 *U.S.C.S.*, 1400 *et seq.*, petitioners argue that parents have the right to place their child in a private school without the consent of their local board of education. (*Id.* at 7) Petitioners point out that a student placed in a private school setting by the Cherry Hill West Child Study Team, or through assignment to a vocational school program, would be permitted to participate in interscholastic sports for Cherry Hill West even where the private school placement resulted in enrollment in a school that is not a member of NJSIAA, because the student remains under the jurisdiction of the assigning school. (*Ibid.*) Thus, petitioners argue, NJSIAA's decision denying petitioners' request effectively acted to punish petitioners for electing not to request public school payment for their son's education or to wait over three months for him to be placed in an institution which may not have achieved success comparable to what has occurred at the Center for Education. (*Id.* at 8)

Secondly, petitioners submit that the NJSIAA violated the Rehabilitation Act of 1973, which provides that no otherwise qualified individual with a disability shall be excluded solely by reasons of his or her disability from participation in, or be denied the benefits of, any program or activity receiving federal financial assistance. (*Id.* at 9)

Citing numerous federal court cases, petitioners maintain that NJSIAA is subject to the Rehabilitation Act and, therefore, required to provide a handicapped individual the opportunity to participate in its programs. (*Id.* at 11) Petitioners contend that C.N. is excluded form participation in the Cherry Hill West High School program solely because of his handicap, since, if C.N. were not handicapped, he would remain a student at Cherry Hill West High School and be entitled to participate in the tennis program. (*Id.* at 12) Therefore, petitioners conclude, the NJSIAA decision must be reversed as violative of the Rehabilitation Act of 1973.

NJSIAA'S POSITION

In presenting its "Statement of Facts," the NJSIAA avers that, contrary to petitioners' assertions that they were required to place C.N. themselves because the Child Study Team was not dealing productively with C.N.'s disability, the hearing before NJSIAA showed otherwise. Citing to testimony and exhibits, NJSIAA contends the school, in fact, carefully developed a plan under Section 504 of the Federal Rehabilitation Act to provide special assistance to C.N., and that the school principal opined that C.N.'s problems were "not so much what was occurring in the classroom, but the travel time which C.N. was experiencing in going from various buildings in a complex housing 1,600 students." NSJIAA further notes that petitioners complained of class sizes, but rejected the district's suggestion of an alternative school having an enrollment of 49 students; and that petitioners' testimony at hearing clearly established the desire not to have their son "stigmatized" by classification as the basis for their reluctance to work with the district child study team to develop an Individualized Education Plan (IEP) for C.N. Finally, NJSIAA notes that the school, through its Principal, recognizes full well

that it can have nothing to do with students not enrolled in the system, yet it somehow believes that participation on the school tennis team should nonetheless be allowed. (NJSIAA Brief at 1-3, quotation at 1)

Citing Dam Jin Koh and Hong Jun Kim v. NJSIAA, 1987 *S.L.D.* 259, *Brady v. NJSIAA*, 96 *N.J.A.R.*2d (EDU) at 980, and *N.J.A.C.* 6A:3-7.4, the NJSIAA points out that the Commissioner's scope of review in NJSIAA determinations is an appellate one; thus, the Commissioner may not overturn an eligibility decision of the NJSIAA absent a finding that it applied its rules in a patently arbitrary, capricious or unreasonable manner. (*Id.* at 5) The NJSIAA asserts that petitioners cannot meet their burden of demonstrating that the NJSIAA Bylaws, Article V, Section 1, or its application violated any federal or state laws or was arbitrary or unreasonable. (*Ibid.*)

Initially, the NJSIAA maintains that this appeal does not implicate any rights under federal law. The Association avers that the federal court decisions cited by petitioners have absolutely no application to the facts of this case, where the challenge is to the requirement that a child, whether disabled or not, be enrolled in a member school to participate in interscholastic sports, since none of the cited decisions supports the right of parents to forsake a school's academic program, while at the same time requiring that school to include their child in its athletic program. (*Id.* at 5-6) The NJSIAA maintains that it has adopted rules, as set forth in its 2002-2003 *NJSIAA Handbook*, to assure that disabled students are fully accommodated to participate in four seasons in any sport, as demonstrated by: 1) the provision that any handicapped or classified student is not required to comply with the Academic Credit Rule and 2) the provision permitting disabled students to participate in interscholastic sports in the seventh and eighth grades

to make certain that they involve themselves in four seasons of a sport before turning 19. (*Id.* at 6-7) The NJSIAA also points out that, although home-schooled students are not eligible to participate in interscholastic sports, a student placed on home instruction under the auspices of the school district is eligible to participate in that district's sports program. (*Id.* at 7)

Secondly, the NJSIAA contends that C.N. participated on the Cherry Hill West tennis team while attending that school and there is no allegation that his disability in any way impeded his participation in interscholastic sports at this member school. (*Ibid.*) The NJSIAA maintains that, if C.N. had remained a student at Cherry Hill West, or if he had been placed by the Cherry Hill School District in an education setting under the district's jurisdiction, then C.N. could have continued to participate in the Cherry Hill School District's interscholastic program; but, instead, his parents decided to place him in a private school outside the Cherry Hill School district's jurisdiction. (*Ibid.*) Thus, C.N.'s inability to participate in interscholastic sports has not been caused by his disability, but, rather, was due solely to a parental decision, made "without any pressure or compulsion from Cherry Hill West or from the NJSIAA," to educate C.N. in a private school. (*Id.* at 7-8)

Additionally, the NJSIAA points out that the Greenberg Academy has no relationship whatsoever to the NJSIAA or the Cherry Hill School District, since the Greenberg Academy has no sports program, is not a member of the NJSIAA, and C.N. was placed at the Greenberg Academy without involvement by the Cherry Hill Child Study Team or the Cherry Hill School District. (*Id.* at 8) The NJSIAA also notes that the NJSIAA is a voluntary association of schools subject to an internal governance

structure established by the member schools themselves. (*Ibid.*) Thus, the NJSIAA posits, the NJSIAA can only function through its member schools who are obligated to administer interscholastic sports at the local level and are responsible for assuring that students are given a physical examination, are under the supervision of certified coaches and adhere to the eligibility standards of the NJSIAA. (*Id.* at 9) The NJSIAA also sets forth the position that Article V, Section 1, of the Bylaws of the NJSIAA, which was adopted in 1978 and requires that a student must be enrolled in a NJSIAA member school to participate in the school's interscholastic athletic program, serves several legitimate interests of the NJSIAA and its member schools, as follows:

1. Each member school is responsible for properly administering and enforcing all NJSIAA rules and regulations, including eligibility rules, to its own students; allowing students to attend one school and compete athletically for another would make proper oversight and administration of rules and regulations impossible.

2. Sports offered by member schools are an integral part of the overall academic and extracurricular program provided for each student enrolled in that school.

3. Allowing students to participate on the athletic teams of other schools would discourage the initiation of appropriate athletic programs by the schools attended by the students and may even encourage schools in difficult financial situations to eliminate programs as a cost saving measure if their students are free to participate in that activity at another school.

4. Allowing a non-enrolled student to participate in a member school's athletic program would wrongfully deny an enrolled student the opportunity to participate in that athletic program at his or her own school. (*Id.* at 10-11)

Moreover, the NJSIAA asserts that *E.L. and N.L., on behalf of R.L. v. NJSIAA,* decided by the Commissioner, August 31, 1998, is controlling; there, as here, petitioning parents voluntarily placed their children in a private school and claimed that

provisions of Article V, Section 1, of the NJSIAA Bylaws infringed on parental choice. (Id. at 11-12) In *E.L.*, the Commissioner found that the four above-enumerated reasons were "sound reasons for the rule as it stands" and the Commissioner further determined that NJSIAA's application of Article V, Section 1, of the NJSIAA Bylaws to deny petitioners' request to allow their son to play ice hockey for the Cranford public high school while enrolled in the Oratory Catholic Preparatory School was neither arbitrary nor unjust since the parental choice had been made by petitioners to enroll their son in a school which did not provide ice hockey. (*Id.* at 12) The Commissioner held that:

> ...That petitioners argue the rule compels them to make a choice with respect to their son's education does not elevate their claim to one of prejudicial or unjust treatment; indeed many parents are similarly faced with having to weigh the varied components of a private or parochial education against those of the public school education. (*Id.* at 12, *citing E.L., supra,* at 7)

Citing cases from court decisions in Maryland, Oklahoma, Montana and Maine, the NJSIAA submits that "courts in other jurisdictions have held that school district policies and requirements which forbid non-enrolled students from participating in pubic school classes or extracurricular programs are permissible if they are rationally related to the school's objectives and interests." (*Ibid.*) In particular, the NJSIAA points out that, in *Kapstein v. Conrad School District*, 931 *P.*2d 1311 (1997), the Montana Supreme Court held that that, in balancing a student's right to participate in public school sports programs with the school district's right to organize and administer its academic and athletic programs, the school district's interest in integrating its academic and extracurricular activities outweighed the private school student's interest in participating in extracurricular activities. (*Id.* at 13-14) Similarly, in *Pelletier v. Maine Principals' Association,* 261 *F. Supp.* 2d 10 (Me. D.C. 2003), the United States District Court upheld

the Maine Principals' Association rule permitting home schooled students to participate in interscholastic athletics, but only at their local public high school, reasoning that "Maine's decision to open the public school athletic programs to home-schooled students without at the same time opening the private school programs does not create a burden on parental choice." (*Id.* at 14-15, *citing Pelletier* at 14)

In conclusion, the NJSIAA readily acknowledges that petitioners have the freedom to choose where their son will be educated, but asserts that petitioners do not have the right, under either state laws or their federal counterparts, to select only the portions of the offered public education which best serve their interests. (*Id.* at 15) The NJSIAA, therefore, contends that its decision in the instant matter must be upheld because it is consistent with the Commissioner's decision in *E.L., supra*, and because the rule in question is rationally related to the legitimate interests of the NJSIAA and its member schools and does not infringe upon petitioners' rights. (*Ibid.*)

COMMISSIONER'S DETERMINATION

The NJSIAA is a voluntary association of public and nonpublic schools, organized pursuant to *N.J.S.A.* 18A:11-3, to oversee athletics for its member schools in accordance with its Constitution, Bylaws, rules and regulations, which are approved by the Commissioner of Education and adopted annually by the member schools. Upon adoption by the member schools, the said rules and regulations are deemed school policy and are enforced first by the internal procedures of the NJSIAA.

The Commissioner's scope of review in matters involving the NJSIAA is appellate. *See N.J.S.A.* 18A:11-3; *N.J.A.C.* 6A:3-7.4; *Board of Education of the City of Camden v. NJSIAA*, 92 *N.J.A.R.*2d (EDU) 182, 183. The Commissioner may not

overturn an action by the NJSIAA in applying eligibility rules absent a finding that the rules were applied in a patently arbitrary, capricious or unreasonable manner. *B.C. v. Cumberland Regional School District*, 220 *N.J. Super.* 214, 231-232 (App. Div. 1987). Nor may the Commissioner substitute his judgment for that of the NJSIAA, *even if he would decide differently in a de novo hearing,* where due process has been provided and where there is adequate basis for the decision reached by the NJSIAA Eligibility Appeals Committee. *Dam Jin Koh, supra.* As codified to provide notice of this standard to the public and regulated parties:[2]

1. If the NJSIAA has granted a petitioner due process and its decision is supported by sufficient credible evidence in the record as a whole, the Commissioner shall not substitute his *** judgment for that of the NJSIAA, even if the Commissioner might judge otherwise in a *de novo* review.

2. The Commissioner shall not overturn NJSIAA's application of its own rules absent a demonstration by the petitioner that such rules were applied in an arbitrary, capricious, or unreasonable manner. *N.J.A.C.* 6A:3-7.4(a).

The burden of proof that an action was thus deficient rests with the person challenging the decision. *Kopera v. West Orange Bd. of Education*, 60 *N.J. Super.* 288, 297 (App. Div. 1960). It is well-established that:

> In the law, "arbitrary" and "capricious" means having no rational basis. *** Arbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration and in disregard of circumstances. Where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached.*** (citations omitted) *Bayshore Sew. Co. v. Dep't. of Env., N.J.*, 122 *N.J. Super.* 184, 199-200 (Ch. Div. 1973), *aff'd* 131 *N.J. Super.* 37 (App. Div. 1974).

[2] *See*, 31 *N.J.R.* 4173(a) and 32 *N.J.R.* 1177(a).

Upon careful consideration of this matter, and mindful of the applicable standard of review, the Commissioner determines to affirm the NJSIAA's decision denying petitioners' request for a waiver of the provisions of Article V, Section 1, of the NJSIAA Bylaws for the reasons set forth below.

Initially, the Commissioner finds that petitioners were provided the due process to which they were entitled and that the NJSIAA made every effort to provide a full, fair and timely hearing by the Eligibility Appeals Committee. Upon review of the testimony and the documentation provided by petitioners and the Cherry Hill School District, it is noted that the Committee voted unanimously to deny petitioners' request for a waiver of Article V, Section 1, of the NJSIAA Bylaws, which states:

> A student, to be eligible for participation in the interscholastic athletic program of a member school, must be enrolled in that school and must meet all the eligibility requirements of the Constitution, Bylaws, and Rules and Regulations, of the NJSIAA. (*NJSIAA Handbook* at 42)

The Committee's decision, memorialized in a written document on March 13, 2003, explains the Committee's reasoning, as follows:

> [1.] There are many students who are not enrolled in a NJSIAA member school, but who are eligible to participate in interscholastic sports, where they have been assigned by that school to a vocational/technical school or as a result of the Child Study Team designation or Individualized Educational Plan. However, these students remain under the jurisdiction of the assigning school. Students who have left the jurisdiction of the member school cannot be eligible to participate on that school's athletic teams.
>
> [2.] To allow any other arrangement would permit parents to enroll in any school of their choice without any oversight by a member school and then participate in that school's team in the unbridled discretion of the student's parents.
>
> [3.] In this case, the student's parents had the ability to have their son assigned to an appropriate placement to deal with his disability. Instead of utilizing the opportunities available through the member school's system,

> including the placement in an alternative school, the parents voluntarily decided to place their son outside of the Cherry Hill School District's jurisdiction, in the Center for Education in Marlton, New Jersey.
>
> [4.] By removing their son from the Cherry Hill West system without any assignment by the District to the private school, the parents made a voluntary determination to remove their son from the ability to participate in interscholastic sports at Cherry Hill West.
>
> [5.] The Committee believes that the parent's motives were certainly laudable and does not in any way question that determination. However, since the choice was totally voluntary and outside the jurisdiction of a member school, there is no basis for granting a waiver of the provisions of Article V, Section 1 of the NJSIAA Bylaws. Accordingly, this student will not be eligible to participate on the Cherry Hill High School West tennis team or any other athletic program at that member school. (NJSIAA's March 13, 2003 Letter memorializing the Committee's decision of March 5, 2003)

Given the explicitness of Article V, Section 1, of the Bylaws and the NJSIAA's articulation of sound reasons for its decision, the Commissioner cannot find that the application of Article V, Section 1, is arbitrary or unjust, as applied to petitioners' son. In so determining, the Commissioner observes that the record is devoid of any allegation that the NJSIAA's rule is being applied in an inconsistent manner. Moreover, since no student, nonpublic or public, attending one school is permitted to play sports for another school,[3] the exception requested here could affect all NJSIAA member schools and, thus, create a situation that would make the proper oversight and administration of NJSIAA rules impossible.

Although the Commissioner completely agrees with petitioners' assertion that they have the right to place their son in a private school at their own expense without the consent of the local board of education, the fact that petitioners have that right does

[3]Article V, Section 1 of the Bylaws has been interpreted to permit students to participate in a school's interscholastic program where students have been assigned by that school to a vocational/technical school or as a result of the Child Study Team designation of Individualized Educational Plan, which did not occur in the instant matter.

not mean that they concomitantly have the right to participate in interscholastic athletics at their local public school while attending a private school that has no relationship to it. As set forth by the Commissioner in *E.L., supra,* at 7, "[t]hat petitioners argue the rule compels them to make a choice with respect to their son's education does not elevate their claim to one of prejudicial or unjust treatment; indeed, many parents are similarly faced with having to weigh the varied components of a private and parochial education against those of the public school education." Moreover, the NJSIAA's determination that non-enrolled students are to be excluded from participating in interscholastic sports in member schools' sports programs is consistent with the findings of courts in other jurisdictions.

Additionally, the Commissioner finds petitioners' argument that C.N. is excluded from participation on the Cherry Hill West tennis team by virtue of his handicap because, absent the handicap, he would remain at Cherry Hill West High School, to be without merit. In so determining, the Commissioner observes that there is no allegation of C.N.'s disability having in any way impeded his participation on Cherry Hill West's tennis team while attending that school; that NJSIAA Bylaws and the Interpretative Guidelines to the NJSIAA Handbook support the NJSIAA's contentions that it has adopted rules to accommodate disabled students to ensure their full participation in interscholastic sports in member schools; and that C.N.'s situation arises not from his disability, but from parental choice freely exercised.

In the instant matter, the Greenberg Academy where C.N. is enrolled has no relationship whatsoever to the NJSIAA or the Cherry Hill School District, and C.N. was enrolled at the Greenberg Academy without any involvement by the Cherry Hill

Child Study Team or the Cherry Hill School District. Under these circumstances, therefore, and for the reasons set forth above, the Commissioner cannot find that the NJSIAA's decision to deny C.N.'s request for waiver of the provisions of Article V, Section 1, of the NJSIAA Bylaws was arbitrary, capricious or unreasonable.

Accordingly, the decision of the NJSIAA Eligibility Appeals Committee is sustained and the Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: 10/09/03

Date of Mailing: 10/10/03

[4] This decision, as the Commissioner's final determination, may be appealed to the Superior Court pursuant to *N.J.S.A.* 18A:11-3.

575-03

B.R.I., on behalf of minor child, E.I.,

PETITIONER,

V.

NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning parent sought reversal of the NJSIAA's decision not to allow his son, who attends private school, to play on a high school tennis team in the Cherry Hill Public School District. Petitioner sought waiver of the provisions of Article V, Section 1, of the NJSIAA Bylaws.

The NJSIAA determined that petitioner's son, E.I., a classified student with Tourette Syndrome, was not eligible to play tennis at Cherry Hill West since petitioner, without involvement by the Cherry Hill Child Study Team, unilaterally determined to place his child in a private school that was not a Department of Education approved school nor a member of NJSIAA.

The Commissioner found that petitioner was provided the due process to which he was entitled; that the NJSIAA made every effort to provide a full, fair and timely hearing by the Eligibility Appeals Committee; and that NJSIAA's rule was not applied in an inconsistent manner. Since no student, nonpublic or public, attending one school is permitted to play sports for another school, unless assigned by that school to a vocational/technical school, or as a result of the Child Study Team designation of Individualized Educational Plan, the exception requested could affect all NJSIAA member schools and, thus, create situations where proper oversight and administration of NJSIAA rules would be impossible. Moreover, the Greenberg Academy, where E.I. is enrolled, has no relationship whatsoever to the NJSIAA or the Cherry Hill Child Study Team or the Cherry Hill School District. The Commissioner found that the NJSIAA's decision to deny E.I.'s request for waiver of the provisions of Article V, Section 1, of the NJSIAA Bylaws was not arbitrary, capricious or unreasonable. Petition was dismissed.

10/09/03

AGENCY DKT. NO. 209-6/03

B.R.I.,[1] on behalf of minor child, E.I.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	
RESPONDENT.	:	

For Petitioner, Frank P. Cavallo, Jr. (Parker, McCay & Criscuolo, P.A.)

For Respondent, Michael J. Herbert, Esq. (Herbert, Van Ness, Cayci & Goodell)

This matter came before the Commissioner of Education on June 9, 2003, by way of a Petition of Appeal seeking reversal of the final decision of the New Jersey Interscholastic Athletic Association (NJSIAA) not to allow petitioner's son, who attends private school at the Center for Education, to play on a high school tennis team in the Cherry Hill Public School District. Briefs and the underlying record of proceedings before the NJSIAA were duly submitted in accordance with the provisions of *N.J.A.C.* 6A:3-7.1 *et seq.*, and the record on appeal closed on August 1, 2003.

The material facts and procedural history of this matter are as follows: E.I. is domiciled in the Cherry Hill School District and attended the public schools of the District from

[1]Although the Petition of Appeal, when filed, was captioned, *B.R.I. and R.S.I., on behalf of minor child, E.I. v. New Jersey State Interscholastic Athletic Association*, Petitioner R.S.I., E.I.'s mother, did not provide a notarized statement of verification as required by *N.J.A.C.* 6A:3-1.4. By letter of June 10, 2003, Petitioner B.R.I., who was acting *pro se* at the time, was advised that "no verification has been filed by petitioner R.S.I., so that, if she wishes to continue as a petitioner in this matter, such verification must be filed within 10 days of receipt of this notice." In that neither B.R.I. nor R.S.I. responded to this notification nor provided the requested verification, B.R.I. is deemed the sole petitioner in this matter.

grade one through grade ten. By his parent's account, E.I. was put on home instruction by the third marking period in tenth grade as he exhibited clinical depression and school phobia due in part to symptoms of Tourette Syndrome and Auditory Processing Delays which affected his performance and social interactions with other students. In consultation with E.I.'s Neuropsychiatrist and the Cherry Hill High School West Child Study Team, E.I.'s medications were altered and additional medications were administered for the depression and E.I. received counseling to address his school phobia. Thereafter, the medications decreased E.I.'s rage episodes and his depression so that he was able to return to Cherry Hill West in the Fall of his junior year. His tics, however, worsened and, according to petitioner, E.I. was tormented by students at the high school. Additionally, according to petitioner, E.I.'s medications were not being followed as required by E.I.'s Individual Education Program (IEP) and E.I. was becoming more and more anxious at the thought of facing another school day. As a result, at the beginning of November 2002, petitioner unilaterally decided to place E.I. at the Greenberg Academy, sometimes referred to as the Center for Education, where Tourette Syndrome students are educated in an individualized environment. Petitioner claims that E.I.'s tics have lessened; he has been accepted by his classmates without ridicule; he has attended almost every day during the 2002-2003 school year; and he has completed eleventh grade.

It is undisputed that at no time did petitioner seek to have E.I. placed by the school district, in the Center or elsewhere, since he believed E.I.'s situation required immediate resolution. When E.I. then sought to participate on the Cherry Hill High School West Tennis Team during the 2002-03 school year,[2] his request was denied by the local school district based on its obligation to abide by operative rules of the NJSIAA. On or about March 3, 2003, a

[2] E.I. played tennis on the Cherry Hill West High School tennis team during his freshman and sophomore years while attending high school at Cherry Hill West.

request for eligibility waiver was made to NJSIAA, supported by a letter from the principal of Cherry Hill West High School, and its denial was unsuccessfully appealed to the NJSIAA Eligibility Appeals Committee (Committee), where, on March 5, 2003, the Committee conducted a hearing and denied petitioner's appeal. The denial of petitioner's request for an eligibility waiver for E.I. to play tennis for Cherry Hill West High School was memorialized in a written document on March 13, 2003, which constitutes the final decision now before the Commissioner on appeal.

PETITIONER'S POSITION

Initially, petitioner asserts that the NJSIAA acted arbitrarily and capriciously when it denied petitioner's request to participate on the tennis team at Cherry Hill West High School. (Petitioner's Brief in Support of Appeal at 6-7) *Citing Florence County School District Four v. Carter*, 510 *U.S.* 7, 12 (1993); *Bernardsville Board of Education v. J.H.*, 42 *F.*3d 149 (3rd Cir. 1994); *School Comm. of Burlington Mass. v. Department of Education,* 471 *U.S.* 359 (1985) and pointing to *N.J.A.C.* 6A:14-2.10 and the Individuals with Disabilities Education Act (IDEA), 20 *U.S.C.S.*, 1400 *et seq.*, petitioner argues that a parent has the right to place his child in a private school without the consent of their local board of education. (*Id.* at 7) Petitioner points out that a student placed in a private school setting by the Cherry Hill West Child Study Team or by an Individualized Placement Program or through assignment to a vocational school program, would be permitted to participate in interscholastic sports for Cherry Hill West even where the private school placement resulted in enrollment in a school that is not a member of NJSIAA because the student remains under the jurisdiction of the assigning school. (*Ibid.*) Thus, petitioner argues, NJSIAA's decision denying petitioner's request was based on petitioner's

decision not to request payment for his son's education or to wait over three months to be placed in an institution which may not have achieved the success that his placement with the Center for Education has achieved with his son. (*Id.* at 8)

Secondly, petitioner submits that the NJSIAA violated the Rehabilitation Act of 1973, which provides that no otherwise qualified individual with a disability shall be excluded solely by reasons of his or her disability from participation in, or be denied the benefits of, any program or activity receiving federal financial assistance. (*Id.* at 9) Citing numerous federal court cases, petitioner maintains that NJSIAA is subject to the Rehabilitation Act and, therefore, required to provide a handicapped individual the opportunity to participate in its programs. (*Id.* at 11) Thus, petitioner contends, E.I. is excluded form participation in the Cherry Hill West High School program solely because of his handicap. (*Id.* at 12) If E.I. were not handicapped, petitioner contends, he would remain a student at Cherry Hill West High School and, thus, be entitled to participate in the tennis program. (*Ibid.*) Therefore, petitioner concludes, the NJSIAA decision must be reversed as violative of the Rehabilitation Act of 1973.

NJSIAA'S POSITION

In presenting its "Statement of Facts," the NJSIAA avers that E.I. received excellent grades during his attendance at Cherry Hill West High School, maintaining an academic average of all "A's" and "B's," except for one "C" in physical education. (NJSIAA Brief at 3) NJSIAA also avers that, contrary to petitioner's assertions that the Child Study Team was not instituting appropriate modifications to deal with E.I.'s disability, the testimony at hearing was otherwise. (*Ibid.*) Citing to psychologist and Child Study Team member Dr. Gloria Wuhl's testimony, NJSIAA contends that a specific plan had been developed to deal

with E.I.'s medical problems; that E.I. had been placed in an appropriate setting; and that E.I. had been abruptly removed from Cherry Hill West by his parents while the plan for an appropriate placement was being implemented. (*Id.* at 3-4) NSJIAA also points out that Dr. Wuhl testified that the Greenberg Academy has not been approved as an acceptable school by the Department of Education and that E.I.'s transfer to that school came as a surprise. (*Id.* at 4) NJSIAA also points out that the Greenberg Academy does not have a sports program, is not a member of NJSIAA and that the Cherry Hill School District had nothing to do with E.I.'s enrollment in the Greenberg Academy, which is not approved by the Department of Education as a school for the disabled. (*Ibid.*) The NJSIAA asserts that this case, therefore, centers on the question of whether petitioner may compel the NJSIAA to render his son eligible to play on Cherry Hill West's tennis team after petitioner made the voluntary decision to withdraw his son from Cherry Hill West High School and place him in a school having no connection with Cherry Hill West High School. (*Ibid.*)

Citing Dam Jin Koh and Hong Jun Kim v. NJSIAA, 1987 *S.L.D.* 259, *Brady v. NJSIAA*, 96 *N.J.A.R.*2d (EDU) at 980 and *N.J.A.C.* 6A:3-7.4, the NJSIAA points out that the Commissioner's scope of review in NJSIAA determinations is an appellate one; thus, the Commissioner may not overturn an eligibility decision of the NJSIAA absent a finding that it applied its rules in a patently arbitrary, capricious or unreasonable manner. (*Id.* at 5) The NJSIAA asserts that petitioner cannot meet his burden of demonstrating that the NJSIAA Bylaws, Article V, Section 1, or its application violated any federal or state laws or was arbitrary or unreasonable. (*Ibid.*)

Initially, the NJSIAA maintains that this appeal does not implicate any rights under federal law, averring that the federal court decisions cited by petitioner have absolutely no

application to the facts of this case, where the challenge is to the requirement that a child, whether disabled or not, be enrolled in a member school to participate in interscholastic sports, because none of the cited decisions supports the right of a parent to forsake a school's academic program, while at the same time requiring that school to include his child in its athletic program. (*Id.* at 5-6) The NJSIAA maintains that it has adopted rules, as set forth in its 2002-2003 *NJSIAA Handbook*, to assure that disabled students are fully accommodated to participate in four seasons in any sport, as demonstrated by: 1) the provision that any handicapped or classified student is not required to comply with the Academic Credit Rule and 2) the provision permitting disabled students to participate in interscholastic sports in the seventh and eighth grades to make certain that they involve themselves in four seasons of a sport before turning 19. (*Id.* at 6-7) The NJSIAA also points out that, although home-schooled students are not eligible to participate in interscholastic sports, a student placed on home instruction under the auspices of the school district is eligible to participate in that district's sports program. (*Id.* at 7)

Secondly, the NJSIAA contends that E.I. participated on the Cherry Hill West tennis team for two years while attending that school and there is no allegation that his disability in any way impeded his participation in interscholastic sports at this member school. (*Ibid.*) The NJSIAA maintains that, if E.I. had remained a student at Cherry Hill West, or if he had been placed by the Cherry Hill School District in an education setting under the district's jurisdiction, then E.I. could have continued to participate in the Cherry Hill School District's interscholastic program but, instead, the parent decided to place his son in a private school outside the Cherry Hill School district's jurisdiction. (*Ibid.*) Thus, the cause of E.I.'s inability to participate in interscholastic sports is not his disability but, rather, was due solely to a parental decision made

"without any pressure or compulsion from Cherry Hill West or from the NJSIAA." to educate E.I. in a private school. (*Id.* at 7-8)

Additionally, the NJSIAA points out that the Greenberg Academy has no relationship whatsoever to the NJSIAA or the Cherry Hill School District as the Greenberg Academy has no sports program, is not a member of the NJSIAA and E.I. was placed at the Greenberg Academy without involvement by the Cherry Hill Child Study Team or the Cherry Hill School District. (*Id.* at 8) The NJSIAA also notes that the NJSIAA is a voluntary association of schools subject to an internal governance structure established by the member schools themselves. (*Ibid.*) Thus, the NJSIAA posits, the NJSIAA can only function through its member schools who are obligated to administer interscholastic sports at the local level and are responsible for assuring that students are given a physical examination, are under the supervision of certified coaches and adhere to the eligibility standards of the NJSIAA. (*Id.* at 9) The NJSIAA also sets forth the position that Article V, Section 1, of the Bylaws of the NJSIAA, which was adopted in 1978 and requires that a student must be enrolled in a NJSIAA member school to participate in the school's interscholastic athletic program of that school, serves several legitimate interests of the NJSIAA and its member schools, as follows:

> 1. Each member school is responsible for properly administering and enforcing all NJSIAA rules and regulations, including eligibility rules, to its own students; allowing students to attend one school and compete athletically for another would make proper oversight and administration of rules and regulations impossible.
>
> 2. Sports offered by member schools are an integral part of the overall academic and extracurricular program provided for each student enrolled in that school.
>
> 3. Allowing students to participate on the athletic teams of other schools would discourage the initiation of appropriate athletic programs by the schools attended by the students and may even

encourage schools in difficult financial situations to eliminate programs as a cost saving measure if their students are free to participate in that activity at another school.

4. Allowing a non-enrolled student to participate in a member school's athletic program would wrongfully deny an enrolled student the opportunity to participate in that athletic program at his or her own school. (*Id.* at 10-11)

Moreover, the NJSIAA asserts that *E.L. and N.L., on behalf of R.L. v. NJSIAA,* decided by the Commissioner, August 31, 1998, where, as in this case, petitioning parents voluntarily placed their children in a private school and claimed that provisions of Article V, Section 1, of the NJSIAA Bylaws infringed on parental choice, is controlling. (Id. at 11-12) In *E.L.,* the Commissioner found that the four above-enumerated reasons were "sound reasons for the rule as it stands" and the Commissioner further determined that NJSIAA's application of Article V, Section 1, of the NJSIAA Bylaws to deny petitioners' request to allow their son to play ice hockey for the Cranford public high school when he was enrolled in the Oratory Catholic Preparatory School was neither arbitrary nor unjust since the parental choice had been made by petitioners to enroll their son in a school which did not provide ice hockey. (*Id.* at 12) The Commissioner held that:

> ...That petitioners argue the rule compels them to make a choice with respect to their son's education does not elevate their claim to one of prejudicial or unjust treatment; indeed many parents are similarly faced with having to weigh the varied components of a private or parochial education against those of the public school education. (*Id.* at 12, *citing E.L., supra,* at 7)

Citing cases from court decisions in Maryland, Oklahoma, Montana and Maine, the NJSIAA submits that "courts in other jurisdictions have held that school district policies and requirements which forbid non-enrolled students from participating in pubic school classes or extracurricular programs are permissible if they are rationally related to the school's objectives

and interests." (*Ibid.*) In particular, the NJSIAA points out that, in *Kapstein v. Conrad School District*, 931 *P.*2d 1311 (1997), the Montana Supreme Court held that that, in balancing the students' right to participate in public school sports programs with the school district's right to organize and administer its academic and athletic programs, the school district's interest in integrating its academic and extracurricular activities outweighed the private school students' interest in participating in extracurricular activities. (*Id.* at 13-14) Similarly, in *Pelletier v. Maine Principals' Association,* 261 *F. Supp.* 2d 10 (Me. D.C. 2003), the United States District Court upheld the Maine Principals' Association rule that permitted home schooled students to participate in interscholastic athletics, but only at their local public high school, reasoning that "Maine's decision to open the public school athletic programs to home-schooled students without at the same time opening the private school programs does not create a burden on parental choice." (*Id.* at 14-15, *citing Pelletier* at 14)

In conclusion, the NJSIAA acknowledges that petitioner has the freedom to choose where his son will be educated, but asserts that petitioner does not have the right, under either state laws or constitution or their federal counterparts, to select only the portions of the offered public education which best serve his interests. (*Id.* at 15) The NJSIAA, therefore, contends that its decision in the instant matter must be upheld in that it is consistent with the Commissioner's decision in *E.L., supra.;* the rule in question is rationally related to the legitimate interests of the NJSIAA and its member schools, and the eligibility rule does not infringe upon petitioner's rights. (*Ibid.*)

COMMISSIONER'S DETERMINATION

The NJSIAA is a voluntary association of public and nonpublic schools, organized pursuant to *N.J.S.A.* 18A:11-3, to oversee athletics for its member schools in accordance with its Constitution, Bylaws, rules and regulations, which are approved by the Commissioner of Education and adopted annually by the member schools. Upon adoption by the member schools, the said rules and regulations are deemed school policy and are enforced first by the internal procedures of the NJSIAA.

The Commissioner's scope of review in matters involving the NJSIAA is appellate. *See N.J.S.A.* 18A:11-3; *N.J.A.C.* 6A:3-7.4; *Board of Education of the City of Camden v. NJSIAA*, 92 *N.J.A.R.*2d (EDU) 182, 183. The Commissioner may not overturn an action by the NJSIAA in applying eligibility rules absent a finding that the rules were applied in a patently arbitrary, capricious or unreasonable manner. *B.C. v. Cumberland Regional School District*, 220 *N.J. Super.* 214, 231-232 (App. Div. 1987). Nor may the Commissioner substitute his judgment for that of the NJSIAA, *even if he would decide differently in a de novo hearing,* where due process has been provided and where there is adequate basis for the decision reached by the NJSIAA Eligibility Appeals Committee. *Dam Jin Koh, supra.* As codified to provide notice of this standard to the public and regulated parties:[3]

> 1. If the NJSIAA has granted a petitioner due process and its decision is supported by sufficient credible evidence in the record as a whole, the Commissioner shall not substitute his *** judgment for that of the NJSIAA, even if the Commissioner might judge otherwise in a *de novo* review.
>
> 2. The Commissioner shall not overturn NJSIAA's application of its own rules absent a demonstration by the petitioner that such rules were applied in an arbitrary, capricious, or unreasonable manner. *N.J.A.C.* 6A:3-7.4(a).

[3] *See*, 31 *N.J.R.* 4173(a) and 32 *N.J.R.* 1177(a).

The burden of proof that an action was thus deficient rests with the person challenging the decision. *Kopera v. West Orange Bd. of Education*, 60 *N.J. Super.* 288, 297 (App. Div. 1960). It is well-established that:

> In the law, "arbitrary" and "capricious" means having no rational basis. *** Arbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration and in disregard of circumstances. Where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached.*** (citations omitted) *Bayshore Sew. Co. v. Dep't. of Env., N.J.*, 122 *N.J. Super.* 184, 199-200 (Ch. Div. 1973), *aff'd* 131 *N.J. Super.* 37 (App. Div. 1974).

Upon careful consideration of this matter, and mindful of the applicable standard of review, the Commissioner determines to affirm the NJSIAA's decision denying petitioner's request for a waiver of the provisions of Article V, Section 1, of the NJSIAA Bylaws for the reasons set forth below.

Initially, the Commissioner finds that petitioner was provided the due process to which he was entitled and that the NJSIAA made every effort to provide a full, fair and timely hearing by the Eligibility Appeals Committee. Upon review of the testimony and the documentation provided by petitioner and the Cherry Hill School District, it is noted that the Committee voted unanimously to deny petitioner's request for a waiver of Article V, Section 1, of the NJSIAA Bylaws, which states:

> A student, to be eligible for participation in the interscholastic athletic program of a member school, must be enrolled in that school and must meet all the eligibility requirements of the Constitution, Bylaws, and Rules and Regulations, of the NJSIAA. (*NJSIAA Handbook* at 42)

The Committee's decision, memorialized in a written document on March 13, 2003, explains the Committee's reasoning, as follows:

> [1.] There are many students who are not enrolled in a NJSIAA member school, but who are eligible to participate in interscholastic sports, where they have been assigned by that school to a vocational/technical school or as a result of the Child Study Team designation or Individualized Educational Plan. However, these students remain under the jurisdiction of the assigning school. Students who have left the jurisdiction of the member school cannot be eligible to participate on that school's athletic teams.
>
> [2.] To allow any other arrangement would permit parents to enroll in any school of their choice without any oversight by a member school and then participate in that school's team in the unbridled discretion of the student's parents.
>
> [3.] In this case, the student's parents had the ability to have their son assigned to an appropriate placement to deal with his disability. Instead of utilizing the opportunities available through the member school's system, including the placement in an alternative school, the parents voluntarily decided to place their son outside of the Cherry Hill School District's jurisdiction, in the Center for Education in Marlton, New Jersey.
>
> [4.] By removing their son from the Cherry Hill West system without any assignment by the District to the private school, the parents made a voluntary determination to remove their son from the ability to participate in interscholastic sports at Cherry Hill West.
>
> [5.] The Committee believes that the parent's motives were certainly laudable and does not in any way question that determination. However, since the choice was totally voluntary and outside the jurisdiction of a member school, there is no basis for granting a waiver of the provisions of Article V, Section 1 of the NJSIAA Bylaws. Accordingly, this student will not be eligible to participate on the Cherry Hill High School West tennis team or any other athletic program at that member school. (NJSIAA's March 13, 2003 Letter memorializing the Committee's decision of March 5, 2003)

Given the explicitness of Article V, Section 1, of the Bylaws and the NJSIAA's articulation of sound reasons for its decision, the Commissioner cannot find that the application

of Article V, Section 1, is arbitrary or unjust, as applied to petitioner's son. In so determining, the Commissioner observes that the record is devoid of any allegation that the NJSIAA's rule is being applied in an inconsistent manner. Moreover, since no student, nonpublic or public, attending one school is permitted to play sports for another school,[4] the exception requested here could affect all NJSIAA member schools and, thus, create a situation that would make the proper oversight and administration of NJSIAA rules impossible.

Although the Commissioner completely agrees with petitioner's assertion that he has the right to place his son in a private school at his own expense without the consent of the local board of education, the fact that petitioner has that right does not mean that he concomitantly has the right to participate in interscholastic athletics in his local public school while attending a private school that has no relationship to the local public school. As set forth by the Commissioner in *E.L., supra,* at 7, "[t]hat petitioners argue the rule compels them to make a choice with respect to their son's education does not elevate their claim to one of prejudicial or unjust treatment; indeed, many parents are similarly faced with having to weigh the varied components of a private and parochial education against those of the public school education." Moreover, the NJSIAA's determination that non-enrolled students are to be excluded from participating in interscholastic sports in member schools' sports programs is consistent with the findings of courts in other jurisdictions.

Additionally, the Commissioner finds petitioner's argument that E.I. is excluded from participation on the Cherry Hill West tennis team by virtue of his handicap because, absent the handicap, he would remain at Cherry Hill West High School, to be without merit. In so

[4]Article V, Section 1 of the Bylaws has been interpreted to permit students to participate in a school's interscholastic program where students have been assigned by that school to a vocational/technical school or as a result of the Child Study Team designation of Individualized Educational Plan, which did not occur in the instant matter.

determining, the Commissioner observes that there is no allegation that E.I.'s disability in any way impeded his participation on the tennis team for the two years he was on Cherry Hill West's team while attending that school. Additionally, as the NJSIAA points out, the NJSIAA Bylaws and the Interpretative Guidelines to the NJSIAA Handbook support the NJSIAA's contentions that it has adopted rules to accommodate disabled students to ensure their full participation in interscholastic sports in their member schools' sports programs and that E.I.'s situation arises not from disability, but from parental choice.

In the instant matter, the Greenberg Academy where E.I. is enrolled has no relationship whatsoever to the NJSIAA or the Cherry Hill School District and E.I. was enrolled at the Greenberg Academy without any involvement by the Cherry Hill Child Study Team or the Cherry Hill School District. Under these circumstances, therefore, and for the reasons set forth above, the Commissioner cannot find that the NJSIAA's decision to deny E.I.'s request for waiver of the provisions of Article V, Section 1, of the NJSIAA Bylaws was arbitrary, capricious or unreasonable.

Accordingly, the decision of the NJSIAA Eligibility Appeals Committee is sustained and the Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.[5]

COMMISSIONER OF EDUCATION

Date of Decision: 10/09/03

Date of Mailing: 10/10/03

[5] This decision, as the Commissioner's final determination in this matter, may be appealed to the Superior Court pursuant to *N.J.S.A.* 18A:11-3.

581-03

BOARD OF EDUCATION OF THE TOWNSHIP OF BURLINGTON, BURLINGTON COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning "Abbott" District appealed the Department's determination of its 2003-04 preliminary "maintenance budget," alleging that the Department's review was not in accordance with the July 23, 2003 order of the Supreme Court. The District also asserted that the Department inappropriately excluded the District's encumbrance figure of $78,890 on the maintenance budget worksheet and that the Department must recalculate the District's excess surplus based on the District's revised calculations, until the Comprehensive Annual Financial Report (CAFR) established otherwise. The District also maintained that the Department must issue a revised preliminary maintenance budget and estimated Additional *Abbott v. Burke* State Aid Award based on adjustments to the reserve and fund balances made after the filed June 30, 2003 Board Secretary's Report.

The ALJ found that the Department appropriately applied the duly promulgated rule implementing the Court's order for "maintenance," and determined that any adjustments to the encumbrances and excess fund balance for the 2002-03 budget based on the District's recalculations and revised information be effectuated within the context of the audit in preparation for the CAFR and the CAFR review.

The Commissioner adopted the Initial Decision, clarifying that the District's encumbrances were properly excluded as a budget expense for 2002-03 by the Department and concurring that any adjustments to the District's maintenance budget be made based on the CAFR review.

October 20, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4094-03

AGENCY DKT. NO. 185-6/03

BOARD OF EDUCATION OF
THE CITY OF BURLINGTON,

Petitioner,

v.

STATE OF NEW JERSEY,
DEPARTMENT OF EDUCATION,

Respondent.

Richard E. Shapiro, Esq., for petitioner

Dianna Rosenheim, Deputy Attorney General, for respondent (Peter Harvey, Attorney General of New Jersey, attorney)

Record Closed: September 25, 2003 Decided: September 26, 2003

BEFORE **JOSEPH F. FIDLER**, ALJ:

STATEMENT OF THE CASE

The City of Burlington School District is an Abbott District, as defined by *N.J.S.A.* 18A:7F-3 and *N.J.A.C.* 6A:24-1.2. Petitioner Board of Education appeals from respondent Department of Education's Notice of Preliminary Maintenance Budget Figure for 2003-2004 and Estimate of Discretionary Additional Abbott v. Burke State Aid Award, dated August 27, 2003.

The issues raised by the district primarily concern the manner of accounting for encumbrances payable as of June 30, 2002, and calculating the amount of excess surplus. The district also contends that the Department has not properly defined maintenance budget, *N.J.A.C.* 6A:10-1.2, but the district has simply asked, without objection, that this legal issue be preserved for appeal.

PROCEDURAL HISTORY

The Department moved before the Supreme Court on March 24, 2003, for an order modifying the remedies in *Abbott v. Burke,* 153 *N.J.* 480 (1998) *(Abbott V). See also Abbott v. Burke,* 172 *N.J.* 294 (2002) (*Abbott IX*). The Department requested that the discretionary Additional *Abbott v. Burke* State Aid (supplemental aid) that it would be required to provide to Abbott districts in 2003-2004 be limited to an amount sufficient to support those programs, positions and services in the districts' approved budgets for 2002-2003. On April 8, 2003, the Education Law Center cross-moved in part for an order setting an expedited schedule for the Department's decisions on districts' budgets. On April 29, 2003, the Supreme Court ordered the Department and the Education Law Center to participate in mediation before the Hon. Philip S. Carchman, J.A.D., to attempt to resolve issues raised by their motions.

Mediation resolved all issues except the 2003-2004 budget process, so the Department's motion for an order extending by an additional year the one-year relaxation of remedies granted in *Abbott IX* remained outstanding. The parties agreed to an expedited schedule for budget approvals and appeals, beginning with the Department's reviews and approvals of districts' budgets by May 30, 2003. Districts' appeals from the Department's reviews were to be transmitted to the Office of Administrative Law, where administrative law judges were to issue initial decisions within 50 days of the appeal. The Commissioner of Education was to issue final decisions within 25 days of the initial decisions. On May 20, 2003, the Supreme Court issued an order incorporating the parties' mediation agreement and providing that the schedule would remain in effect until further order of the Court.

On May 30, 2003, the Department issued decisions on the *Abbott* districts' budgets. In this matter, Assistant Commissioner Gordon MacInnes, Division of Abbott Implementation, notified the district that the Department had completed its initial review of the district's 2003-

2004 expenditure budget dated April 15, 2003. The district was further notified that the expenditure budget conformed with the maintenance standard set forth in the Department's guidance of February 14, 2003, and was approved except as noted in the letter:

> The following items could not be approved because the DOE does not have sufficient information at this time to determine actual need:
>
> Health benefits will be approved when the actual amount of the cost from January 2004 to June 2004 is known.
>
> Since special education tuition costs cannot be precisely projected, the district should base its estimate on 2002-2003 actual expenditures with the understanding that these expenditures will be adjusted based upon actual enrollment/costs.

Assistant Commissioner MacInnes' letter further advised the district that

> The amount of Additional Abbott v. Burke State aid necessary to support your approved budget cannot be determined with precision at this time due to a variety of factors including the inability to determine the exact amount of the school district's available revenues for 2003-2004 such as unbudgeted surplus which will be informed by an ongoing comprehensive analysis of expenditures being done by the Treasurer, the potential savings identified by the Treasurer that may be forthcoming from areas such as debt refinancing for early retirement and school construction and the outcome of any appeal. A payment schedule for Additional Abbott v. Burke State aid will be provided to your district once the Commissioner has issued final decisions on the budget appeals and, as in past years, that payment schedule will be subject to adjustment based on the annual audit filed pursuant to *N.J.S.* 18A:23-1.

On June 5, 2003, the district's verified petition of appeal was filed with the Department. The Department transmitted the contested case to the Office of Administrative Law on June 9, 2003. *N.J.S.A.* 52:14B-2(b). On June 12, 2003, the Department's answer was filed in the OAL. By letter Order dated June 18, 2003, I directed the parties to prepare for a hearing to commence on July 14, 2003.

On June 24, 2003, the Supreme Court issued an order approving the mediated agreement

and scheduling argument on the Department's motion for an order extending the relaxation of remedies granted in *Abbott IX.* On July 1, 2003, the Department moved for an order amending the schedule for processing appeals to allow the Court to rule on the applicable standard before hearings and issuance of initial decisions. On July 10, 2003, the Supreme Court heard oral argument on the budget process. On that date, the Department requested an adjournment of the scheduled hearing to await the Supreme Court's ruling on the maintenance standard. I held a telephone conference with counsel and the adjournment was granted.

By Order dated July 23, 2003, the Supreme Court granted the Department's application to extend the relaxation of remedies granted in *Abbott v. Burke,* 153 *N.J.* 480 (1998) *(Abbott V).* The Department was authorized to treat the 2003-2004 school fiscal year as a maintenance year for purposes of calculating Additional Abbott v. Burke State Aid for the Abbott districts. The Court defined a maintenance budget and directed that the Department promulgate an emergency regulation establishing the standard for evaluating the effectiveness and efficiency of the districts' non-instructional programs. Among other conditions, the Court's Order established a schedule for the Department to provide in a Notice to each district preliminary maintenance budget figures for the 2003-2004 school year consisting of the 2002-2003 approved budget and an estimate of the supplemental funding needed to support the currently approved budget. The Order also superseded its earlier modified scheduling Order to require that the Office of Administrative Law issue initial decisions on district appeals from the Department's preliminary maintenance budget figures for the 2003-2004 school year within 30 days of the date of the Department's Notices.

The Department of Education's Notice of Preliminary Maintenance Budget Figure for 2003-2004 and Estimate of Discretionary Additional Abbott v. Burke State Aid Award (Exhibit J-1) is dated August 27, 2003. The possible issues on appeal were discussed in a telephone conference on September 3, 2003, and the matter was scheduled to be heard on September 16, 2003. After evaluating discovery, counsel for petitioner district provided a more specific list of issues by letter dated September 8, 2003.

By letter dated September 14, 2003, counsel for petitioner advised that he had mistakenly scheduled himself for the September 16, 2003, hearing when he had a hearing in Newark on

another Abbott appeal the same day. At his request, the matter was rescheduled for September 18, 2003, at 2:00 p.m. On the new hearing date, petitioner's witnesses were not available. Counsel then agreed that the hearing would be held on the afternoon of September 24, 2003, after they completed another hearing that day in Newark. The hearing was commenced in the afternoon and completed on the evening of September 24, 2003, and the record remained open for submission of letter briefs by the close of business the following day.

DISCUSSION

The Department's Notice of Preliminary Maintenance Budget Figure for 2003-2004 and Estimate of Discretionary Additional Abbott v. Burke State Aid Award (Exhibit J-1), dated August 27, 2003, provides:

> Pursuant to the July 23, 2003 Order of the Supreme Court of New Jersey in Abbott v. Burke, the Department has determined that your district's preliminary maintenance budget figure for the 2003-2004 school year is $23,571,893.00, inclusive of the district's General Fund Budget and restricted ECPA and DEPA revenue accounts. This number reflects the instructional and non-instructional programs approved and provided in the 2002-2003 school year and includes increases to the 2002-2003 budget to reflect non-discretionary costs and adjustments to the 2002-2003 budget based on actual 2002-2003 expenditures as informed by information provided the accounting firm retained by the Treasurer to review you district's financial information. A copy of the information provided by that accounting firm is available upon request.
>
> The Department has further reviewed the revenues available to your district for the 2003-2004 school year. The Department has identified an additional $500,488 in fund balance that must be appropriated in the district's 2003-2004 revised budget. Initially, the Department of Education identified a projected excess surplus balance of $1,379,846 based on information contained in the district's June 30, 2003 Board Secretary's report. This amount is reduced by $440,000, which is 2% of the undesignated fund surplus. This amount was further reduced by the amount currently budgeted for fund balance in the district's 2003-2004 budget ($200,000). Additionally, this amount is reduced by the outstanding 2002-2003 Account Receivable in Additional Abbott v. Burke Aid ($239,358). Accordingly, the district should revise line 121 in their 2003-2004 budget to reflect the new amount of budgeted fund balance of $700,488 (increase of $500,488).

Projected Surplus balance at June 30, 2003	$1,379,846
2% required Surplus	440,000
Potential excess surplus	939,846
Budgeted fund balance recap	200,000
Fund balance to be budgeted	739,846
Less: Receivable A v B	(239,358)
Line 121 – additional	500,488
New Line 121	$700,488

Based on the revenues available to your district for 2003-2004, your district's estimated need for discretionary Additional Abbott v. Burke State Aid is determined to be $1,215,216.00. A revised 2003-2004 budget, consistent with this letter, must be provided to the Department no later than September 26, 2003. It should be noted that the preliminary maintenance budget and the estimated need for discretionary Additional Abbott v. Burke State aid will be subject to further adjustment after submission by your district of the 2002-2003 CAFR.

The parties agreed that petitioner district would proceed with its proofs first. Assistant School Business Administrator Ingrid Walsh testified that she has held that position with the district for three years. Previously, she served as an auditor with professional accounting firms, specializing in municipal and school district audits. Ms. Walsh is familiar with the Notice of August 27, 2003, and also with the revised Maintenance Budget Worksheet admitted into evidence as Exhibit J-2. According to Ms. Walsh, the Worksheet shows revisions made after conversations with Keith Costello, the Department's Budget Manager for petitioner school district.

Ms. Walsh testified that she prepared the Board Secretary's report to the Board of Education for the 12 month period ending June 30, 2003. The version of the report admitted into evidence as Exhibit P-1 is not the first version. According to Ms. Walsh, she did a "soft close" in July 2003, and then did adjustments after doing an internal audit for errors. She reviewed all relevant data and input changes as needed for a year-end closing. On page two of the report, in the Liabilities and Fund Equity portion, there is an entry for $78,890 appropriated as a reserve for

encumbrances. Ms. Walsh testified that this amount was found in the initial "soft close" and she reviewed all the bills, no change was needed.

Exhibit P-2 is the district's Open Purchase Order Report by Vendor Name. It was Ms. Walsh's testimony that items or services received by the district are included in accounts payable, but items not received or partially received, or services not completed, are reflected as open orders or encumbrances in the Open Purchase Order Report. The total of $78,890 for open encumbrances is found on the last page of the document. Ms. Walsh itemized the open encumbrances in a Schedule of Encumbrances Payable for the Year Ended June 30, 2003 (Exhibit P-3). She acknowledged that the entry for $40,000 represented her estimate that an $80,000 contract was half completed; it is a two-year project. Ms. Walsh testified sincerely that she used the Department's audit guidelines to determine the open encumbrances.

Ms. Walsh does not agree with the Department's calculation of excess surplus. In her opinion, the Department's figure of $500,488 is too high. The district's Excess Surplus Calculation (Unaudited) for the Fiscal Year Ended June 30, 2003, was admitted into evidence as Exhibit P-4. Ms. Walsh calculated 2% of an Adjusted 2003-2003 General Fund Expenditures figure of $20,633.925, or $412,679. To this was added an Extraordinary Aid Allowable Adjustment of $9,263, for a total of $421,942. This amount was subtracted from the Total Unreserved/Undesignated Fund Balance of $758,617, to obtain a figure for Excess Surplus of $336,676. This is $163,812 less than the Department's calculation of excess surplus.

Craig Wilkie has been petitioner district's School Business Administrator since September 2002, and he oversees the Assistant Business Administrator's work. He testified that he is aware of a letter dated September 16, 2003, from Richard Rosenberg, Assistant Commissioner, Division of Finance, Department of Education, to Chief School Administrators, School Business Administrators/Board Secretaries, and Public School Accountants, regarding year-end encumbrances (Exhibit R-1). According to Mr. Wilkie, this letter was issued at some point after Ms. Walsh had completed her work on the Open Purchase Order Report by Vendor Name (Exhibit P-2) and the Schedule of Encumbrances Payable for the Year Ended June 30, 2003 (Exhibit P-3). In his opinion, her work was consistent with the guidelines set forth in Assistant Commissioner Rosenberg's letter, which provides in part that

For the current 2002-03 fiscal year audit as well as future audits, all public school accountants are asked to give utmost consideration to encumbrances on the school district's books at June 30, 200X through a thorough review and analysis of open purchase orders.

Open purchase orders at June 30, 200X should be classified into the following two categories for review and classification:

1. Category one represents purchase orders for which the goods have been received or the services have been rendered at June 30th that have not been paid. These purchase orders must be expensed in the current audit period, the related encumbrances reversed, and a liability (accounts payable) established. If the invoice has not been received the amount must be estimated. In accordance with GAAP, an expenditure is recorded when goods are received or services rendered.
2. Category two represents purchase orders which will be honored in the subsequent year. These purchase orders will be rolled over into the next fiscal year and will be shown in the June 30th general fund balance sheet as a reserve for encumbrances. Per NCGA Statement 1, paragraph 91 "encumbrances outstanding at year-end represent the estimated amount of the expenditures ultimately to result **if unperformed contracts in process at year-end are completed. Encumbrances outstanding at year-end do not constitute expenditures or liabilities."**

These purchase orders must be checked for validity, which means, the purchase orders must have a valid contractual agreement (i.e., contain an actual order of goods or services) in place at June 30, 200X. Blanket purchase orders do not constitute valid purchase orders. As a general rule, for other than construction contracts, the liquidation of these orders should be within 60-90 days of the year-end.

In reviewing the 90-day cut-off period during the year-end audit, purchase orders that existed at June 30, 200X but were not liquidated by September 30 should be canceled and not included in the June 30 reservation of fund balance, with the exception of capital or other long term projects. Open purchase orders for items that are: 1) no longer considered necessary; 2) not substantiated with a valid contract; or 3) aged (regardless of materiality) and have been on the books for over 90 days should also be canceled and not included in June 30 reservation of fund balance.

> In addition, per review of the agreed upon procedures performed by several accounting firms for the Abbott school districts that were recently concluded, on several occasions it was noted that expenditures for 2003-04 were being improperly encumbered in the 2002-03 fiscal year. Districts may not have open encumbrances for items related to the next year such as salaries, insurance premiums, etc.
>
> District's account payable, accruals and year-end expenditure cut-off should be thoroughly reviewed with attention given to ensure that valid expenditures for the current year are captured and expenditures for the subsequent year are recorded in the proper accounting period.
>
> For further guidance on year-end reporting and encumbrances please review, Section I – General Compliance, Chapter 5, "Bids & Contracts/Purchasing" and Chapter 8, "Year-End Procedures" of the 2002-03 Audit Program.
> [Emphasis in original].

Keith Costello is a Budget Manager/Examiner for the Department of Education, Office of Abbott Implementation. He is licensed in New Jersey as a Certified Public Accountant, and he previously served approximately 18 years in the Office of State Auditor. Mr. Costello testified that he is aware of Assistant Commissioner Rosenberg's letter regarding year-end encumbrances. It is his surmise that the letter was sent to all school districts.

Mr. Costello acknowledged that the Department's calculation for excess surplus was almost $164,000 more than petitioner district's calculation. Part of this difference is attributable to the $78,890 that the district reserved for encumbrances. That amount was not included in the Department's calculation because the information was not available. In addition, the Department used a different figure to calculate 2% of the fund balance. Mr. Costello did not think that the resulting difference here, between $440,000 and $412,942, was a significant difference between figures that are estimates. He candidly acknowledged that he had no reason to question the district's numbers and they may be accurate. However, he testified that is the Department's position that it should wait until the district's audit and Comprehensive Annual Financial Report to make adjustments.

Mr. Costello testified that the remainder of the difference in the calculations for excess surplus has not been accounted for yet. He explained that at the time the Department did its

calculations, it was not aware of the decreases Ms. Walsh had taken on her Excess Surplus Calculation (Unaudited) for the Fiscal Year Ended June 30, 2003 (Exhibit P-4), such as Capital Reserve in the amount of $949,664. Mr. Costello testified that the revised Maintenance Budget Worksheet, admitted into evidence as Exhibit J-2, is consistent in method with how the Department handled all the other Abbott districts this year. The revisions were worked out with petitioner district, and they reflect decreases in non-recurring federal revenues and salary increases for a couple of positions. These changes are shown under the heading "Adjust," and they total $381,800. When this number is added to the preliminary maintenance budget figure for the 2003-2004 school year set forth in the Notice of August 27, 2003, $23,571,893, the revised preliminary maintenance budget figure is $23,953,693. The new estimated need for supplemental aid is $1,597,016 (Exhibit J-2).

Mr. Costello acknowledged that in past years, the Department has waited for the CAFR to make revenue adjustments. This year, rather than advancing the funds first and then subsequently adjusting downward if necessary, the Department has based the maintenance budget on estimates that it was thought would be agreeable to the districts. He reiterated that he had no reason to question Ms. Walsh's calculations, but he has not had a chance to analyze them. To Mr. Costello's knowledge, the independent accounting firm did not question the district's encumbrance calculations.

The forgoing represents the sum of the evidential record, which is essentially undisputed.

The parties make several legal arguments. Petitioner district contends that the Department must make changes in the maintenance budget worksheet based upon supplemental documentation from the district. The district should not have to wait until the Comprehensive Annual Financial Review for the year ending June 30, 2003, is submitted to the Department and reviewed. Petitioner argues that to delay the determination until the CAFR would directly thwart the Supreme Court's July 23, 2003, Order and prior *Abbott* decisions. Pursuant to the Court's Order, the Department must establish a preliminary maintenance budget figure "consisting of the 2002-2003 approved budget and an estimate of the supplemental funding that will be needed to support the currently approved budget." Included are any documented increases in non-discretionary expenditures, less any claimed inefficiencies (in this case, there are none). The

Department then calculates the revenues available to the district in 2003-2004 and the difference between the available revenues and the adjusted maintenance budget for 2003-2004 must be filled by Additional Abbott v. Burke State Aid.

The changes petitioner district seeks from the Department are inclusion of the district's encumbrance figures on the maintenance budget worksheet; recalculation by the Department of the district's excess surplus based on the district's calculations, until the CAFR establishes otherwise; and provision of a revised preliminary maintenance budget and estimated Additional Abbott v. Burke State Aid Award. The district contends that this request is supported by the Supreme Court's decision in *Abbott v. Burke*, 170 *N.J.* 537, 544 (2002). Addressing the Department's obligation to consider supplemental documentation and to make appropriate plan and budget adjustments in the preschool context, the Court stated: "That cooperative effort is only possible if the DOE staff works with the Abbott districts in the preparation of their plans, and continues through the administrative process to accept supplemental documentation and to assist the districts in curing any deficiencies that have caused the Department to reject any plan." *Id.* Petitioner district has provided supplemental documentation with respect to actual expenditures and encumbrances, and with respect to the excess fund balance. It contends that the Department must now incorporate those revised figures in the maintenance budget worksheet and provide the district with adjusted numbers and revised Abbott v. Burke State Aid based on those numbers.

The Department first asserts that petitioner district bears the burden of proof in this matter and must demonstrate its compliance with the Department's duly adopted regulations in order to establish any entitlement to additional aid. While the Supreme Court's Order of July 23, 2003, provides that the Department shall bear the initial burden of establishing the basis for any proposed reductions to the district's maintenance budget based on the effective and efficient standard set forth in the Department's emergency regulations, the Department's Notice of August 27, 2003, reveals that the Department did not reduce petitioner district's maintenance budget based on ineffectiveness or inefficiency. Thus, petitioner bears the burden of proof, pursuant to *N.J.A.C.* 6A:24-9.6(c).

The Department further contends that it properly calculated petitioner's 2003-2004 maintenance budget and Additional Abbott v. Burke State Aid Award. *N.J.A.C.* 6A:10-3.1 sets forth the requirements for Additional Abbott v. Burke Aid, and specifically provides that a district's budget shall only contain "those programs, positions and services approved and provided in 2002-2003." The regulation also provides that the maintenance budget "shall include any documented increase in non-discretionary expenditures including, but not limited to, contracted salary increases, increases in health benefits, and increases in special education." *N.J.A.C.* 6A:10-3.1(d)(4).

With regard to the district's position that $78,890 in encumbrances should be counted now for the 2002-2003 school year expenses, and that the excess fund balance should be $163,812 less, the Department notes that the $163,812 figure includes the $78,890. The encumbrance figure had not been included in the data available to the Department when it issued its Notice of August 27, 2003. The Department further notes that the $163,812 figure also includes the difference in the parties' calculation of the 2% of the fund balance ($440,000 v. $412,942). However, the remaining difference of about $57,000 was not specifically explained and may be attributable to various reserves the district took subsequent to the June 30, 2003 Board Secretary's Report. It is the Department's position that these new numbers, including the district's encumbrance amount that includes estimates, must be audited in preparation of the CAFR, and if correct for the 2002-2003 school year, the budget will be adjusted at that time.

Having considered the evidential record and the parties' contentions, it is my view that petitioner district has failed to establish that it is entitled to the relief that it seeks. While it is clear that the Department was obligated by the Supreme Court's Order of July 23, 2003, to provide in a Notice to the district preliminary maintenance budget figures for the 2003-2004 school year, it is likewise clear that the Department complied with this obligation. The district has subsequently provided revised information. Since the district will soon have an audit and Comprehensive Annual Financial Report completed, it is reasonable that any adjustments to the encumbrances and excess fund balance for the 2002-2003 budget be based upon this review. I so **CONCLUDE**. Thus, I further **CONCLUDE** that this appeal should be **DISMISSED.**

It is so **ORDERED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within the time allowed under the existing orders of the New Jersey Supreme Court and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Notwithstanding the provisions of any rule to the contrary, exceptions to Initial Decisions of the Office of Administrative Law in *Abbott* District budget appeal matters shall be filed within five (5) days of the date of mailing of the Initial Decision, and reply exceptions shall be filed within two (2) days of receipt of exceptions. File written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 26, 2003
DATE

Joseph F. Fidler
JOSEPH F. FIDLER, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

9/26/03
DATE

E-mailed Initial Decision to the parties on:

9/26/03
DATE

EXHIBITS

Joint Exhibits:

J-1 Notice of Preliminary Maintenance Budget Figure for 2003-2004 and Estimate of Discretionary Additional Abbott v. Burke State Aid Award, dated August 27, 2003

J-2 Maintenance Budget Worksheet

For Petitioner:

P-1 Revised Board Secretary's Report

P-2 Open Purchase Order Report, By Vendor Name

P-3 Schedule of Encumbrances Payable for the Year Ended June 30, 2003

P-4 Excess Surplus Calculation (Unaudited) for the Fiscal Year ended June 30, 2003

For Respondent:

R-1 Year-End Encumbrances letter dated September 16, 2003, from Department to Chief School Administrators, School Business Administrators/Board Secretaries, and Public School Accountants

WITNESSES

For Petitioner:

Ingrid Walsh

Craig Wilkie

For Respondent:

Keith Costello

OAL DKT. NO. EDU 4094-03
AGENCY DKT. NO. 185-6/03

BOARD OF EDUCATION OF THE TOWNSHIP OF BURLINGTON, BURLINGTON COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

The record of this local "Abbott" District's appeal of the Department of Education's (Department) decision on its supplemental funding request for the 2003-2004 school year, and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The Board of Education of the Burlington School District's (District) exceptions and the Department's reply thereto were duly submitted in accordance with the schedule established in response to the Court's order for expedition and were considered by the Commissioner in reaching this decision.

Initially, with respect to the District's claim in its exceptions that the Administrative Law Judge (ALJ) failed to follow the Supreme Court's definition of "maintenance budget," but, instead, used the "inconsistent definition of 'maintenance budget' in the Department of Education's emergency regulations" (District's Exceptions at 1-2), the Commissioner finds that the Department's application of the regulatory definition of "maintenance budget" set forth at *N.J.A.C.* 6A:10-1.2 in its review and approval of the District's 2003-2004 budget, and the ALJ's utilization of such definition in its consideration of the

District's appeal is entirely appropriate. With respect to this issue, the ALJ in this matter states solely that:

> The district also contends that the Department has not properly defined maintenance budget, *N.J.A.C.* 6A:10-1.2, but the district has simply asked, without objection, that this legal issue be preserved for appeal. (Initial Decision at 2)

The ALJ does not, therefore, directly address the appropriateness of applying the Department's "maintenance definition." Upon review of the record in this matter and upon consideration of the arguments set forth by the District in its exceptions, however, the Commissioner finds that neither the OAL nor the Commissioner have jurisdiction to determine directly or indirectly the validity of *N.J.A.C.* 6A:10-1.2, as such determination is solely within the jurisdictional purview of the Appellate Division or the Supreme Court. R. 2:2-3(a); *see, also, Pascucci v.* Vagott, 71 *N.J.* 40, 51-52 (1976); *Wendling v. N.J. Racing Com'n.*, 279 *N.J. Super.* 477, 485 (App. Div. 1995). Moreover, even if it were to be assumed, *arguendo*, that the OAL and the Commissioner have jurisdiction to determine the validity of the regulation, as argued by the District, the Commissioner finds that the Department's definition of "maintenance budget," as detailed in *N.J.A.C.* 6A:10-1.2, does not differ in any appreciable way from the Supreme Court's definition of that term contained in its Budget Order of July 23, 2003. Consequently, the Department's application of such regulatory definition in its review and approval of the District's 2003-2004 budget is wholly appropriate.

The remaining issues in this appeal are: 1) whether the Department appropriately excluded the District's encumbrance figure of $78,890 on the maintenance budget worksheet; 2) whether the Department should recalculate the District's excess surplus based on the District's revised calculations, until the Comprehensive Annual Financial Report (CAFR) establishes otherwise; and 3) whether the Department must issue a revised preliminary maintenance budget

and estimated Additional *Abbott v. Burke* State Aid Award based on adjustments to the reserve and fund balances made after the filed June 30, 2003 Board Secretary's Report.

Turning first to whether the Department appropriately excluded the District's encumbrance figure of $78,890 on the maintenance budget worksheet, the Commissioner points out that Keith Costello, Budget Manager/Examiner for the Department of Education, Office of Abbott Implementation, testified that, by memo dated September 16, 2003 to all school districts, Assistant Commissioner Richard Rosenberg addressed the procedures to be followed for open purchase orders and encumbrances on the school district's books as of June 30. The September 16, 2003 memo states, in pertinent part:

> Open purchase orders at June 30, 200X should be classified into the following two categories for review and reclassification:
>
> 1. Category one represents purchase orders for which the goods have been received or the services have been rendered at June 30th that have not been paid. These purchase orders must be expensed in the current audit period, the related encumbrances reversed, and a liability (accounts payable) established. If the invoice has not been received the amount must be estimated. In accordance with GAAP, an expenditure is recorded when goods are received or services are rendered.
>
> 2. Category two represents purchase orders which will be honored in the subsequent year. These purchase orders will be rolled over into the next fiscal year and will be shown in the June 30th general fund balance sheet as a reserve for encumbrances. Per NCGA Statement 1, paragraph 91 "encumbrances outstanding at year-end represent the estimated amount of the expenditures ultimately to result *if unperformed contracts in process at year-end are completed. Encumbrances outstanding at year-end do not constitute expenditures or liabilities."* (emphasis in text) (Exhibit R-1, in evidence)

Accordingly, category one purchase orders and the related encumbrances are to be considered 2002-2003 fiscal year expenditures, but category two purchase orders are considered expenditures in the 2003-2004 fiscal year and, thus, are not to be included in the development of a "maintenance budget" for the 2003-2004 school year pursuant to *N.J.A.C.* 6A:10-1.2. The

Commissioner, therefore, concludes that it was entirely appropriate and consistent with Assistant Commissioner Richard Rosenberg's letter of September 16, 2003, *N.J.A.C.* 6A:23-2.2 and *N.J.A.C.* 6A:10-1.2 for the Department to exclude $78,890 in encumbrances from the District's 2003-2004 maintenance budget. As the Department points out:

> Assistant Business Administrator Walsh testified that her encumbrance figure of $78,890 included items not yet received, services not yet performed, and contract estimates.[1] Also included in the encumbrances is an estimate for the legal cost of the ongoing 2003-2004 budget appeal. Some of these are costs for which the correct 2002-2003 amounts were not yet known as of September 24, 2003, the date of the hearing. Thus, it is appropriate to wait for the annual audit of the encumbrances, consistent with the Department's letter of September 16, 2003 to the auditors and business administrators (R-1), before any adjustments are made to include them as prior year expenditures. (Department's Exceptions at 5-6)

In light of the Assistant Business Administrator's testimony that the encumbrance figure of $78,890 includes items not yet received or partially received, services not yet performed, and contract estimates, based on the proofs brought to this record, the Commissioner is unable to determine which, if any, of the District's encumbrances totaling $78,890 have become accounts payable by virtue of the receipt of the encumbered goods or services on or before June 30, 2003 so as to be considered 2002-2003 expenditures. The Commissioner, therefore, concludes that the District's encumbrances were properly excluded as a budget expense for 2002-2003 by the Department, and directs that any adjustments to be made will be based on updated information with respect to the June 30, 2003 encumbrances for the 2002-2003 school budget year in the course of the CAFR review scheduled to begin in November 2003.

Turning to the two remaining questions, whether the Department should recalculate the District's excess surplus based on the District's revised calculations and whether the Department must issue a revised preliminary maintenance budget and estimated Additional

[1] Assistant School Business Administrator Ingrid Walsh testified that $40,000 of this amount represented her estimate that an $80,000 contract was half completed. (Initial Decision at 7)

Abbott v. Burke State Aid Award based on adjustments to the reserve and fund balances made after the filed June 30, 2003 Board Secretary's Report, the Commissioner agrees with the ALJ that any adjustments to the District's maintenance budget be made based on the CAFR review. In so determining, the Commissioner points out that any adjustment with respect to a change of encumbrances to accounts payable as a result of the CAFR review, as directed above, will affect the excess surplus figure, the fund balance[2] and the Additional *Abbott v. Burke* State Aid Award. Moreover, the unresolved discrepancy in the District's excess budget surplus figures and the Department's excess budget surplus figures, *i.e.*, the Department's excess surplus figure is $163,812 higher than the District's calculation, is best resolved within the context of the upcoming CAFR review as the $78,890 that the District reserved for encumbrances and the difference in the parties' calculation of the 2% of the fund balance ($440,000 v. $412,942) account for part of this difference, but the District, who has the burden in this matter, failed to adequately explain the additional difference of about $57,000 or to establish the accuracy of the District's excess surplus figure.

Accordingly, for the reasons expressed therein, the Commissioner adopts the Initial Decision as clarified above.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 10/20/03

Date of Mailing: N/A

[2] In that the Commissioner has determined that the Department properly excluded the District's encumbrances as an expense for 2002-2003 and, thus, the Department's calculation of fund balance remains unchanged, it is unnecessary to address the District's request that "the DOE should be required to disburse immediately the Additional Abbott v. Burke State Aid receivable that was eliminated based on the erroneous calculation of fund balance." (District's Exceptions at 21)

[3] Pursuant to *P.L.* 2003, *c.* 122, "*Abbott*" determinations are final agency actions appealable directly to the Appellate Division of the New Jersey Superior Court.

582-03

BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK, MIDDLESEX COUNTY,

PETITIONER,

V.

NEW JERSEY STATE DEPARTMENT OF EDUCATION,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning Abbott District challenged the Department of Education's determination of excess fund balance as of June 30, 2003, as well as the Department's determination of certain maintenance calculations.

The ALJ recommended adjusting the Department's excess surplus figure by $3.6 million; found that the salaried contracted raises should be calculated in accordance with the District's figures, including a 6.81% increase; the preliminary budget should be adjusted to include the figures for special education for existing and new students, per the District's testimony; the adjustment for Consumer Price Index (CPI) should be adjusted to reflect an additional $122,554; the preliminary budget should include $400,000 for the Special Technical High School and $503,014 for transportation costs and an increase of $24,241 for utilities. The ALJ also found that IDEA funds may be included as revenue.

The Commissioner modified the Initial Decision, finding the Department's determination regarding excess fund balance should be undisturbed, pending receipt of the Comprehensive Annual Financial Report (CAFR); the Department's determination regarding increases for contracted salaries is upheld; the District's maintenance budget should be modified to include a nondiscretionary increase of $859,282, rather than $462,905; the Department's determinations regarding CPI adjustment, the special technical high school and transportation costs should be upheld; and that the ALJ properly determined that revenue adjustments may include IDEA funds and the District's maintenance budget should include an increase of $24,241 for utilities.

October 20, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4161-03

AGENCY DKT. NO. 198-6/03

BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK, MIDDLESEX COUNTY,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION,

Respondent.

George F. Hendricks, Esq., for petitioner (Hendricks and Hendricks, attorneys)

Michael Walters, Deputy Attorney General, for respondent (Peter C. Harvey, Attorney General of New Jersey, attorney)

Record Closed: September 24, 2003 Decided: September 25, 2003

BEFORE **STEVEN C. REBACK**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This is an appeal by the petitioner, the Board of Education of the City of New Brunswick, Middlesex County (hereinafter "the Board" or "New Brunswick"), from a "Notice of a Preliminary Maintenance Budget Figure for the school year 2003-2004 and Estimate of Discretionary Additional *Abbott v. Burke* State Aide Award," memorialized by letter of the

Department of Education to the Superintendent of the New Brunswick School District on August 27, 2003. The letter advises that based upon preliminary audits conducted in July of 2003, the respondent (hereinafter "the Department" or "State" or "DOE") has determined that for the 2003-2004 school year New Brunswick is entitled to a maintenance budget of $104,596,723 inclusive of the District's General Fund Budget and restricted by ECPA and DEPA revenue accounts. The State notes that the number, in its view, accurately reflects the instructional and non-instructional programs approved and provided in the 2002-2003 school year including increases to the 2002-2003 budget to reflect non-discretionary costs and adjustments to the 2002-2003 budget based on actual 2002-2003 expenditures. These expenditures were based upon information provided by the accounting firm retained by the Treasurer of the State of New Jersey to review New Brunswick's financial information.

New Brunswick argues that the maintenance budget amount erroneously and insufficiently reflects the actual maintenance budget required for the 2003-2004 school year. The assertion in dollar amount substantially involves the calculation by the Department of a $12,844,173 surplus which it contends was reflected as unspent revenues in the budget for 2002-2003. Although the Comprehensive Annual Financial Report (hereinafter "CAFR") may and probably will subject the maintenance budget to further adjustments, see *N.J.S.A.* 18A:23-1 *et seq.*, this proceeding is mandated at this time by order of the New Jersey Supreme Court. Neither counsel nor I, without having done any additional research, given the exigencies of issuing this decision, was unable to answer the question for ourselves as to the impact of the decision *sub judice* on the CAFR audit and vice versa. The CAFR audit and budget have yet to be finalized and are estimated to be complete within the next few months, thus to some extent making the numbers on the preliminary budget questionable; for purposes of these proceedings, however, the Board and the Department accept these numbers and based upon those calculations, it is the Board's view that the $10,411,708 surplus alleged to have been accrued by New Brunswick for the previous school is incorrect. That for reasons which will be expanded upon later in this decision, much of that alleged "surplus" had been diminished by various encumbrances and accounts payable which were or will be paid by the District to various vendors not later than September 30, 2003. Thus, while the issue is not before me, New Brunswick would argue that the surplus reflected by the audits of the 2002-2003 school year were also erroneous, thus depriving the District of funds *for that year* and the error is compounded by reiterating the

erroneous surplus for the current school year. I shall not address the issue of the surplus for the 2002-2003 school year unless it relates directly to the 2003-2004 budget.[1]

In addition to arguing that the surplus is inaccurate, New Brunswick also argues various inaccuracies contained in the State budget at various line items, *i.e.* salaries, special education programs, the consumer price index adjustment and other aspects of the budget that will be addressed specifically. The bottom line, from New Brunswick's perspective, is that based upon these alleged erroneous figures, the true maintenance budget for the 2003-2004 school year should be $116,094,000, not the projected maintenance budget of $104,596,723 projected by the State. It should also be noted that based upon the audit, no inefficiency or lack of thoroughness was reflected in New Brunswick's program and thus no penalties are associated with the requested budget.

The Department of Education relies primarily if not exclusively on the two audits which had been conducted in July of 2003 and the expertise of the Acting Director of Fiscal Review and Improvement for *Abbott* Implementation, Mr. Glen Forney, an accountant who was personally responsible for devising much, if not all, of the preliminary budget offered by the Department. The State argues that based upon Mr. Forney's testimony and calculations and general accounting practices, the adjustments and figures arrived at were proper, reasonable and fair and should not be altered in any fashion to the benefit New Brunswick; however, the Department does acknowledge the caveat that the preliminary budget will be impacted by changes, if any, resulting from the CAFR audit mentioned earlier. So, for purposes of this hearing and this decision, the only numbers that reasonably are available to work with are those set forth by the Board in its preliminary budget and the testimony and evidence provided by the District which may have been unavailable to the State when the preliminary budget was calculated.

The various key budgetary financial figures are shrouded with ambiguity. On various documents and through various aspects of the testimony, different figures had been used to ascertain, for example, the estimated surplus for the 2002-2003 year, and the actual budget the District allegedly requires. As a result of this ambiguity for me as well as for the reader, it should be noted that two significant numbers were arrived at through stipulation. It had been agreed to

[1] It was stipulated that New Brunswick's adjusted 2002-2003 budget is $110,785,600.

by the parties that irrespective of other numbers reflected in the documents, the surplus alleged as of the date of the hearing is $9,911,707. New Brunswick asserts that the appropriate maintenance budget for the 2003-2004 school year should be $116,094,000.

As noted previously, the matter was initiated by an informal pleading which I deem to be the letter of August 27, 2003 issued by the Department of Education through its Assistant Commissioner, Mr. Gordon MacInnes. The responsive pleading was accepted by both parties to be the letter written not by counsel for New Brunswick, but rather to counsel from the business administrator/board secretary of the District, dated September 4, 2003.

By way of background, on or about July 23, 2003, the Supreme Court of New Jersey granted the State's motion to relax the *Abbott v. Burke* remedies and standard as applied to *Abbott* districts for the 2003-2004 school year budget. *Abbott v. Burke*, 153 *N.J.* 48, 80 (1998) (hereinafter "Abbott V"). In its order of July 23, the Supreme Court states that "The DOE shall have the authority to treat the 2003-2004 school year as a maintenance year for purposes of calculating additional *Abbott v. Burke* State Aid for the *Abbott* districts." July 23, 2003 Order at 4. Further, the order provides that "During 2003-2004, K through 12 programs provided for in the 2002-2003 school year will be continued subject to the conditions set forth in the order." The order than provides a negative definition of a "maintenance budget" indicating that such budget "does not include the restoration of programs, positions, or services, that were reduced in the 2002-2003 program or new programs, positions or services accept in respect to Paragraph 2E of the Court's order of June 24, 2003." *Id.* at 4, 5.

As part of its order, the Department of Education was directed by the Supreme Court to promulgate emergency rules governing the entire *Abbott v. Burke* budgeting process for the 2003-2004 school year. Pursuant to that order, the Department of Education promulgated *N.J.A.C.* 6A:10-1.2 in which the phrase "maintenance budget" is defined as follows:

> "Maintenance budget" means, for the 2003-2004 school year, a budget funded at a level such that the district can implement 2002-2003 approved and provided programs, services, and positions and includes documented increases in non-discretionary expenditures and adjustments for actual 2002-2003 expenditures. Examples of non-discretionary expenditures are increases in contracted salaries, health benefits, and special education tuition. Maintenance does not include the

> restoration of programs, positions, or services that were provided in previous years or new programs, positions, or services unless necessary to meet paragraph 2c of the Supreme Court's order of June 24, 2003 in *Abbott v. Burke*. Maintenance also does not include non-recurring 2002-2003 expenditures.

Following a rather protracted and expedited procedural history of this matter as it wended its way through the New Jersey Supreme Court's rulings, the Court finally issued its last order concerning the procedure to be employed and various other aspects of arriving at a maintenance budget on July 23, 2003. Following that Order, the matter was preheard by telephone on August 28, 2003 at which time it was agreed that the earliest possible date for commencement of the hearing was September 9, 2003. Following a half-day discussion with the parties concerning possible resolution of all or part of the matter, the case went forward to hearing and was continued at the earliest time possible for all parties and this judge, Monday, September 15, 2003 and Tuesday, September 16, 2003 at the Office of Administrative Law, Mercerville, New Jersey.

Pursuant to the agreement of the parties, on September 17, 2003, my office received a short stipulation of fact incorporated in a letter submitted by Mr. Hendricks. In addition, by Monday, September 22, 2003, counsel submitted briefs and written argument in support of their respective positions. On September 24, 2003, my office received a brief letter reply to Mr. Michael's submission from Mr. Hendricks. The reply essentially goes to the general assertion raised by the State that the District did not submit proof of the various errors it asserts are contained in the preliminary maintenance budget. Where that assertion has been made by the Deputy Attorney General in respect to specific aspects of the budget, I will address the particulars of the proofs provided.

It should also be noted that on August 22, 2003, the Department of Education sought leave from the Supreme Court for a three-day extension of time to issue decisions on *Abbott* districts' applications for supplemental funding, and on August 26, the Court issued such order granting the Department's request for an extension and thus setting a deadline for the issuance of initial decisions to on or before September 26, 2003.

FACTUAL AND HISTORIC BACKGROUND

To place the case in context, some history of the "*Abbott*" rulings is appropriate. I shall not go back to the original *Abbott I* decision, *Abbott v. Burke*, 100 *N.J.* 269 (1985), nor to its related predecessor, the seminal case of *Robinson v. Cahill*, 118 *N.J. Super.* 223 (Law Div. 1972), other than to say that as a result of these holdings, the State of New Jersey was ordered to set forth remedial measures it determined that must be implemented to ensure that public school children from the poorest (*i.e. "Abbott")* urban communities receive the educational entitlements that the Constitution of New Jersey guarantees them. More specifically, the Court refers to that provision within the New Jersey Constitution which states that:

> [t]he Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of 5 and 18 years.

In passing, of course, the Court ruled as unconstitutional all prior public school funding that had then been in place. Recognizing that educational funding is directly correlated to quality of education and that funding is in most districts primarily generated through real estate tax assessments, the Court concluded that in order to have an even playing field and provide the children of the State with equal protection under the law, State funding must reflect the disparities existing in various urban neighborhoods in terms of available real estate tax assessment funding as compared with those more affluent suburban neighborhoods and that the State, particularly the Legislature, had an unequivocal positive obligation to provide remedial funding to those *Abbott* districts so that a parity of sorts could be achieved, at least through finances, between inner city school systems and those of the generally more affluent school systems in surrounding suburban areas within the State.

Thus, the whole notion of a "maintenance budget" is truly an aberration from the principles that were originally set forth in *Abbott I* following the general seminal holding of *Robinson v. Cahill*. In 2002, four years after the *Abbott V* ruling, the Department of Education, filed a motion seeking a one-year relaxation of the *Abbott V* remedies, "based on concerns about the implementation of the *Abbott IV* and *Abbott V* remedial measures, in combination with the State's current budget crisis." *Abbott v. Burke*, 172 *N.J.* 294, 295 (2002) ("Abbott IX"). Seeking

a one-year cessation of further growth of certain of the *Abbott* remedial measures, the DOE requested: 1) the right to limit additional supplemental funding for 2002-2003 for each *Abbott* district to the expenditures contained in the 2001-2002 K-12 DOE-approved district budget; 2) the authorization to preclude any district appeals seeking funding at a level in excess of that limit; 3) the authority to suspend school-based budgets, school-based need requests and zero-based budgeting; 4) the ability to afford districts flexibility to reduce, eliminate or limit growth of certain whole school reform enhancements such as technology coordinators and security coordinators; 5) the ability to authorize districts to eliminate positions and make staffing modifications in various programs such as technology programs, alternative schools, accountability programs, school-to-work and college transition; and 6) the ability to authorize districts to make educational judgments about retaining certain specified position such as media/technology coordinator, technology coordinator and drop-out prevention specialist. *Id.* at 296-97.

Acknowledging the State's fiscal crisis and the motivation underlying the DOE's proposal to strictly limit 2002-2003 supplemental funding to 2001-2002 adjusted levels, the Court held the Commissioner had the authority preliminarily to establish districts' supplemental funding for 2002-2003 at the level of expenditures contained in the 2001-2002 K-12 DOE approved district budget. *Id.* at 297. However, the Court ruled, the Commissioner did not have the authority to preclude any district appeals seeking supplemental funding for 2002-2003 in excess of the funding, as adjusted, for fiscal year 2001-2002. *Ibid.*

In addition, the Court granted the "DOE's request for one year to afford districts flexibility to eliminate, reduce, or limit growth of certain whole school reform enhancements as specified, to eliminate positions and make staffing modifications in various needs-based programs as specified, and to make educationally appropriate decisions about retention of certain positions as specified ... subject to the districts' right of appeal based on educational need related to impairment of the core elements of whole school reform and essential enhancements thereof." *Id.* at 297-98.

In 2003, the DOE again moved for modification of the Court's *Abbott V* decision. *Abbott v. Burke,* ____ *N.J.* ____, (2003)(slip op. at 2)("*Abbott X*"). After cross-motions were filed by

the Education Law Center (hereinafter "ELC"), the Court ordered on April 29, 2003, "that the ELC and the DOE participate in mediation for the purpose of resolving the issues raised by the parties in their motion and cross-motion." *Ibid.* The mediation resulted in the parties reaching an agreement on all issues except the DOE's application to extend by one additional year the one-year relaxation of remedies granted in *Abbott IX*. *Id.* at 4. The mediated agreement approved by the Court provided in part:

> 4. *Supplemental Programs*
>
> a. Every *Abbott* school shall continue to implement supplemental programs as set forth in the chart entitled "Supplemental Programs in *Abbott* Schools."[2] attached hereto. Although the DOE has not agreed that all of the programs listed on the chart are supplemental or are required by *Abbott V*, the Department has agreed to the inclusion of the contents of the chart in regulations to be adopted;
>
> b. Regulations shall be developed to guide school and district assessment, planning and implementation of needs-driven supplemental programs as set forth in the chart entitled "Supplemental Programs in *Abbott* Schools";
>
> 5. *Supplemental Funding*
>
> a. The DOE 2003-2004 proposed regulations notwithstanding, the DOE represents that its funding proposal relates only to the 2003-2004 school year, and that it does not otherwise seek to modify or limit the right of *Abbott* districts to request supplemental funding for all demonstrably needed programs, services and positions and to appeal the denial of such requests, as provided for in *Abbott V*, 153 *N.J.* at 517-19, 525-27;
>
> b. Regulations shall be developed to implement the provisions of paragraph 5(a);
>
> [*Id.* at 10. *Footnote added.*]

The Court also ordered the sole remaining issue in dispute – the DOE's application to extend by one additional year the one-year relaxation of remedies previously granted in *Abbott IX* – be set down for oral argument. *Id.* at 13.

[2] *See* Memorandum Appendix I for chart.

Following oral argument, the Court issued its Order, *Abbott v. Burke*, ____ *N.J.* ____, (2003)("*Abbott XI*"), dated July 23, 2003. Noting that the DOE has the responsibility to implement firm administrative controls accompanying increased funding to *Abbott* districts to ensure money is spent effectively and efficiently, the Court held the DOE had "the authority to treat the 2003-2004 school year as a maintenance year for purposes of calculating Additional *Abbott v. Burke* State Aid for the *Abbott* districts." *Id.* at 4.

The Court explained that K-12 programs provided for in the 2002-2003 school year would be continued during 2003-2004; and that the Statewide aggregate amount of Additional *Abbott v. Burke* State Aid for 2003-2004 would be calculated as the total amount of Additional *Abbott v. Burke* State Aid approved for the *Abbott* districts for Fiscal Year 2002-2003, subject to adjustment as required for a maintenance budget. *Id.* at 4-5. "A maintenance budget shall mean that a district will be funded at a level such that the district can implement current approved programs, services, and positions and therefore includes documented increases in non-discretionary expenditures. Examples of non-discretionary expenditures are increases in contracted salaries, health benefits, and special education tuition. Maintenance does not include the restoration of programs, positions, or services that were reduced in 2002-2003, or new programs, positions, or services." *Id.* at 5.

Moreover, the Court authorized the DOE to reduce a district's presumptive amount of Additional *Abbott v. Burke* State Aid if a districts' "non-instructional programs" were not "effective and efficient." *Id.* at 6. The Court stated, "[f]or purposes of calculating the Additional *Abbott v. Burke* State Aid and in furtherance of its pre-existing duty to implement administrative controls, the DOE shall promulgate an emergency regulation establishing the standard for evaluating the effectiveness and efficiency of the districts' non-instructional programs." *Id.* at 5-6. Non-instructional programs were defined as "office/administrative expenditures and programs, positions, services and/or expenditures that are not school based or directly serving students." *Id.* at 6.

The Court ordered the DOE to provide each district notification of its preliminary maintenance budget figures for the 2003-2004 school year, consisting of the 2002-2003 approved budget and an estimate of the supplemental funding needed to support that currently approved

budget, within thirty days of the issuance of its Order. *Ibid* Moreover, for any expenditure deleted from a district's 2002-2003 budget related to the district's non-instructional programs based on the effective and efficient standard, the DOE was directed to include in the written notice a specific statement explaining why the program or part thereof is no longer effective and efficient. *Id.* at 6-7.

In addition, the Supreme Court also provided that *Abbott* districts could appeal any reductions to their maintenance budgets by the DOE's application of the effective and efficient standard. *Id.* at 7. It is within the context of this background that New Brunswick has appealed the preliminary maintenance budget provided to it by the Department.

BURDEN OF PROOF

In cases heard by the OAL, the Supreme Court indicated that the Department of Education has the burden of moving forward to establish the basis for any proposed reductions to the District's maintenance budget based on the effective and efficient standards set forth in the DOE's emergency regulations. If that initial burden is met, the District shall then bear the burden of demonstrating that any budgetary reductions are not justified under that standard. It is within this framework that we shall examine New Brunswick's appeal.

THE FACTS

Unless otherwise noted, the following is a substantially uncontradicted narrative of the operative facts in these proceedings. If a factual dispute has been presented, I shall set forth its adversarial basis, arrive at an explicit finding of fact and give reasons in support of it.

Accordingly, I **FIND**:

A few caveats to begin: While in no way addressing any issues of bad faith of either party, it must be noted that many of the budgetary determinations are based upon broad projections into the future. The words "crystal ball" were occasionally used during the course of the testimony. A budget is a fluid instrument. It in reality can never be fully determined to be

accurate until after the completion of the budget year when revenues and costs can be fully ascertained. Thus, while the assumption is that both parties acted in good faith, as a non-accountant, the approach that I have taken in assessing the propriety of the maintenance budget offered and that which is disputed by New Brunswick and is to view the entire matter within the context of reasonableness and fairness. Moreover, I have adopted the view that the factual accuracy of the budgetary calculations and formulae are to a great extent based upon which of the parties has a more intimate day-to-day responsibility for those numbers.

In this instance, without casting any aspersions on the gentlemen testifying on behalf of the Department in their capacities of fiscal reviewers of this *Abbott* district, it is clearly my view that the person possessed with the most intimate knowledge of the numbers is Mr. Richard Jannarone, the Business Administrator of the District. Mr. Jannarone convinced me by his spontaneity, almost immediate recollection of detailed numbers, and his passion, that great weight should be accorded to his testimony, and this I have done. Mr. Jannarone lives with the New Brunswick budget, day to day, week to week, month to month, year to year. He appears almost possessed with the need to provide the most accurate and efficient budget that is available within the District. Many of the numbers arrived at by Mr. Jannarone were generated on the night preceding the hearing date. Moreover, I found Jannarone to be a very credible witness. His spontaneity, his direct answers to questions, his willingness to acknowledge ignorance of certain facts when that occurred, his ability to recollect information that had been passed on to the Department months ago through his memory only and accurately setting forth the dates that various reports and information asked for or not was provided to the State was very impressive. In addition, I think that Mr. Jannarone treats his job not merely as a public employee, but as a "calling." He is the third generation school business administrator in his family, two generations before him also reached the level of superintendent. Thus, my reliance on Mr. Jannarone's expertise and knowledge as well as the accuracy of his testimony outweighs much of what was provided by the State – not because the State witnesses were not found to be credible, but because Jannarone was, and continues to be, literally on top of every number that is the basis of this appeal, whereas the State's witnesses were distanced by geography as well as by lack of on the ground experience within the business office and the District itself. Having made these remarks, we shall now address the specifics. It should be reiterated that there has never been a

finding that New Brunswick was in any way inefficient or ineffective in the conduct of its non-instructional programs.

As was noted in the earlier discussion of the history of this matter, pursuant to the August 27, 2003 letter from Assistant Commissioner MacInnes, the District was advised that the preliminary maintenance budget for the 2003-2004 school year would be $104,596,723 inclusive of the District's general fund budget and restricted by ECPA and DEPA revenue accounts. The Department maintains in the letter (R-1) that the number accurately reflects the instructional and non-instructional programs approved and provided in the 2002-2003 school year and includes as well increases to the 2002-2003 budget reflecting nondiscretionary costs and adjustments to the previous year's budget based upon actual 2002-2003 expenditures which was provided to the State Treasurer by information provided to the latter by the accounting firm retained by the State to review New Brunswick's financial information. It is New Brunswick's position that the budget inaccurately reflects a proper maintenance budget for the 2003-2004 school year by approximately $12.5 million. That purported deficit has resulted, in New Brunswick's view, from miscalculation of various line item budgetary matters, as well as by a significant discrepancy by the accountants acting on behalf of the District in conjunction with the Board's experts in ascertaining the purported budgetary surplus which was carried over from the 2002-2003 school year, which amounts to approximately $9,911,707. While the Board argues that much of that surplus may have been accounted for when the initial budgetary calculations were done by the accountants in early July, that they do not accurately reflect the purported surplus today. Much of this discussion surrounds the issue of defining and ascertaining what has either been described as "encumbrances" and "accounts payable." Both are technical accounting theories and concepts which I will make an effort to define for the laymen as best I can later in this decision.

The preliminary and maintenance budget which is the subject matter of New Brunswick's appeal has been entered into evidence as respondent's Exhibit 1. For purposes of ease of discussion, the preliminary budget shall be set forth at this time. It is as follows:[3]

[3] Because of the small font size, my secretary had difficulty in replicating R-1 into the text of the decision. Of course, if any disparity exists between the text and R-1, the latter prevails.

Budget 2002-2003

Line #			
9470	Approved General fund budget 02-03		99,255,989
Less	Local Contribution to Special Revenue		(2,980,494)
2511			
	Add:		
13300	Early Childhood aid		11,768,014
13690	DEPA Aid		2,471,552
13900	Distance Learning network aid		270,539
	Adjusted 02-03 State program budget		110,785,600
	Less:		
Trenton to	Adjust for actual state program spending fund 11, 12, 13		(10,963,245)
do	Adjust for actual state program spending fund 15		(1,880,928)
			(12,844,173)
	Base 02-03 state program budget		97,941,427
	Add/(Subtract) Difference between 02-03/03-04 Plan		
	Less:		
	EC Plan 03-04 as of May 16, 2003	12,900,026	
	EC Plan 02-03	(11,768,014)	
			1,132,012
	Add or deduct: Non-discretionary items:		
	Salaries – Contracted Rate	2,635,526	
	Health Benefits	2,352,640	
	Charter School Tuition	(119,392)	
	Special Education	462,905	
	CPI at 2.11% non-sal net of Util	191,605	
	Utilities rate increases	0	
	Subtotal		5,523,284
If applicable	Adjust For non-recurring items	0	
	non-cash items	0	
	Other	0	
	Decrease in Federal aids	0	
			0
	Subtotal adjustments		6,655,296

	Less:		
	Ineffective/Inefficiencies for items that are applicable in 0203 Irosenfarb Winters) or Budget Managers		0
	FY 03-04 Total State program Budget @ Maint.		**104,596,723**

Budget: 2003-2004

410	Total Gen'l fund Revenues	113,481,748	
	SD8 Adjustment for PSEA recorded incorrectly by district (PSEA at Feb 2003 should be $6,886,524 and district recorded		
360	$4,638,935	2,247,589	
425	ECPA	8,225,520	
BS Report	ECPA Carryforward	142,900	
426	DEPA	2,471,552	
	Subtotal state program aid	126,569,309	
		(31,293,750)	
	Base GF revenue 03-04		95,275,559
	Add/(Subtract): Revenue Adjustments:		
	PSEA adjustment	35,571	
	IDEA	712,780	
	Other: MISC unbudgeted rev	0	
	Excess Fund Balance ($2,673,318 used to offset receivable)	9,911,707	
			10,660,058
	FY 03-04 GF Total Budgeted Revenues Available		105,935,617
	Difference: Need for Supplemental aid		(1,338,894)

Bold items are what must be disclosed per the court.
Ineffective an inefficient terms must be in written form in the final letter to the districts.

[R-1]

The parties have stipulated to the accuracy of the following: Line 9470, Approved General Budget 2002-2003, $99,255,989. They have also stipulated to line items 13300, 13690 and 13900, totaling $110,785,600. The parties have also stipulated as to the amounts apportioned for health benefits and charter schools, which are $2,352,640 and $119,392, respectively. Finally,

the parties have also agreed to the revenues available to the District for the 2003-2004 school year which totals $31,293,750.

I shall first address the issue involving the most significant sum that was excluded from the District's 2003-2004 preliminary budget: the Department concluded that there was an actual surplus of $9,911,707 that the District retained from the 2002-2003 school year. That amount, as such, was deemed to be a surplus and depending upon how one assesses it, reduced the maintenance needs of the District or was already available to the District so that the State could offset State funds by that amount in reaching the appropriate maintenance level for the 2003-2004 school year. It is New Brunswick's position that based upon an erroneous surplus, the actual maintenance budget for the 2003-2004 school year should be $116,094,000.

The individual primarily responsible for testifying in support of the Department's preliminary budget is Mr. Glen Forney. He currently serves as the acting director of the Department's fiscal revenue and improvement section with special emphasis on *Abbott* implementation. He is and has been a State auditor since the early 1980's and holds a bachelor's degree in accounting from Rutgers University. Mr. Forney became more intimately involved with the calculations of the budget when one of his colleagues, Mr. Vincent Mastrocola, a budget manager for two years with the Department and directly assigned to the New Brunswick District since November 2002, was, pursuant to Mr. Forney's testimony, originally assigned to the on-hands calculations but became "unavailable" during certain critical times when the process was conducted. Consequently, Mr. Forney assumed primary responsibility both for the preparation of the actual preliminary budget as well as the substance of the Assistant Commissioner's letter to Dr. Larkin, dated August 27, 2003, which essentially serves as the pleadings in this case and provides bottom line numbers. Forney testified that the budget was prepared in the latter part of August.

ADJUSTMENT FOR 2002-2003 EXCESS SURPLUS

Mr. Forney and the Department assert that approximately $9,911,707 was deemed to be an "adjustment" for purposes of calculating New Brunswick's 2003-2004 budget. The word "adjustment" is ambiguous to the layperson because it doesn't tell you whether the adjustment is

a plus or a minus. It is just referred to as an "adjustment." In this instance, the approximately $10.9 million "adjustment" for excess revenues resulted in a deduction of New Brunswick's 2003-2004 proposed maintenance budget because it is the Department's view that that amount represents money that remained unspent for the 2002-2003 school year and should thus be carried over and utilized by New Brunswick for the current school year budget. Calculations for these alleged unspent revenues are found at Exhibit R-8.

Mr. Forney indicated that the numbers in terms of the adjustment for unspent appropriations were derived from the CPA firm retained by the State to review New Brunswick's budget and from other sources as well. Thus, the 2003-2004 preliminary maintenance budget reflects what the State asserts were the actual expenditures in the 2002-2003 maintenance budget. This hotly contested issue was aggressively and, in my view, successfully disputed by the testimony of New Brunswick's business administrator, Richard Jannarone. Mr. Jannarone, with the District since 1999, has served as the School Administrator and Board Secretary since May of this year and previously served as Assistant Board Secretary and Business Administrator. His role is central in the preparation, creation and the formulation of the District's school budget. He was responsible for constructing the proposed budget for 2003-2004, initially submitted to the Department in December of 2002. The final budget was prepared in late February, early March of 2003. It was without dispute that Mr. Jannarone conducted numerous and on occasion all day meetings following that submission with representatives of the Department, clarifying information where requested, supplementing other information and, pursuant to his testimony, which was not rebutted, answering all questions and making all documents available to anyone from the Department or its authorized subcontractors to examine the finances of New Brunswick. The approximate $10 million surplus was addressed by Mr. Jannarone in a knowledgeable, forthright, intelligent manner.

In order to understand the position of both parties concerning this surplus, it is necessary to have a very fundamental understanding of two accounting concepts. One is "encumbrances" and the other is "accounts payable." The basic definitions of these terms was generally agreed to by the parties off the record. For purposes of accounting, the term "encumbrance" is defined as the receipt of goods or services yet to be paid for. In the instant case, those goods or services must have been provided New Brunswick by June 30, 2003 in order to eliminate them as part of

any excess surplus. "Accounts payable" refers to those goods or services received, in this instance, by New Brunswick *prior* to June 30, 2003 and *paid* for by not later than September 30, 2003. In both instances, the encumbrance, if the definition is satisfied, as well as the accounts payable are considered to be part and parcel of the *2002-2003 budget* and should be reflected in the maintenance budget for the following year.

Mr. Jannarone essentially testified that a significant number of items which were deemed to be a surplus for the 2002-2003 school year and thus added to what was described as excess surplus was in reality accounts payable or encumbrances both of which are in compliance with the requirements that they be included within the 2002-2003 budget and, therefore, excluded as excess surplus for the forthcoming school year. Jannarone explained that it is his practice, as is the practice of most school districts, to submit all outstanding purchase orders in March. In order for those orders to be placed and paid, the business administrator requires an invoice, a voucher accompanied by an affidavit and a receiving report attesting to the fact that whatever had been purchased was indeed received by the district, whether that be goods or services. The bills for these various goods and services are then paid by New Brunswick on a monthly basis following monthly Board approval. He testified further that in March and April of 2003, New Brunswick had experienced significant difficulties in confirming the validity of various bills primarily because of lack of staffing. As a result, some of those bills for goods and services which had been received *prior* to June 30, 2003 (and thus should have been a part of the actual budget of 2002-2003) were treated as accounts payable. Others which could not be readily verified were treated as encumbrances. Jannarone unequivocally stated that the Schedule G of the initial order by the Board CPAs and which contains the $9.9 million surplus is in error. (*See* Exhibit R-8).

On or about July 31, 2003, the New Brunswick Board of Education provided a lengthy document to the Department setting forth all of those goods and services which were either accounts payable and/or encumbered as of that date. It should be reiterated at this time that budgetary computations are fluid. Thus, there are many other encumbrances and accounts payable that reflect goods and services actually received and utilized by the District in 2002-2003 which have yet to be paid and which may be paid by not later than September 30, 2003 and still be attributed to the 2002-2003 budget year. Based upon Mr. Jannarone's testimony, in conjunction with R-83, as well as his calculations up through to the date of the actual hearing

resulting from his obtaining more contemporaneous numbers from the New Jersey Department of Education's website, it was the District's determination that $10,307,496.67[4] represented either reported encumbrances and/or accounts payable such that that sum must be deemed to be monies spent in the 2002-2003 school year, not deemed to be an excess surplus which is carried over to the current school year and, therefore, should be added to the original preliminary budget determinations arrived at by the Board and memorialized in its letter of January 6, 2003. Based upon the actual numbers as they exist at this time (by this time I refer to the date of the last testimonial phase of these proceedings), the encumbrances and account payables which Jannarone asserts were erroneously deemed to be surplus totaled approximately $10,307,496.67. (R-83).

In my judgment, there was no competent evidence that refuted Mr. Jannarone's numbers. His testimony was that he provided all the data and information that was available to him either gratuitously or at the request of the Department concerning every aspect of the budget including the alleged excess surplus, early on during the budgeting process. Moreover, he testified under oath that he had documents and records available (although not produced for evidence) to prove and establish his assertions concerning the excess surplus and to justify the determination of how much of that was really deemed to be accounts payable and encumbrances that should have been deemed part of the actual and approved budget of 2002-2003. Therefore, while I indeed recognize that this figure is a fluid figure subject to change and that CAFR may indeed come to a contrary or disparate result, I **FIND** that the determination by the State Department of Education determining that the District of New Brunswick has an excess surplus of approximately $9,911,707, which therefore must be negatively adjusted to New Brunswick's 2003-2004 revised budget is incorrect. I further **FIND** that the New Brunswick Board of Education has established by a preponderance of the relevant credible evidence that as of the date of the hearing, there was a significantly smaller surplus and that as a consequence the purposed budget provided by the Department to the Board be adjusted to reflect an increase for the 2003-2004 school year, which is reflected by the elimination of the purported excess surplus. The circumstances as I can best ascertain is that of the $9,911,707 which was earmarked by the State as surplus for the 2002-2003 school year, as of the date of the hearing, the evidence demonstrated that New Brunswick

[4] It is my understanding, as previously mentioned, that the actual amount of excess surplus is alleged by the Department to be $9,911,707.

had actually paid $3.6 million of those outstanding encumbrances and/or accounts payable. So, while it is represented, and I have no reason to question it, that by September 30, 2003, there will be no further accounts payable and encumbrances and therefore no surplus, it is my understanding that in this rather triangulated and distorted time line during which these issues are being resolved that I ascertain from the record what the *actual* numbers are now, not in two weeks. Thus, based upon the evidence and testimony, I **CONCLUDE** that New Brunswick has diminished its purported surplus by $3.6 million (remembering again that it is the position of New Brunswick that it will eliminate the entire surplus within the time frame allotted).

During the course of the proceedings, some mention was made of a concept referred to as "backloading" or something to that effect. Since I do not have a transcript of the proceedings, I am unable to specify the particulars of the phrase. Nevertheless, what apparently is meant by this pejorative phrase is to accuse a vendee of waiting until the very end of the fiscal year to create encumbrances. No one directly asserted that New Brunswick was guilty of this practice but, nevertheless, it does appear that many of the encumbrances and accounts payable did result in actions taken close to the end of the school year. For purposes of the issues before me, however, I see no relevance whatever to when those encumbrances were created just as long as the goods and/or services were received before June 30, 2003 and that all encumbrances and/or accounts payable are paid for by September 30, 2003. Therefore, whether there is or is not "backloading" by a school district, in my view and based upon my very limited accounting background, has no relevance at all when it comes to ascertaining the appropriate maintenance budget. Whether it has relevance in other aspects of accounting practice and budgeting is not for me to decide. Therefore, I am **ORDERING** that the $3.6 million figure be used as an adjustment to reduce the purported excess surplus set forth by the Department and shall be added to the projected 2003-2004 budget. Again, I must indicate that there is a certain sense of the bizarre here because we are dealing with numbers that will not be the numbers that are actually ascertained or utilized and will not be the numbers necessarily reflected by the CAFR audit. To that extent, the caveat remains. I shall next address the various other disputes concerning individual budgetary items.

SALARIED CONTRACTED RAISES

The Department's preliminary budget allocates an additional $2,635,526 to the 2002-2003 maintenance budget representing salaries of both teaching staff and non-teaching staff contracted employees of the District for 2003-2004. The representatives of the Department candidly acknowledged that this number was arrived at not through factual examination of the actual salaries of all of the approximately 1,100 employees of the District, but rather by imposing what it deemed to be a reasonable increase of 5% over last year's budgeted salaries.

The Business Administrator of New Brunswick did not base his figures on projections or formulae, but on the actual numbers that he "crunched." It was his unrebutted testimony that for the school year 2003-2004, the actual increase of salaried contracted raises is 6.81%. Based upon that number and his calculations, the District was "shortchanged, by $5,565,193." During the course of his testimony, particularly in respect to this item, Mr. Jannarone made an interesting point. He noted that it was his view that when the *numbers* suited the Department, it used actual data; when the numbers did not suit the Department, it used general policies and formula. While he characterized the Department as acting in "bad faith" by using this selective process, as well as by its conduct in other areas of the computation process, I make no finding in regard to this assertion. In his brief, the DAG argues that the calculations by the District are unreliable and subject to change. *See,* brief, DAG Walters at 8-9. This, of course, can be said of most of the calculations. Nevertheless, the soundness of the Board's analysis in my view provides me with sufficient proof to accept its calculations subject to the CAFR audit.

SPECIAL EDUCATION

The proposed preliminary budget offered by the Department to New Brunswick for the increased costs for 2003-2004 related to classified students was indicated in R-1 to be $462,905. This number, as best as I can ascertain, does not only account for the needs of existing special education students in New Brunswick but the needs of new enrollments commencing 2003-2004 as well. The figure was arrived at by the accountants contracted with the Department based upon average costs of tuition per student which was arrived at through a reasonable projection and the assumption that 17% of the special education students in the District would be required to be

referred for out of district for placement.[5] Reliance was also placed on figures derived from the 2002-2003 budget.

Rather than rely on projections and rather than lumping both existing special education students and new enrollments of special education students together, the District provided calculated figures representing both. These were based upon actual numbers arrived at and crunched by Mr. Jannarone and presumably members of his staff. In commenting upon the documentation provided by the Department in support of its special education maintenance budget (*see* Exhibits R-35 through R-48), Mr. Jannarone testified that in order to reasonably ascertain those increases, it is absolutely essential that there be supportive documents provided which indeed was provided to the Department by New Brunswick. Nevertheless, Jannarone asserts that the State did not calculate existing costs but provided statistical data for new placements only and did not account for tuition increases of those students who have already been classified the District and in need of additional funding, which he estimated to be $859,282. He arrived at this figure by actually sitting down and counting those students who are already in the District and classified and ascertaining as best as he reasonably could the *actual* cost increase for the school year 2003-2004. He also notes that while the State projected new enrollments of classified children to be 13 based upon prior years, as of the date of the hearing, 400 students actually were required to be evaluated by the District's child study team of which approximately 200 would be classified. This reflects an additional group of classified kids numbering 34 and it is based upon this additional figure plus an estimate of 17% of an increase that resulted in Mr. Jannarone's generating the approximately $860,000 figure for existing enrollments. In addition, with respect to new enrollments, the figure that was based upon actual on-hand numbers was arrived at to be $1,234,415. Again, as in previous discussions, when one is confronted with the actual number cruncher and is aware that he has intimate knowledge – perhaps more knowledge than any other human being – of the needs of the District and he is entirely credible, then absent evidence to the contrary, one must accept that evidence over the projected evidence arrived at by auditors who might not even have had a close much less intimate knowledge of what the actual number of classified students and their related costs are. DAG Walters argues that calculation of special education tuition increases "raised new issues." DAG Walters' brief at 11. But that can

[5] The Department has acknowledged that at Page 48 of respondent's Exhibit 36, which reflects special education calculations, there was a minor error resulting in a small increase to the District.

be asserted with respect to many line items. It does not address the merits of the claim and, therefore, I reject it for that reason. Accordingly, I **CONCLUDE** that the preliminary budget be adjusted in favor of New Brunswick to include the figures for special education existing students and new enrollments as set forth by Mr. Jannarone's testimony and memorialized in Exhibit P-9.

CONSUMER PRICE INDEX ADJUSTMENT

There is provision in the law – and this is without dispute – that for purposes of ascertaining a maintenance budget in *Abbott* districts, the consumer price index should be reflected in various line items of the budget. Pursuant to the State's preliminary budget determinations (*see* R-1), it utilized a consumer price index adjustment of 2.11% and applied that to non-salaried accounts in the amount of $191,605. Mr. Jannarone took issue with this particular number and provided testimony and supportive documents which either are evidential or would be made available to the Department or has already been provided to the Department concerning this CPI increase. His testimony, which I believe was not significantly impeached, demonstrates that of the CPI increases calculated by the Department, an omission of $122,554 was made by the auditors, and those calculated omissions may be found on Exhibit P-17 for identification. Those documents support Mr. Jannarone's and the Board's determination that the budgeting for the consumer price index increase was incorrect. Accordingly, I **CONCLUDE** that the proposed 2003-2004 budget offered by the Department shall be adjusted to reflect an additional CPI increase totaling $122,554. Mr. Walters made the same argument of "surprise" here as he did with respect special education tuition. It is rejected here for the same reason.

SPECIAL TECHNICAL HIGH SCHOOL

The District of New Brunswick has a special relationship with the Robert Wood Johnson Hospital and Medical School that has lasted for approximately ten years. That relationship has resulted in the construction and operation of what has been described as a special technical high school located within the District. While this high school was significantly funded by other than District funds by contract for the year 2002-2003, the District contributed $2 million to the special technical high school representing their obligation (perhaps in terms of rental) to the school's ongoing existence. My understanding based upon the testimony was that this is a

special school, if not for gifted children, than for those who might greatly benefit from course offerings not otherwise available in the typical schools in the District. For the school year 2003-2004, Mr. Jannarone noted that the contractual obligation of the District is to pay $2.4 million towards the upkeep of the technical high school.

This cost is reflected nowhere in the Department's preliminary budget; it simply was omitted. Given that there were utterly no proofs offered to contradict the District's position regarding this expenditure, I **CONCLUDE** that the additional $400,000 utilized by the District for the school year 2003-2004 be added to the preliminary budget offered by the Department.

TRANSPORTATION COSTS

Increase in transportation costs, to the best of my knowledge, is not reflected anywhere in the Department's proposed preliminary budget. (R-1). The testimony indicated that while the District utilizes transportation in the same fashion as do most other districts, because of the unusual demographics of New Brunswick, special and bilingual education students have significantly increased over the years. The relevance of this increase is that more transportation requirements are utilized intra-District to transport students from various schools to other schools so as to allow them to take advantage of programs not otherwise available in their assigned school. No evidence was offered by the Department, in my view, to in any way contradict this determination, and based upon the calculations arrived at by the District, it has determined that based upon an increase per educational services and commission on costs of over $5.5 million results in a 9% increase resulting in a dollar amount adjustment in favor of New Brunswick of $503,014 for transportation costs. I **CONCLUDE** that the calculation arrived at for increased transportation costs is reasonable and valid and should be adjusted in favor of New Brunswick in the Department's preliminary budget.

REVENUE ADJUSTMENTS

In its preliminary maintenance budget, the Department calculated that monies specifically earmarked for classified students (IDEA) was received totaling $712,780. The Board disagrees with that calculation and actually indicates that the increase in revenues for IDEA students

totaled approximately $280,000. It acknowledges its error. Irrespective of this mistake, however, the Board argues that based upon the guidelines for fiscal year 2004 respecting budgeting IDEA students (R-10), *no* monies that are earmarked for the IDEA budget can, pursuant to the Department's own policy, be counted as general revenues. The policies are encompassed in Exhibit R-10, the Department's own statements of what can and what cannot be utilized for revenue. It is provided at Page 9 of the exhibit that funds provided for (IDEA) "may not be used to reduce the level of expenditures for the education of students with disabilities made by ... local funds below the level of those expenditures for the preceding fiscal year." On the following page, it is further provided that IDEA monies may not be used as "flow-through funds" to take the place of [...] State and local funds which had been previously utilized to provide FAPE or meet the goal of full educational opportunity. IDEA-B funds are to *supplement* State and local efforts. (R-10 at 10 [emphasis in original]).

It was Mr. Jannarone's testimony that by utilizing the Department's own policies, he and the District ascertained without hesitancy that funds earmarked for IDEA increases which in the proposed budget (R-1) were set at $712,780 cannot be deemed revenue.

The Department argues, both in the course of its testimony and in its post-hearing legal brief, that the position of New Brunswick which asserts that the IDEA Part B revenues must be used for special education purposes only is based upon a misunderstanding of the Department's maintenance calculation. The cost of providing special education programs and services in 2002-2003 is included in the adjusted 2002-2003 State Program Budget, set forth in R-1, in the amount of $110,785,600. The Department increased this amount by $462,905, the estimated increase in special education cost for the 2003-2004 school year. Since, the Department asserts, it included those costs of special education programs and services in the calculation of the maintenance budget, it properly and appropriately included the revenues received to those programs and services. Thus, the Department argues it is not requiring the District to use the IDEA Part B revenues to fund general education programs; rather, the IDEA Part B revenues should be used to fund the special education programs and services included in the maintenance calculation.

In my view, the issue of the application of the policies expressed by New Brunswick which were set forth by the Department must be interpreted in a fashion consistent with the

Department's position. Deference must be accorded the agency with respect to the interpretation of its own policies and/or promulgated rules. Mr. Walters' argument is accepted and, as a result, I **CONCLUDE** that the determination of the Department including IDEA Part B revenue in the calculation of New Brunswick 2003-2004 total budget revenues available be and is hereby **SUSTAINED**.

UTILITIES

As will be noted, the preliminary maintenance budget proposed by the State leaves room for no additional expenditures for the District's utilities. Why no adjustment was made for utilities is unclear; however, it may very well be the case that the District was responsible for failing to provide documentation in that regard to the Department during the course of its audit. In any event, there is no question but that the cost of the utility rate increases – which are significant in the District given its size and numbers of students – was not reflected in the budget and has been increased pursuant to the CPI for the 2003-2004 year in the amount of $24,241. No evidence was offered by the State to contradict these determinations and, accordingly, I **FIND** that the preliminary budget should be adjusted in favor of New Brunswick to reflect the increased cost of utilities pursuant to the CPI.

Based upon a review of the records within these constrained time frames, the analysis of the disputes concerning the preliminary budget has been completed.

It should also be noted in the decision that not only was Mr. Jannarone an impressive witness but so to was Dr. Ronald Larkin, the Superintendent of the New Brunswick School District for the past 23 years. He unequivocally stated – and he seemed entirely candid and forthright – that the District simply cannot run based upon the maintenance budget provided to it by the State of New Jersey. He has already instructed Mr. Jannarone to fix the budget which has already begun to cut back on various summer programs and indicated as well that should that budget (R-1) be approved, the District would come to a halt because it would be unable to fund many of the services and would be required to layoff significant numbers of the approximately 1,100 employees of the District. At one point, while I believe he was exaggerating, he indicated that to live with the budget proposed by the State would leave perhaps Superintendent Larkin and

"maybe" Mr. Jannarone available as the only employees of the District. Mr. Jannarone too struck me as a man who has devoted his life with passion to quality education of the students in his district. And having been "around the block" on budget issues for many, many years, his testimony was striking in its candor and the sad confidence underlying the scenario that would result in Superintendent Larkin's opinion were the budget to remain as it was originally proposed by the Department.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within the time allowed under the existing orders of the New Jersey Supreme Court and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Notwithstanding the provisions of any rule to the contrary, exceptions to Initial Decisions of the Office of Administrative Law in *Abbott* District budget appeal matters shall be filed within five (5) days of the date of mailing of the Initial Decision, and reply exceptions shall be filed within two (2) days of receipt of exceptions. File written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

9/25/03
DATE

STEVEN C. REBACK, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

9/25/03
DATE

E-mailed Initial Decision to the parties on:

9/25/03
DATE

cmo

WITNESSES

For Petitioner:

Richard Jannarone
Dr. Ronald Larkin
Craig Yetman

For Respondent:

Glen Forney
Vincent Mastrocola

EXHIBITS

For Petitioner:

P-1	Portions of a document published by the Department of Education entitled *Abbott* Addendum to the Audit Program 2002-2003 (Pages 47 through 76 inclusive)
P-2	Letter from Assistant Commissioner of Education, Gordon MacInnes to Superintendent Dr. Ronald F. Larkin, January 6, 2003
P-3	Report of the Secretary to the Board of Education of the City of New Brunswick regarding general funding as of June 30, 2003
P-4	Memorandum to *Abbott* Districts from Assistant Commissioner Gordon MacInnes requesting supporting documentation for the FY 2003-2004 budget, March 11, 2003 (2 pages)
P-6	Personnel list of employees within the New Brunswick School District, March 11, 2003 (47 pages)
P-9	Proposed Maintenance Budget for 2003-2004 prepared by the Board of Education of the City of New Brunswick (2 pages) disregard handwritten notations

P-10	Pages 9 and 10 and coversheet of document entitled, Individuals With Disabilities Education Act, Part B, Amendments of 1997, Combined Application for Grants, Guidelines and Forms, Fiscal Year 2004
P-11	Letter from then School Business Administrator/Board Secretary to New Brunswick, Mr. Edward D. Kent, from Gordon MacInnes, Assistant Commissioner, April 9, 2003 (2 pages)
P-12	Salary Guide for teaching staff pursuant to contract for the school years 2001-2002, 2002-2003 and projected 2003-2004 (2 pages) (undated)
P-13	Document essentially identical to P-16 with different handwritten corrections
P-14	Pages 1-8.1 and 1-8.2 of document (the specific pages referred to as Section 1 – General Compliance, Chapter 8, Yearend Procedures), June 3, presumably issued by the State Department of Education
P-16	Preliminary worksheet document referred to as New Brunswick 2003 Schedule A (2 pages) (undated) with handwritten changes

For Respondent:

R-1	What has been deemed by the parties to represent the proposed Preliminary Maintenance Budget for New Brunswick for the 2003-2004 School Year
R-8	Worksheet reflecting adjustment for actual spending of the District, presumably for School Year 2002-2003
R-27	New Brunswick District Budget Review for Fiscal Year 2003-2004 (2 pages)
R-35 through R-48	Calculations provided to the Department from the District concerning special education budgetary items
R-49 through R-70	Accountant's audit requested at the behest of the State Department (24 pages) (undated)

R-75 and R-76	Calculations of the Department and its auditors in respect to increase revenues resulting from monies provided for IDEA and preschool expenses and adjustments
R-81	Scheduled G of New Brunswick's 2003 Projected Surplus (undated)
R-82	Comparison of Revenue Budget versus Actual Budget of New Brunswick as of June 30, 2003 (4 pages) (undated)
R-83	New Brunswick Board of Education's inventory of encumbered and accounts receivables, July 31, 2003 (21 pages)
R-84	Preliminary draft of P-9 (2 pages) (undated)

OAL DKT. NO. EDU 4161-03
AGENCY DKT. NO. 198-6/03

BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK, MIDDLESEX COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

The record of this local "Abbott" District's appeal of the Department's decision on its supplemental funding request for the 2003-2004 school year, and the Initial Decision of the Office of Administrative Law have been reviewed. The parties' exceptions and replies were duly submitted in accordance with the schedule established in response to the Court's order for expedition and were considered by the Commissioner in reaching this decision.

Upon careful and independent review of the record, the Commissioner determines to modify the Initial Decision, as set forth below.

BURDEN OF PROOF

Initially, the Commissioner recognizes that the Supreme Court's Order provides that the Department "shall bear the [initial] burden of moving forward to establish the basis for any proposed reductions to the [Abbott] district's maintenance budget based on the effective and efficient standard set forth in the DOE's emergency regulations."*** *Abbott v. Burke*, M-976 September Term 2002, at 7. However, as indicated in the preliminary maintenance decision letter dated August 27, 2003, the Department did not reduce the District's maintenance budget

based on ineffectiveness or inefficiency. Therefore, the Commissioner notes, and the District so acknowledges, that the District bears the burden of proving that the Department's calculations were unreasonable or otherwise improper. *N.J.A.C.* 6A:24-9.6(c). See, also, Letter from Peter J. Hendricks to the Administrative Law Judge (ALJ), September 23, 2003; see, also, Petitioner's Reply at 1.

SURPLUS

In its exceptions, the Department maintains its position that the District's excess funding balance as of June 30, 2003 is reasonably estimated at $9,911,707. (Respondent's Exceptions at 5-6) In this connection, respondent contends that the Initial Decision is based on a misunderstanding of its position with respect to encumbrances and accounts payable. Respondent explains:

> An encumbrance is an accounting tool that permits the district to reserve funding for purchase orders that were issued during the 2002-2003 school year, but the goods or services were *not* received by the district as of June 30, 2003. An encumbrance is *not* an expenditure in the 2002-2003 school year, but rather merely a reservation of fund balance, which may be expended in the 2003-2004 school year if the goods and services are received. By contrast, an account payable is an expenditure which is incurred in the 2002-2003 school year for goods and services actually received or provided prior to June 30, 2003.
>
> ***
>
> With regards to those purchase orders for goods and services that have not been received or provided before June 30, 2003, they would be rolled over as encumbrances into [the] 2003-2004 school year. As such these purchase orders are properly excluded from the 2003-2004 maintenance calculation, *i.e.*, approved goods and services actually provided in the 2002-2003 [school year]. (emphasis in text) (*Id.* at 2, 3)

The Commissioner finds that the above explanation is consistent with the record in the matter entitled *Board of Education of the City of Burlington v. New Jersey State Department of*

Education, Commissioner Decision No. 581-03, decided October 20, 2003. Therein, Keith Costello, Budget Manager/Examiner for the Department of Education, Office of Abbott Implementation, testified that, by memo dated September 16, 2003 to all school districts, Assistant Commissioner Richard Rosenberg addressed the procedures to be followed for open purchase orders and encumbrances on the school district's books as of June 30. The September 16, 2003 memo states, in pertinent part:

> Open purchase orders at June 30, 200X should be classified into the following two categories for review and reclassification:
>
> 1. Category one represents purchase orders for which the goods have been received or the services have been rendered at June 30th that have not been paid. These purchase orders must be expensed in the current audit period, the related encumbrances reversed, and a liability (accounts payable) established. If the invoice has not been received the amount must be estimated. In accordance with GAAP, an expenditure is recorded when goods are received or services are rendered.
>
> 2. Category two represents purchase orders which will be honored in the subsequent year. These purchase orders will be rolled over into the next fiscal year and will be shown in the June 30th general fund balance sheet as a reserve for encumbrances. Per NCGA Statement 1, paragraph 91 "encumbrances outstanding at year-end represent the estimated amount of the expenditures ultimately to result *if unperformed contracts in process at year-end are completed. Encumbrances outstanding at year-end do not constitute expenditures or liabilities."* (emphasis in text)

Therefore, the Commissioner finds that "category one" purchase orders and the related encumbrances are to be considered 2002-2003 fiscal year expenditures in applying *N.J.A.C.* 6A:10-1.2, but "category two" purchase orders are considered expenditures in the 2003-2004 fiscal year and, thus, are not to be included in development of a "maintenance budget" for the 2003-2004 school year.

Notably, although there remains a dispute about *the estimated amount* of excess surplus available, if any, the parties herein do not appear to offer opposing methodologies for calculating that figure. Moreover, in its exceptions, the Commissioner notes that the District respectfully suggests "that the exact surplus, in addition to the $3.6M calculated by the Administrative Law Judge, abide a [Comprehensive Annual Financial Report] CAFR audit as originally suggested by the New Jersey Department of Education." (New Brunswick's Exceptions at 1) Consequently, mindful of the District's burden in this matter, the Commissioner determines not to disturb respondent's preliminary calculations at this juncture, subject to receipt of the CAFR in November 2003, whereupon the methodology promulgated by Assistant Commissioner Rosenberg shall be applied.

CONTRACTED SALARIES

The Department reiterates in its exceptions that its salary calculations, contrary to the ALJ's finding, were based on *actual* expenditures for salaries in the 2002-2003 school year, whereas, New Brunswick's calculations were erroneously based on the *budgeted* salaries of individuals on its payroll on March 11, 2003. (Department's Exceptions at 7-8, referencing Exhibits R-27 through R-29, P-9) Respondent continues:

> In fact, after hearing testimony pertaining to the methodology employed by the Department, petitioner changed its proposed methodology and based it on the amount of actual expenditures of salary in 2002-2003 as calculated by the Department. R-84 and P-6 demonstrate that petitioner initially sought an increase for contracted salaries in the amount of $3,746,973. *** However, after the Department testified that *actual* expenditures on salaries in 2002-2003 were used to determine the increase for the non-discretionary contracted salary increase, petitioner changed its calculation, as demonstrated by P-9, by abandoning its request for a 6.81% increase. At that point, petitioner sought an increase of $5,565,193, or a 10.47% increase over 2002-03 actual expenditures on salaries. *** Petitioner arrived at this amount by comparing *actual* expenditures on salaries in 2002-2003 to the amount of

> salaries *budgeted* in 2003-2004 for all individuals employed by petitioner on March 11, 2003. Thus, the 6.81% increase, as initially asserted [by] petitioner, is irrelevant to the methodology. (emphasis in test) (Department's Exceptions at 8-9)

The Department, however, maintains that the District's amended methodology is flawed, in that it takes into account *actual* expenditures in salaries for 2002-2003, but uses amounts *budgeted* in 2003-2004 for individuals employed in the District as of March 11, 2003. Moreover, the Department asserts that "Mr. [Richard] Jannarone agreed that, under the methodology proposed by petitioner, the district could receive such a benefit twice because petitioner's methodology uses *budgeted* salaries for 2003-2004. (emphasis in text) (*Id.* at 9) Furthermore, the Department notes that, using its calculations of actual salary expenditures, and based upon prior conversations with the District, it used 5% as the average contracted rate of increase. (*Id.* at 9-10)

In its replies, petitioner does *not* specifically refute the Department's exception arguments on this issue, but, merely states, "The New Brunswick Board of Education offered detailed proofs on the costs of the contractual maintenance budget. The DOE simply used flat figures and 'estimates.'" (Petitioner's Reply at 1)

Thus, upon consideration of the parties' arguments, particularly those summarized herein, and mindful of the burden of proof, the Commissioner is compelled to conclude that, notwithstanding the credible testimony offered by Mr. Jannarone on this issue, petitioner has not met its burden of demonstrating that the Department's calculation of nondiscretionary salary increase for the 2003-2004 school year, is unreasonable or inconsistent with a maintenance budget, as defined by *N.J.A.C.* 6A:10-1.2. In so finding, the Commissioner recognizes that the Department's overall charge in this matter was to determine the level of 2003-2004 funding that would enable the District to continue in a "maintenance" mode, that is, to implement in 2003-

2004 the programs, services and positions provided in 2002-2003. While it is true that dollar amounts actually paid out for staffing prior to June 30, 2003 will not perfectly predict the cost of providing comparable staffing in the next, it is *equally* true that originally budgeted amounts and other similar projections are no less imprecise. Thus, in the Commissioner's view, a methodology which preliminarily establishes the 2003-2004 cost of providing positions at "maintenance" levels by determining, as nearly as possible without benefit of audit, the actual approved cost of providing them in 2002-2003 and then allowing for reasonable, non-discretionary adjustments, is a uniform, fair and rational method for estimating future expenditures which cannot otherwise be determined with any degree of precision. The ALJ's determination in this regard, is, therefore, set aside.

SPECIAL EDUCATION

The Department takes exception to the ALJ's conclusion that petitioner's preliminary maintenance budget should include a nondiscretionary increase in special education tuition in the amount of $2,093,697. The ALJ arrives at this conclusion, the Department contends, based upon a misunderstanding of the methodology used by the Department to calculate petitioner's nondiscretionary increases for special education tuition. (Department's Exceptions at 11)

The Department explains that its methodology begins with a trend analysis of the percentage of students that districts send out of district. Based on this trend analysis, the Department determined that 17% of New Brunswick's students are sent out of district. The Department then compared enrollment of special education students in October 2002 (1,121) to the projected enrollment of special education students for October 2003 (1,196) and determined that New Brunswick would have approximately 75 new special education students in the 2003-

2004 school year. (*Id.* at 11-12) Of the 75 new students, it is estimated that 17%, or 13 students, will be sent out of district in the 2003-2004 school year. Multiplying the number of out-of-district placements, 13, by $36,306, the Department estimates that the District will need an additional $462,905 [*sic*].

The Department reasons that by basing its calculation on the number of special education students in New Brunswick in previous years, its determination is reasonable and should not be disturbed. (*Id.* at 12) By contrast, the Department asserts that New Brunswick has provided no documentation, but merely uncorroborated testimony, to substantiate its projected increase of 200 students in special education for 2003-2004. As such, the Department contends that petitioner has failed to prove a "*documented* increase in non-discretionary expenditures," as provided by *N.J.A.C.* 6A:10-3.1(d)(4). (emphasis in text) (Department's Exceptions at 13)

In reply, New Brunswick merely insists that it "offered detailed proofs on the costs of special education and Judge Reback's Findings of Fact should be sustained." (Petitioner's Reply at 2)

Upon review, the Commissioner is not persuaded that petitioner has met its burden of documenting a need for special education tuition beyond that which was determined by the Department. In this connection, the Commissioner finds that, indeed, there is nothing on this record to substantiate Mr. Jannarone's testimony that there are likely to be 200 new special education students in New Brunswick in the 2003-2004 school year, as shown in Exhibit P-9, so as to competently challenge the Department's projected new enrollment figure. Neither is the record clear with respect to the basis for the tuition increases which petitioner alleges are necessary for those students who are currently classified. This lack of clarity notwithstanding,

however, the Commissioner acknowledges that the Department concedes, in its exceptions, that petitioner's preliminary maintenance budget should include a nondiscretionary increase for special education tuition in the amount of $859,282, rather than $462,905. (Department's Exceptions at 13) The Commissioner, therefore, modifies the ALJ's finding accordingly.

CONSUMER PRICE INDEX ADJUSTMENT

The Department takes exception to the ALJ's conclusion that the preliminary maintenance budget should be adjusted to reflect an *additional* Consumer Price Index (CPI) increase in the amount of $122,554, beyond the Department's increase of $191,605. (Department's Exceptions at 14)[1] In this connection, the Department argues that:

> [The] Initial Decision states that petitioner provided "supportive documents which are either evidential or would be made available to the Department or has already been provided to the Department concerning the CPI increase." Initial Decision, p. 24. The only document submitted as evidence by petitioner in support of the CPI increase was P-13 which does not provide any demonstration that petitioner will incur a non-discretionary increase in these specific amounts. For example, the record contains no documentary evidence demonstrating that during 2003-04 petitioner will incur a non-discretionary increase in the following budget accounts: legal services; judgments against the school district; cleaning; repair and maintenance services; rental of land and buildings; insurance; energy; general administration related to capital outlay; and school administration related to capital outlay. (*Id.* at 14-15)

Thus, the Department reasons that petitioner has failed to document an increase, as required by *N.J.A.C.* 6A:10-3.1(d)(4). Additionally, the Department asserts that "on cross-examination, Mr. Jannarone conceded that he did not provide any documentation demonstrating that petitioner will incur a non-discretionary increase in these specific accounts." (*Id.* at 15) Notably, New Brunswick does not challenge the Department's recitation of the facts, but merely

[1] The Department arrived at its CPI adjustment figure of $191, 605 by multiplying certain non-salary accounts by 2.11%. (Department's Post-hearing Brief at 10)

states, that it "offered [a] detailed analysis of its calculated CPI increases. Judge Rebeck's [sic] Findings of Fact should be sustained." (Petitioner's Reply at 2)

Upon review, the Commissioner is compelled to conclude that the record herein does not confirm the validity of the claimed "omission" in CPI adjustment. Here, the ALJ found that Mr. Jannarones's testimony "demonstrates that of the CPI increases calculated by the Department, an omission of $122, 554 was made by the auditors, and those calculated omissions may be found on Exhibit P-17 for identification." (Initial Decision at 22) However, because P-17 was merely marked for identification and not placed into evidence, it is not available for the Commissioner's review. Moreover, Exhibit P-13, which was submitted as evidence, does not, alone, sufficiently document that petitioner will incur nondiscretionary increases in the specified budget accounts. Therefore, the Department's CPI adjustment is upheld.

SPECIAL TECHNICAL HIGH SCHOOL

It is undisputed that petitioner's maintenance budget did not include a non-discretionary increase in the amount of $400,000 for what is apparently a joint venture with the Robert Wood Johnson Hospital and Medical School which has resulted in the construction of a special technical high school within the District. (Initial Decision at 22) Petitioner describes this as a "contractual agreement with the Science and Technology High School testified to by Richard Jannarone as a contractual obligation that would increase $400,000 in the school year 2003-2004***." (Petitioner's Post-hearing Brief at 6) Respondent, however, asserts that the record is unclear as to whether this service is nondiscretionary or, indeed, what *type* of service is provided. (Department's Exceptions at 15-16)

The Commissioner determines that the record herein simply does not substantiate that the Department erred in excluding the $400,000 from petitioner's maintenance budget. In so

finding, the Commissioner notes that, despite petitioner's assertions that "[t]his is an ongoing contractual obligation***" (Respondent's Reply at 2), this record does not include a copy of the contract and is, in fact, devoid of *any explanation* of the services which are anticipated to be provided pursuant to the contract. Indeed, the ALJ only speculates that the District's contribution to the special high school was "perhaps in terms of rental." (Initial Decision at 22) Moreover, the Commissioner finds that the ALJ appears to have improperly shifted the burden of proof in this regard, as he determined, "there were utterly no proofs offered to contradict the District's position regarding this expenditure***." (Initial Decision at 23) Rather, it was the District's burden, as it so concedes, to prove that the Department's calculation were improper. Given the lack of petitioner's documentation pursuant to this disputed calculation, the Commissioner is simply not persuaded that it has met its burden.

TRANSPORTATION COSTS

It is undisputed that petitioner's preliminary maintenance budget does not include a nondiscretionary increase in the amount of $503,014 for transportation. Once again, however, the Department asserts that petitioner failed to submit any documentary evidence demonstrating a contractual increase for transportation. (Department's Exceptions at 16) Indeed, the Department contends that "Mr. Jannarone acknowledged that he had not yet received documentation indicating an increase in transportation costs." (*Id.* at 16) Notably, petitioner does not dispute the Department's exceptions on this issue, but merely states that "[t]ransportation cost increases must be included in the Maintenance Budget." (Petitioner's Reply at 2)

The Commissioner again determines that the record herein simply does not demonstrate that the Department erred in not including a nondiscretionary increase in the amount

of $503,014 for transportation. In so concluding, the Commissioner finds no evidence to substantiate Mr. Jannarone's testimony, however plausible it may be. In this regard, the Commissioner finds that, again, the ALJ appears to have improperly shifted the burden of proof in this regard, as he determined, "No evidence was offered by the Department *** to in any way contradict***" the testimony offered with respect to the district's transportation requirements. (Initial Decision at 23) As noted, it was the District's burden to prove that the Department's omission was improper and, given the absence of documentation on this issue, the Commissioner is not persuaded that petitioner has met its burden.

REVENUE ADJUSTMENTS

Petitioner takes exception to the ALJ's finding that an IDEA grant may be included as revenue, adding that "It is clear that regulations preclude the use of such a grant to replace or supplant State or local revenues." (Petitioner's Exceptions at 2) The Department, however, reiterates that because it included the costs of special education programs an services in the calculation of its maintenance budget, it appropriately included revenues received to fund these services. (Department's Reply at 2) The Department clarifies, however, that it is not requiring the District to use IDEA Part B revenue to fund general education programs, but rather to fund the special education programs and services included in the maintenance calculation. (*Ibid.*)

The Commissioner finds, for the reasons set forth in the Initial Decision, that the Department properly included IDEA Part B revenue in the calculation of the District's 2003-2004 total budget revenues available.

UTILITIES

The Department argues that it did not include a nondiscretionary increase for utilities,

> since the amount that petitioner spent on utilities in 2002-03 exceeded the amount budgeted by petitioner in the 2003-04 budget submitted to the Department. In essence the Department accepted the amount budgeted by petitioner for utilities for the 2003-04 school year. At hearing, however, petitioner argued that in 2003-04, it would incur an increase in utilities in the amount of $24,241 above actual expenditures on utilities in 2002-03. (Department's Exceptions at 17)

Additionally, the Department notes that, to the extent the District experiences an unforeseen increase in utility during the 2003-04 school year, it may apply for an increase in supplemental funding. *N.J.A.C.* 6A:10-3.1(g).

Moreover, the Department asserts that the Initial Decision "double counts" the increase for utilities, in that the ALJ concluded that the preliminary maintenance budget should be adjusted to reflect an additional CPI increase in the amount of $122,554, which amount already includes an increase for "Energy (Energy and Electricity)" in the amount of $24,241. (P-13) Then, the ALJ again increases the preliminary budget for a nondiscretionary increase of $24,241 for utilities at page 25 of the Initial Decision. Petitioner does not address the issue of the "double count" in its replies, but merely affirms that "[u]tility cost increases must be included in the Maintenance Budget." (Petitioner's Reply at 2)

The Commissioner finds that, given his previous conclusions hereinabove which would eliminate the problem of "double counting" raised by the Department and further noting the Department's failure to dispute the likelihood of increased utilities costs, for the reasons set forth in the Initial Decision, the District's preliminary budget should be adjusted to reflect an increase in the amount of $24,241 for utilities.

Accordingly, the Initial Decision is modified as set forth above.[2]

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 10/20/03

Date of Mailing: N/A

[2] The Commissioner so determines, based upon the proofs brought to *this* record, while acknowledging that the presentation of such evidence may have been disadvantaged by both a Court Order to expedite proceedings and the unavailability of the CAFR until November 2003, which will reveal the District's true audited find balance and available revenue, if any, as of June 30, 2003. In any event, beyond his determination herein, the Commissioner underscores the availability of a mechanism for Abbott districts to address needs, arising during the year due to unanticipated expenditures or unforeseen circumstances, for additional resources to implement Department-approved programs and services. *N.J.A.C.* 6A:10-3.1(g).

[3] Pursuant to *P.L.* 2003, *c.* 122, "*Abbott*" determinations are final agency actions appealable directly to the Appellate Division of the New Jersey Superior Court.

583-02

BOARD OF EDUCATION OF THE CITY OF PLEASANTVILLE, ATLANTIC COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning "Abbott" District appealed the Department's determination of its 2003-04 preliminary "maintenance budget," alleging that the Department's review was not in accordance with the July 23, 2003 Order of the Supreme Court.

The ALJ determined that the OAL does not have jurisdiction to determine the validity of *N.J.A.C.* 6A:10-1.2, as such determination is solely within the jurisdictional purview of the Appellate Division or the Supreme Court.

The Commissioner concurred with the ALJ's findings and conclusions and adopted the Initial Decision.

October 20, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4163-03

AGENCY DKT. NO. 183-6/03

BOARD OF EDUCATION OF

CITY OF PLEASANTVILLE

Petitioner,

v.

STATE OF NEW JERSEY,

DEPARTMENT OF EDUCATION,

Respondent.

Damon Tyner, Esq., for petitioner (Fox Rothschild, LLP, attorneys)

Jennifer Cordes, Deputy Attorney General and **Brendan Ruane**, Deputy Attorney General for respondent (Peter C. Harvey, Attorney General of New Jersey, attorney)

Record Closed: September 24, 2003 Decided: September 25, 2003

BEFORE **W. TODD MILLER**, ALJ:

STATEMENT OF THE CASE

In this matter, the Board of Education of the City of Pleasantville, Atlantic County, the operator of an urban special needs *"Abbott"* school district, appeals from the Department of Education's (DOE's) initial review of the district's 2003-2004 expenditure budget. *N.J.S.A.* 18A:7F-3; *see also N.J.A.C.* 6A:10-1.1 *et seq.*

On March 24, 2003, the DOE moved before the Supreme Court for an order modifying the decision in *Abbott v. Burke,* 153 *N.J.* 480 (1998) *(Abbott V). See also Abbott v. Burke,* 172 *N.J.* 294 (2002) (*Abbott IX*). The DOE requested that the discretionary Additional *Abbott v. Burke* State Aid (supplemental aid) that it would be required to provide to *Abbott* districts in 2003-2004 be limited to an amount sufficient to support those programs, positions and services in the districts' approved budgets for 2002-2003. On April 8, 2003, the Education Law Center (ELC) cross-moved for an order setting an expedited schedule for the DOE's decisions on districts' budgets and requiring the DOE to conduct a formal evaluation of the implementation of Whole School Reform (WSR), etc. On April 29, 2003, the Supreme Court ordered the DOE and the ELC to participate in mediation before the Hon. Philip S. Carchman, J.A.D., to attempt to resolve issues raised by their motions.

Mediation resolved all issues except the 2003-2004 budget process, so the DOE's motion for an order extending by an additional year the one-year relaxation of remedies granted in *Abbott IX* remained outstanding. However, the parties agreed to an expedited schedule for budget approvals and appeals, beginning with the DOE's reviews and approvals of districts' budgets by May 30, 2003. Districts' appeals from the DOE's reviews were to be transmitted to the OAL, where administrative law judges (ALJs) were to issue initial decisions (IDs) within 50 days of the appeal. The DOE's Commissioner was to issue final decisions within 25 days of the IDs. On May 20, 2003, the Supreme Court issued an order incorporating the parties' mediation agreement and providing that the schedule would remain in effect until further order of the Court.

On May 30, 2003, the DOE issued decisions on the *Abbott* districts' budgets. In this case, by letter of that date, the DOE's Assistant Commissioner, Division of Abbott Implementation notified the district that the DOE had completed its initial review of the district's 2003-2004 expenditure budget dated February 27, 2003, that the expenditure budget was approved except as noted in the letter. On June 6, 2003, the district's verified petition of appeal was filed with the Department. *N.J.S.A.* 18A:6-9. The DOE transmitted the contested case to the OAL, where it was filed on June 9, 2003. *N.J.S.A.* 52:14B-2(b). On June 12, 2003, the Department's answer was filed in the OAL.

On June 24, 2003, the Supreme Court issued an order approving the mediated agreement and scheduling argument on the DOE's motion for an order extending the relaxation of remedies granted in *Abbott IX.* On July 1, 2003, the DOE moved for an order amending the schedule for processing the appeals to allow the Court to rule on the standard in the appeals to the OAL before hearings and issuance of initial decisions. On July 10, 2003, the Supreme Court heard oral argument on the budget process. The Supreme Court granted the DOE's motion and relaxed *Abbott v. Burke,* 153 *N.J.* 480 (1998) *(Abbott V)* remedies as applied to the 2003-2004 budget process. The Court's July 23, 2003, Order states the following:

1. The DOE's application to extend the relaxation of remedies granted in *Abbott V* is granted as follows: The DOE shall have the authority to treat the 2003-2004 school fiscal year as a maintenance year for purposes of calculating Additional *Abbott v. Burke State* Aid for the *Abbott* districts. During 2003-2004, K-12 programs provided for in the 2002-2003 school year will be continued, subject to conditions set forth in this Order.

2. The Statewide aggregate amount of Additional *Abbott v. Burke* State Aid shall be presumptively calculated as the total amount of Additional *Abbott v. Burke* State Aid approved for the *Abbott* districts for Fiscal Year 2002-2003, subject to adjustment as required for a maintenance budget. A maintenance budget shall mean that a district will be funded at a level such that the district can implement current approved programs, services, and positions and therefore includes documented increases in non-discretionary expenditures. Examples of non-discretionary expenditures are increases in contracted salaries, health benefits, and special education tuition. Maintenance does not include the restoration of programs, positions, or services that were reduced in 2002-2003, or new programs, positions, or services, except in respect of Paragraph 2c. of the Court's Order of June 24, 2003 (pertaining to those elementary schools without a whole school reform developer in place in 2002-2003 and permitting whole school reform contracts in certain circumstances), irrespective of the timing for the promulgation of regulations governing that provision.

3. For purposes of calculating Additional *Abbott v. Burke* State Aid and in furtherance of its pre-existing duty to implement administrative controls, the DOE shall promulgate an emergency regulation establishing the standard for evaluating the effectiveness and efficiency of the districts' non-

instructional programs. (Non-instructional programs are defined as office/administrative expenditures and programs, positions, services and/or expenditures that are not school based or directly serving students.) Insofar as any *Abbott* district has not been informed of its total amount of last year's approved Additional *Abbott v. Burke* State Aid, the DOE shall provide written notice of that amount within two weeks of the date of this Order. The DOE's application of the effective and efficient standard in its review of a district's maintenance school budget may result in a reduction to a district's presumptive amount of Additional *Abbott v. Burke* State Aid.

4. Within 30 days of the issuance of this Order, the DOE shall provide in a Notice to each district preliminary maintenance budget figures for the 2003-2004 school year consisting of the 2002-2003 approved budget and an estimate of the supplemental funding that will be needed to support that currently approved budget. If the DOE deletes an expenditure from a district's 2002-2003 budget related to the district's non-instructional programs and based on the effective and efficient standard, the DOE must include in the written notice to the district the expenditure deleted along with a specific statement explaining why the program or part thereof is no longer effective and efficient.

5. *Abbott* districts may appeal any reductions to their maintenance budgets by the DOE's application of the effective and efficient standard, which appeals shall be heard by the [OAL]. In those appeals, the DOE shall bear the burden of moving forward to establish the basis for any proposed reductions to the district's maintenance budget based on the effective and efficient standard set forth in the DOE's emergency regulations. If that initial burden is met, the district shall bear the burden of demonstrating that any budgetary reductions are not justified under that standard.

6. The Order of the Court dated July 7, 2003, modifying the Court's scheduling Order of May 20, 2003 in order to provide the [OAL] thirty days within which to determine and issue initial decisions in the twenty-three pending budget appeals, is hereby superseded by this Order. The [OAL] shall issue initial decisions on district appeals from the DOE's preliminary maintenance budget figures for the 2003-2004 school year within 30 days of the dates of those decisions as set forth in Paragraph 4 of this Order.

> 7. To the extent that monies are deleted by the DOE in the districts' non-instructional programs based on the effective and efficient standard, those monies shall be made available to the districts as follows: an *Abbott* district may apply for and the State may award such aid for demonstrably needed programs or services. The allocation of such available funds shall not be viewed as inconsistent with this Court's approval of use of a maintenance budget for Fiscal Year 2003-2004.

The Supreme Court also set a schedule for new DOE decisions on supplemental funding and the administrative appeal and hearing process and ordered the DOE to promulgate emergency regulations governing the process. The DOE, relying on the Fiscal Year 2004 Appropriations Act and the Supreme Court's July 23, 2003, Order, promulgated emergency regulations amending *N.J.A.C.* 6A:10, including *N.J.A.C.* 6A:10-1.2, 3.1, -4.2, and -4.7. The regulations are effective August 22, 2003, and expire June 30, 2004. Among these emergency regulations, *N.J.A.C.* 6A:10-1.2 states:

> "Maintenance budget" means, for the 2003-2004 school year, a budget funded at a level such that the district can implement 2002-2003 approved and provided programs, services, and positions and includes documented increases in non-discretionary expenditures and adjustments for actual 2002-2003 expenditures. Examples of non-discretionary expenditures are increases in contracted salaries, health benefits, and special education tuition. Maintenance does not include the restoration of programs, positions, or services that were provided in previous years or new programs, positions, or services unless necessary to meet paragraph 2c of the Supreme Court's order of June 24, 2003 in *Abbott v. Burke.* Maintenance also does not include non-recurring 2002-2003 expenditures.

During the September 10, 2003[1] telephone prehearing conference, the school district advised that it had two issues for consideration. The district was given until September 12, 2003 to identify, in writing, the specific issues to be considered by the OAL. The parties were ordered to submit briefs on the issues by September 19, 2003. The specific issues identified by the district were:

[1] There were several telephone conferences with the parties prior to September 10, 2003, but due procedural history of the Abbott cases the precise issues for consideration could not articulated until September 10, 2003.

1) Whether the emergency regulation promulgated by the DOE regarding the definition of a maintenance budget is inconsistent with the Supreme Court's Order of July 23, 2003?

2) Whether the budget determination worksheet issued to petitioner by DOE was properly computed, where petitioner has unveiled several mathematical miscalculations, which improperly reduced the total budget?

On September 19, 2003, the parties file their respective legal arguments with this ALJ. Oral argument was heard on September 24, 2003 at the OAL office in Atlantic City. The parties resolved issue number 2. An executed settlement agreement, relating exclusively to issue number 2, was received on September 25, 2003. Accordingly, the record closed on September 25, 2003.

LEGAL ARGUMENTS

DISTRICT'S ISSUE # 1 "Maintenance Budget"

The school district asserts that it is not seeking to overturn the adopted regulation, but that in this matter the OAL is confronted with a choice of law as follows: whether to apply the Supreme Court's explicit definition of "maintenance budget" or the different regulatory definition adopted by the DOE? The school district contends that *N.J.A.C.* 6A:10-1.2's "maintenance budget" definition is contrary to the New Jersey Supreme Court's Order. The district argues that the OAL has jurisdiction to determine whether DOE's emergency regulation (*N.J.A.C.* 6A:10-1.2) defining "maintenance budget" or the Supreme Court "maintenance budget" definition is applicable to the 2003-2004 funding question. The district further suggests that Supreme Court mandates that the OAL determine this issue pursuant to prior *Abbott* rulings. *Abbott*, 153 *N.J.* 480, 526-527 (1998). Thus, under those decisions, it is the responsibility of the OAL, in the first instance, to assess in these disputes whether the DOE has properly implemented the Abbott educational remedies and mandates, and that the legal authority set forth in the Supreme Court's Order is binding on the OAL and should be applied herein.

During oral argument counsel for the district suggested that the "approved and provided for" language contained in the Order means programs that were approved in 2002-2003, even if not funded, must be funded this year. Any other interpretation would undermine the overriding purpose of the *Abbott* decisions. To bolster its interpretation, the district referred to the Supreme Court's Order, paragraph 2, and emphasized that maintenance budget does not include restoration of programs that were eliminated in 2002-2003 nor does it include funding for new programs. Hence, the district argues that the Supreme Court purposely did not fund new, reduced or eliminated programs. Therefore, by implication, the Supreme Court must have intended to fund "approved" programs that were not new, reduced or eliminated in 2002-2003. For example, if an approved program commenced in 2002-2003 but for some reason was temporarily suspended or altered, say by using a substitute teacher rather than a full time teacher, it should be fully funded in 2003-2004. Or if an approved program in 2002-2003 was part of the effective and efficient standard but, it did not get started until the end of the school year, under the DOE interpretation, it would not be funded in 2003-2004 since, it commenced towards the end of the year. This would in effect terminate a valid, approved program from 2002-2003 and, defeat the spirit of the Abbott decisions.

On the contrary, DOE argues that the OAL is without jurisdiction to consider the validity of an agency rule. DOE urges that any challenge to the emergency rule must be brought in the Appellate Division or the Supreme Court. R. 2:2-3(a); *See also*, *Pascucci v. Vagott*, 71 *N.J.* 40, 51-52 (1976). DOE urged that the OAL generally derives its jurisdiction over a controversy involving contested issues of fact and not over a language dispute between the Supreme Court and a State Agency. Even if the Supreme Court directed that the OAL resolve Abbott cases and controversies, as indicated in other Abbott matters, the meaning of "maintenance budget" was not the type of controversy contemplated, by the Court, to be heard at the OAL level. *Abbott*, 153 *N.J.* 480, 526 (1998).

DOE also urged that an agency regulation is presumptively valid and its interpretation of its own regulation is entitled to great weight. DOE promulgated the maintenance budget definition, through its rule making procedure. The emergency regulation is reasonably within specifications of the Supreme Court Order. Therefore, it is not for the OAL to determine the applicability of a language dispute in a properly promulgated regulation. For instance, the OAL

did not receive the case from DOE to decide a factual dispute. This distinction is vital to the OAL statutory jurisdiction.

If certain programs were not in full operation in 2002-2003, and thus not fully funded in the 2003-2004, this would represent an insignificant amount relative to the budget issues at hand. The concept of a maintenance budget was to provide a stable amount, equal to the 2002-2003 funding, so the same programs could be offered in 2003-2004. The process is not perfect.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

Notably, if the emergency regulation were determined to be inconsistent with the Supreme Court Order, it would render the regulation meaningless and effectively invalidate it. Therefore, if the district is successful in its position before the OAL, it is a challenge to the validity of *N.J.A.C.* 6A:10-1.2. If the district were successful, an ALJ would have to find that *N.J.A.C.* 6A:10-1.2 was invalid because it was contrary to an Order of the Supreme Court. The district analogizes this to a determination regarding a choice of law rather than an attack on the validity of a regulation. I disagree. The OAL cannot or should not obtain jurisdiction over an agency regulation through the "back door". The OAL falls within in the executive branch. It is not a court and has no jurisdiction to determine the validity of a rule. *N.J.S.A.* 52:14F-1; *Wendling v. New Jersey Racing Comm'n*, 279 *N.J. Super.* 477, 485 (App. Div. 1995) (holding that the Appellate Division and not the OAL has jurisdiction for a challenge to the validity of a rule); *In re 1999-2000 Abbott Implementing Regulations, N.J.A.C. 6:19A-1.1 et seq.*, 348 *N.J. Super.* 382 (App. Div. 2002) (a previous challenge to rules implementing *Abbott* decisions brought in the Appellate Division.). Any attempt by the OAL to determine the validity of an agency regulation would be contrary to the *Administrative Procedures Act.* (*N.J.S.A.* 52:14B-1 et seq.) and R. 2:2-3(a). In short, the OAL does not have jurisdiction to, directly or indirectly, determine the validity of *N.J.A.C.* 6A:10-1.2 because there it is not permitted to by statute or court rule. I therefore **CONCLUDE** that the OAL does <u>not</u> have jurisdiction to invalidate the DOE's definition of "maintenance budget" (*N.J.A.C.* 6A:10-1.2). Likewise, in *Board of Education of the City of Asbury Park v. New Jersey Department of Education,* OAL Dkt. No. EDU 4095-03, Hon. John R. Tassini, ALJ, entered an Order relative to Maintenance Budget (September 4, 2003). In that Order, Judge Tassini stated that the school district's contention is

essentially a challenge to the validity of the above-cited regulation. Judge Tassini concluded that the district's challenge to the " 'maintenance budget' may not be heard in the OAL and that the regulation must be applied in the OAL."

Assuming for the moment that the OAL does have jurisdiction determine a choice of law as suggested by the district, I **CONCLUDE** that the definition of maintenance budget as determined in *N.J.A.C.* 6A:10-1.2 is consistent with the Supreme Court's July 23, 2003, Order. The district does not seek a decision invalidating *N.J.A.C.* 6A:10-1.2. Rather, they argue that, based on the *Abbott* decisions, the OAL must determine whether the DOE regulation is consistent with the Supreme Court's Budget Order of July 23, 2003. The Hon. Joseph F. Martone, ALJ addressed this issue in *Board of Education of the Township of Neptune v. New Jersey Department of Education,* OAL Dkt. No. EDU 4096-03. In reaching his conclusions on the meaning of "maintenance budget" Judge Martone observed that:

> In its Order of July 23, 2003, the Supreme Court states, "During 2003-2004, K-12 programs *provided* for in the 2002-2003 school year will be continued, subject to conditions set forth in this Order," and "*Maintenance does not include the restoration of programs, positions, or services that were reduced in 2002-2003,* or new programs, positions, or services, except in respect of Paragraph 2c. of the Court's Order of June 24, 2003." July 23, 2003 Order, at 4, 5. [Emphasis added.] The foregoing language requires that programs, positions, or services be in existence in order to be included in the maintenance budget.
>
> In its Order, the Supreme Court also stated:
>
> A maintenance budget shall mean that a district will be funded at a level such that the district can implement *current* approved programs, services, and positions and therefore includes documented increases in non-discretionary expenditures. [Emphasis added.]

If the interpretation of the school district and *amicus* is accepted, the word "current" in the above passage should be viewed as referring to, describing and modifying the word "approved". Thus, under their interpretation, any programs, services, and positions that are currently approved are to be funded. However, the word "current" is more properly viewed as referring to, describing and modifying the words "programs, services, and positions". That is, the Supreme Court intended that the programs, services, and positions are to be current, that is,

currently in existence. Therefore, I **CONCLUDE** that the use of the adjective "current" rather than the adverb "currently" implies that the programs, services, and positions must be in existence in order to be funded.[3]

The language ultimately adopted by the Supreme Court to define "maintenance budget" is also reflective of the language contained in the DOE's proposal, which is attached to the Report of The Abbott Mediation (Order of April 29, 2003). The language proposed by the DOE is as follows:

> Maintenance means that a district will be funded at a level that will enable it to *continue implementing* the current approved programs, services and positions and therefore includes actual documented increases in non-discretionary expenditures.
> [Emphasis added.]

The above language as proposed by the DOE requires that the approved programs, services and positions to be maintained should be currently in existence in order that their continued implementation may be enabled through funding. I **CONCLUDE** that the language ultimately used by the Supreme Court to define "maintenance" is entirely consistent with the DOE's proposal.

Judge Martone concluded that:

> Given the foregoing language contained in the Supreme Court's Budget Order of July 23, 2003, I do not see that *N.J.A.C.* 6A:10-1.2's "maintenance budget" definition is inconsistent with the Supreme Court's Budget Order of July 23, 2003. I **CONCLUDE** that the foregoing Order provides a reasonable basis for *N.J.A.C.* 6A:10-1.2's "maintenance budget" definition. Therefore, I also **CONCLUDE** that it is unnecessary to disregard the "maintenance budget" definition contained in *N.J.A.C.* 6A:10-1.2 in deciding the present matter.

[2] It is noted that the words "current" and "approved" are both adjectives in form, and that adjectives are used to modify nouns. Adverbs such as the word "currently" are used to modify verbs, adjectives or other adverbs. Thus, under rules of grammar, the adjective "current" cannot be considered to be a modification of the word "approved" but can only be considered a modification of the terms "programs, services, and positions".

On the issue of defining "maintenance budget" for the school year 2003-2004, I fully agree with the well-reasoned analysis by Judge Martone. Therefore, I incorporate legal reasoning of Judge Martone as part of this Initial Decision. In addition to concurring with Judge Martone's reasoning, I offer the following additional observations. The interplay between the words "approved" and "provided for" in relation to the concept of "maintenance budget" must derive their meaning from all the circumstances that gives rise to the Department of Education motion. The New Jersey Attorney Generals Office initiated the present matter on behalf of the Department of Education on motion before the Supreme Court for modification of the decision in *Abbott V*. The background is that the state has been visited with a serious budget crisis[2]. DOE in its Reply Brief in *Abbott V* stated:

> This Court, acknowledging the fiscal crisis and the motivation underlying the State's proposal to contain ineffective spending in the Abbott districts for the 2002-2003 school year, granted the Department flexibility to eliminate, reduce or limit growth of certain programs, positions and services as long as the core instructional program was not negatively affected. *Abbott IX*, 172 N.J. 294, 297-298
>
> In addition, the fiscal situation in the State has not improved and, in fact, has become graver.
>
> *See*, DOE's April 21, 2003, Reply Brief filed in *Abbott v. Burke*, Sup Ct. Dkt No. 42,170 at page 21-22.

The *Abbott V* motion sought to strike a balance between urban special needs districts (Abbott districts) and state budget crisis. Mindful of the budget problems, DOE promulgated an emergency regulation, which continued to address the needs of the Abbott districts but was within its financial means. Simply stated, DOE sought to fund Abbott districts at the 2002-2003 amounts, subject to certain mandatory adjustments or increases. DOE was mindful of the Supreme Court Order that stated a "maintenance budget shall mean that a district will be funded at a level such that the district can implement current approved programs, services, and positions and therefore includes documented increases in non-discretionary expenditures." Consistent with

[2] In the Governor 2003 budget address he stated, "let me repeat that – the state of New Jersey starts out this budget year $5 billion in the red. www.state.nj.us/budget03/speech_text.html. Similarly the Commissioner of Education stated "As the Governor has stated repeatedly, this is not a budget we wanted to submit, but we are confident that this budget will enable the school districts to weather the year with some belt tightening, creative solutions, innovative programs and cooperative agreements. www.state.nj.us/njded/news/0410bud.html

the Supreme Court's Order, DOE promulgated *N.J.A.C.* 6A:10-1.2 which provides in part ' "Maintenance budget" means, for the 2003-2004 school year, a budget funded at a level such that the district can implement 2002-2003 approved and provided programs, services, and positions and includes documented increases in non-discretionary expenditures and adjustments for actual 2002-2003 expenditures.'

The issue at hand is about funding last year's programs so the Abbott districts are not deprived of those programs while the state resolves its budget crisis. The emergency regulation addresses this situation by fully funding last year's programs and allowing certain adjustments or increases, if warranted. Generally, on a global basis, the existing 2002-2003 programs should not receive less funding. Funding for those programs (funding meaning "approved and provided for") in 2002-2003 budgets represent the floor and the ceiling amount to be funded in the 2003-2004 budget. This, I believe, was the intent of DOE's original motion and it is consistent with corresponding emergency regulation Ordered by the Supreme Court. Moreover, it is consistent with the Supreme Court's definition of maintenance budget. The Supreme Court did not Order DOE to increase the 2003-2004 budget to include "the restoration of programs, positions, or services that were reduced in 2002-2003, or new programs, positions, or services." A "current" program that was not funded in 2002-2003 is a new program for the purposes of a budget analysis. It is not a current program that is required to be funded. In interpreting a rule, a court may look to the policy sought to be achieved. *Matter of Gastman*, 147 *N.J. Super.* 101, 109 (App. Div. 1977). In the present matter, the policy sought to be achieved was to balance the DOE budget crisis against the needs of the Abbott districts. DOE was charged with developing a regulation for that purpose. I further **CONCLUDED** that confining the 2003-2004 budget amounts to "current programs in existence" and funded in 2002-2003 budget make sense when viewed against the backdrop of this motion.

To the extent the OAL has jurisdiction, as mandated by the Supreme Court in *Abbott*, 153 *N.J.* 480, 526-527 (1998) and that petitioner asked for a determination regarding the choice of law, I make the following conclusions. For the reasons set forth in Judge Martone's Order and independently, I **CONCLUDE** that the amount to be funded for 2003-2004 budget year is limited to only those programs that were in existence and funded in 2002-2003. Any such conclusion to the contrary would ignore the circumstances upon which DOE filed its motion. If

additional programs that were not funded in 2002-2003 were funded in the present budget, it would defeat the intent of the emergency regulation. It would not represent a maintenance budget but rather a budget increase over the prior years budget. It is the funding in the 2002-2003 budget that is the starting point for analysis. DOE sought to restrict the 2003-2004 budget to only that amount that it funded in the prior year. DOE promulgated a regulation to meet that need and that is not inconsistent with the Supreme Court Order. Moreover, the interpretation of a regulation, as offered by DOE, is entitled to great weight and is presumptively valid. *Medical Society of New Jersey v. New Jersey Department of Law and Public Safety*, 120 *N.J.* 18 (1990). Agencies are permitted significant discretion when applying criteria contained in regulations to ensure flexibility in dealing with varying circumstances. *Matter of Crown/Vista Energy Project*, 279 *N.J. Super.* 74 (App. Div. 1995).

DISTRICT'S ISSUE # 2 Budget Miscalculations

Prior to and during the hearing, the parties and their professionals agreed to Stipulation a regarding the controversy over the budget miscalculations (issue # 2). The parties have prepared a Stipulation, which is attached and fully incorporated herein. I have reviewed the record and terms of the Stipulation and I **FIND**:

1. The parties have voluntarily agreed to the Stipulation as evidenced by their signatures and as stated on the record on September 24, 2003.

2. The Stipulation disposes of all issues in controversy at this time. The Stipulation is an interim measure to bridge the current dispute regarding the budget calculations but, the budget remains subject to an annual audit. Each party specifically reserves their right to assert a claim after the audit is completed. This would include seeking additional Abbott funding by the district or seeking a refund by the DOE. This Stipulation is intended to provide the district with adequate Abbott funding prior to the conclusion of the audit but also preserve the rights of all parties to challenge or appeal the funding or the outcome of the final audit. *N.J.S.A.* 18A:23-1 *et seq.*

I **CONCLUDE** that the budget miscalculation issue # 2 is no longer a contested case before the Office of Administrative Law.

ORDER

Based upon the foregoing, it is hereby **ORDERED** that the definition of "maintenance budget" set forth in *N.J.A.C.* 6A:10-1.2 is applicable in this matter. It is further **ORDERED** that the parties comply with the settlement terms in connection with issue # 2 (budget miscalculations).

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within the time allowed under the existing orders of the New Jersey Supreme Court and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Notwithstanding the provisions of any rule to the contrary, exceptions to Initial Decisions of the Office of Administrative Law in *Abbott* District budget appeal matters shall be filed within five (5) days of the date of mailing of the Initial Decision, and reply exceptions shall be filed within two (2) days of receipt of exceptions. File written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

9-25-03
DATE

W. TODD MILLER, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

9.25.03
DATE

E-mailed Initial Decision to the parties on:

9/25/03
DATE

/lam

Documents Relied Upon

P-1 Binder provided by the District During Oral Argument

District's September 19, 2003 Letter Memorandum

DOE's September 19, 2003 Letter Memorandum

Reply Brief of the Commissioner in Supreme Court Docket No. 42,170

District's Letter of September 12, 2003 Setting Forth the Issues

PETER C. HARVEY
Attorney General of New Jersey
R.J. Hughes Justice Complex
25 Market Street
Post Office Box 093
Trenton, New Jersey 08625

By: Jennifer L. Cordes
Deputy Attorney General
(609) 984-4987

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
DOCKET NO.: EDU 04163-03S
AGENCY REF. NO.: 183-6/03

CITY OF PLEASANTVILLE BOARD OF EDUCATION,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION,

Respondent.

Administrative Action

STIPULATION OF FACTS

Petitioner, having requested an administrative hearing to contest the amount of supplemental Abbott v. Burke State Aid it was awarded and the budget process under which that award was calculated, and the parties having discussed the matter, and upon presentation of new documentation to the Department of Education, the parties hereby stipulate to the following facts:

Attachment 16 ED
16a

1. $98,372.86 shall be added to the line item entitled, "Salaries - Contracted Rate," reflected in the amended budget worksheet attached to this Stipulation as Exhibit A.

2. $479,037.36 shall be added to the line item entitled, "Special Education," reflected in the amended budget worksheet attached as Exhibit A.

3. $177,197.76, plus $94,371.00, shall be added to the line item entitled, "CPI at 2.1% non-sal net of Util." reflected in the amended budget worksheet attached as Exhibit A.

4. $948,068.00 shall be deducted from the line item entitled, "FY 03-04 GF Total Budgeted Revenues Available," reflected in the amended budget worksheet attached as Exhibit A.

5. The estimated amount of supplemental aid that petitioner will be receiving totals $12,010,822.56, reflected in the amended budget worksheet attached as Exhibit A.

6. The parties agree that the estimated award of supplemental Abbott v. Burke State Aid for the Petitioner may be revised pending the audit process that will be completed on or about November 5, 2003. Accordingly, petitioner reserves any right to appeal the results of that process at the time the final supplemental Abbott v. Burke State Aid award is provided. Respondent reserves any right to contest that appeal.

7. The parties acknowledge that there is an outstanding issue regarding the definition of the "maintenance budget" standard that is being decided simultaneously by William Todd Miller, ALJ.

8. This document, in connection with the Initial Decision being issued by ALJ Miller, referred to in Paragraph 9 of this Stipulation, resolves all issues raised in petitioner's appeal, subject to any further rights to file exceptions to, or appeals from, the Initial Decision concerning the "maintenance budget" definition.

9. This Stipulation shall be construed as if it were drafted by both parties and both parties waive all statutory and common law presumptions which would serve to have the document construed in favor, or against, any party as the drafter hereof.

10. This Stipulation may be executed in counterparts.

Damon G. Tyner, Esq.
Attorney for Petitioner

Dated:

Jennifer L. Cordes
Deputy Attorney General
Attorney for Respondent

Dated: 9.25.03

Exhibit A

District: Pleasantville Maintenance Calculation - Final Revision

Budget: 2002-2003

Line #:			
9470	Approved General fund budget 02-03	$54,061,114.00	
2511	Less: EC Transfer	($574,605.00)	
			$53,486,509.00
	Add:		
13300	Early Childhood aid		$4,103,462.00
13690	DEPA Aid		$1,991,500.00
13900	Distance Learning network aid		$184,990.00
	Adjusted 02-03 State program budget		$59,766,461.00
	Adjust for actual state program spending fund 11		
7580	General Current Expense	$20,648,901.00	
8340	Capital Outlay	$2,063,531.00	
9460	Special Schools	$0.00	
9465	GF Transfer to Charter Schools	$3,751,279.00	
	Less: Actual from Bd Sec Rpt	($26,328,339.44)	
			$135,371.56
	Adjust for actual state program spending fund15 - 94%		
9466	GF Contribution to WSR	$25,941,568.82	
	Less: Actual from Bd Sec Rpt	($26,138,169.82)	
			($196,601.00)
			($61,229.44)
	Base 02-03 state program budget		$59,705,231.56
	Add/(Subtract) Difference between 02-03/03-04 Plan		
	EC Plan 03-04	$4,822,327.00	
	EC Plan 02-03	($4,103,462.00)	
			$718,865.00
	Add or deduct Non-discretionary items:		
	Salaries - Contracted Rate	$1,630,730.00	
	Health Benefits	$1,428,598.00	
	Charter School Tuition	$750,427.00	
	Special Education - Tuition	$727,161.00	
	CPI at 2.11% non-sal net of Util	$363,811.00	
	Utilities rate increases @ 8.1%	$88,549.00	
	Subtotal		$4,989,276.00
	If applical Adjust. For non-recurring items	$0.00	
	non-cash items	$0.00	
	Other - KC Provider Budget not in Plan 03-04	$183,469.00	
	Decrease in Federal aids	$0.00	
			$183,469.00
	Subtotal adjustments		$5,691,610.00
	FY 03-04 Total State budget @ Maintenance		$65,396,841.56

Budget: 2003-2004

00410	Total Gen'l fund Revenues	$60,620,492.00	
00421	ECPA carryover calc by state	$118,989.00	
00422	DEPA carryover calc by state	$90,675.00	
00425	ECPA	$3,469,509.00	
00426	DEPA	$1,292,724.00	
	Subtotal state program aid	$66,592,589.00	
00284	Less Request for AAv8A for 03-04	($12,045,173.00)	
	Base GF revenue 03-04		$53,547,416.00
	Add/(Subtract): Revenue Adjustments:		
	IDEA Increase/(Decrease)	$38,603.00	
	Extraordinary Aid Increase/(Decrease)	$0.00	
	Other: MISC unbudgeted rev	$0.00	
	Excess Fund Balance	$0.00	
	Subtotal		$38,603.00
	FY 03-04 GF Total Budgeted Revenues Available		$53,586,019.00
	Difference: Need for Supplemental aid		$12,010,822.56

OAL DKT. NO. EDU 4163-03
AGENCY DKT. NO. 183-6/03

BOARD OF EDUCATION OF THE CITY OF PLEASANTVILLE, ATLANTIC COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	
	:	

The record of this local "Abbott" District's appeal of the Department's decision on its supplemental funding request for the 2003-2004 school year, and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Pleasantville's exceptions and the Department's reply thereto were duly submitted in accordance with the schedule established in response to the Court's order for expedition and were considered by the Commissioner in reaching this decision.

Upon careful and independent review of the record, the Commissioner concurs with the Administrative Law Judge (ALJ), that the OAL does not have jurisdiction to determine, directly or indirectly, the validity of *N.J.A.C.* 6A:10-1.2, as such determination is solely within the jurisdictional purview of the Appellate Division or the Supreme Court. R. 2:2-3(a); *see, also, Pascucci v. Vagott*, 71 *N.J.* 40, 51-52 (1976); *Wendling v. N.J. Racing Com'n.*, 279 *N.J. Super.* 477, 485 (App. Div. 1995). Even if it were to be assumed, *arguendo*, that the OAL has jurisdiction to determine "a choice of law" as argued by the District, the Commissioner agrees

with the ALJ that the Department's definition of "maintenance budget," as detailed in *N.J.A.C.* 6A:10-1.2, does not differ in any appreciable way from the Supreme Court's definition of that term contained in its Budget Order of July 23, 2003. Consequently, the Department's application of such regulatory definition in its review and approval of the District's 2003-2004 budget is wholly appropriate.

The Commissioner notes that with respect to the second issue in controversy in this matter, *i.e.*, budget miscalculations, the parties have entered into a Stipulation of Settlement which, pursuant to *N.J.A.C.* 1:1-19.1(c) and (d), is deemed to be the final decision at this time on this issue.

Accordingly, the Initial Decision of the OAL is adopted for the reasons expressed therein.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 10/20/03

Date of Mailing: N/A

* Pursuant to *P.L.* 2003, *c.* 122, "Abbott" determinations are final agency actions appealable directly to the Appellate Division of the New Jersey Superior Court.

584-03

BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning "Abbott" District appealed the Department's determination of its 2003-04 preliminary "maintenance budget," alleging that the Department's review was not in accordance with the July 23, 2003 order of the Supreme Court and challenging the Department's reduction, as part of its review of noninstructional expenditures for effectiveness and efficiency, of certain noninstructional supervisory positions. The District also sought to continue its appeal of certain issues arising from the budget determination made by the Department prior to the Court's order.

The ALJ found that the Department appropriately applied the duly promulgated rule implementing the Court's order for "maintenance," and further found that the Board could continue its appeal of prior budget issues. The ALJ upheld the Department's determinations with respect to restoration of programs, capital project and non-instructional salary expenditures, and other items not meeting the definition of "maintenance" or standards of effectiveness and efficiency, but also found that additional funding must be provided to support fully two positions only partly filled in 2002-03.

The Commissioner concurred with the ALJ's conclusions regarding "maintenance" and most specific issues, notwithstanding that the Commissioner did not find issues arising from the Department's prior determination pertinent to the appeal herein. However, the Commissioner rejected the conclusion that additional funding must be provided for two previously part-year positions, finding that the Department's method of calculation provided sufficient salary amounts to cover variances in year-to-year staffing needs.

October 20, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL Dkt. No. EDU 4157-03
Agency Ref. No. 187-6/03

BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION,

Respondent.

Harvey C. Johnson, Esq., P.C., for petitioner

Michael Walters, Deputy Attorney General, **Kathleen Asher**, Deputy Attorney General and **Allison Eck,** Deputy Attorney General, for respondent (Peter C. Harvey, Attorney General of New Jersey, attorney)

Record Closed: September 24, 2003 Decided: September 26, 2003

BEFORE **ANA C. VISCOMI,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, the Board of Education of the City of Camden (hereinafter "school district" or "district"), the operator of an urban special needs "*Abbott*" school district,

appeals from the Department of Education's (hereinafter "DOE") initial and revised preliminary review of the district's 2003-2004 expenditure budget. *N.J.S.A* 18A:7F-3; see also *N.J.A.C.* 6A:10-1 *et seq.*

The following procedural history has been gleaned from the Supreme Court's Order of July 23, 2003. On March 24, 2003, the DOE moved before the Supreme Court for an order modifying the decision in *Abbott v. Burke*, 153, N.J. 480 (1998) (*Abbott V*). See also *Abbott v. Burke*, 172 N.J. 294 (2002) (*Abbott IX*). The DOE requested that the discretionary additional *Abbot v. Burke* state aid (supplemental aid) that it would be required to provide to Abbott districts in 2003-2004 be limited to an amount sufficient to support those programs, positions and services in the districts' approved budgets for 2002-2003. On April 8, 2003, the Education Law Center (ELC) cross-moved for an order setting an expedited schedule for the DOE's decisions on districts' budgets and requiring the DOE to conduct a formal evaluation of the implementation of Whole School Reform (WSR), etc. On April 29, 2003, the Supreme Court ordered the DOE and the ELC to participate in mediation before the Hon. Philip S. Carchman, J.A.D, to attempt to resolve issues raised by their motions.

Mediation resolved all issues except the 2003-2004 budget process, so the DOE's motion for an order extending by an additional year the one-year relaxation of remedies granted in *Abbott IX* remained outstanding. However, the parties agreed to an expedited schedule for budget approvals and appeals, beginning with the DOE's reviews and approvals of districts' budgets by May 30, 2003. Districts' appeals from the DOE's reviews were to be transmitted to the OAL, where administrative law judges (ALJs) were to issue initial decisions within 50 days of the appeal. The DOE's Commissioner was to issue final decisions within 25 days of the initial decisions. On May 30, 2003, the Supreme Court issued an Order incorporating the parties' mediation agreement and providing that the schedule would remain in effect until further order of the Court.

On May 30, the DOE issued decisions on the Abbott districts' budgets. In this case, by letter of that date, the DOE's Assistant Commissioner, Division of Abbott

Implementation notified the district that the DOE had completed its initial review of the district's 2003-2004 expenditure budget March 28, 2003 and that the expenditure budget was approved except as follows:

- Restorations – the March 28 budget submitted by the district added or restored a total of $17.3 million that was not included in the March 18 budget. Of this amount we cannot approve $12,570,164 with the balance explained by contractual salary increases that were not included in the March 18 budget;

- Capital Outlay – There is a number of items in the capital budget that can or will be financed by the School Construction Corporation and cannot be approved;

- Vacancies – The district failed to provide complete and accurate information on position status for the Department to make an accurate projection. Based on the information provided to date, we cannot approve $1,603,000 in the position account, but the final amount will be based on actual vacancies;

- Health benefits – Since the increases for the State Health Benefits Plan for the period January-June 2004 cannot be precisely projected, the district should use 12% as the projected increase with the understanding that the actual increase will be approved;

- Since charter school and special education tuition costs cannot be precisely projected, the district should base its estimate on 2002-2003 actual expenditures with the understanding that these expenditure (sic) will be adjusted based upon actual enrollment/costs;

- Excessive legal fees- $250,000;

- Excessive supervisory staff -- $725,000;

- Various fund 11 accounts – technology, school-based non-salary accounts, tuition and aid-in-lieu of transportation are not approved above the 02-03 level.

On June 6, 2003, the district's verified petition of appeal was filed with the DOE. *N.J.S.A.* 18A:6-9. The DOE transmitted the contested case to the OAL, where it was filed on June 9, 2003. *N.J.S.A.* 52:14B-2(b). On June 12, 2003, the DOE's answer was filed in the OAL. This matter was assigned to be heard before Jeff S. Masin, Acting Director and Chief ALJ.

On June 24, 2003, the Supreme Court issued an order approving the mediated agreement and scheduling argument on the DOE's motion for an order extending the relaxation of remedies granted in *Abbott IX.* On July 1, 2003, the DOE moved for an order amending the schedule for processing the appeals to allow the Court to rule on the standard in the appeals to the OAL before hearings and issuance of initial decisions. On July 10, 2003, the Supreme Court heard oral argument on the budget process. The Supreme Court granted the DOE's motion and relaxed *Abbott v. Burke,* 153 *N.J.* 480 (1998) *(Abbott V)* remedies as applied to the 2003-2004 budget process. The Court's July 23, 2003, Order provides:

> 1. The DOE's application to extend the relaxation of remedies granted in *Abbott V* is granted as follows: The DOE shall have the authority to treat the 2003-2004 school fiscal year as a maintenance year for purposes of calculating Additional *Abbott v. Burke State* Aid for the *Abbott* districts. During 2003-2004, K-12 programs provided for in the 2002-2003 school year will be continued, subject to conditions set forth in this Order.
>
> 2. The Statewide aggregate amount of Additional *Abbott v. Burke* State Aid shall be presumptively calculated as the total amount of Additional *Abbott v. Burke* State Aid approved for the *Abbott* districts for Fiscal Year

2002-2003, subject to adjustment as required for a maintenance budget. A maintenance budget shall mean that a district will be funded at a level such that the district can implement current approved programs, services, and positions and therefore includes documented increases in non-discretionary expenditures. Examples of non-discretionary expenditures are increases in contracted salaries, health benefits, and special education tuition. Maintenance does not include the restoration of programs, positions, or services that were reduced in 2002-2003, or new programs, positions, or services, except in respect of Paragraph 2c. of the Court's Order of June 24, 2003 (pertaining to those elementary schools without a whole school reform developer in place in 2002-2003 and permitting whole school reform contracts in certain circumstances), irrespective of the timing for the promulgation of regulations governing that provision.

3. For purposes of calculating Additional *Abbott v. Burke* State Aid and in furtherance of its pre-existing duty to implement administrative controls, the DOE shall promulgate an emergency regulation establishing the standard for evaluating the effectiveness and efficiency of the districts' non-instructional programs. (Non-instructional programs are defined as office/administrative expenditures and programs, positions, services and/or expenditures that are not school based or directly serving students.) Insofar as any *Abbott* district has not been informed of its total amount of last year's approved Additional *Abbott v. Burke* State Aid, the DOE shall provide written notice of that amount within two weeks of the date of this Order. The DOE's application of the effective and efficient standard in its review of a district's maintenance school budget may result in a reduction to a district's presumptive amount of Additional *Abbott v. Burke* State Aid.

4. Within 30 days of the issuance of this Order, the DOE shall provide in a Notice to each district preliminary maintenance budget figures for the 2003-2004 school year consisting of the 2002-2003 approved budget and an estimate of the supplemental funding that will be needed to support that currently approved budget. If the DOE deletes an expenditure from a district's 2002-

2003 budget related to the district's non-instructional programs and based on the effective and efficient standard, the DOE must include in the written notice to the district the expenditure deleted along with a specific statement explaining why the program or part thereof is no longer effective and efficient.

5. *Abbott* districts may appeal any reductions to their maintenance budgets by the DOE's application of the effective and efficient standard, which appeals shall be heard by the [OAL]. In those appeals, the DOE shall bear the burden of moving forward to establish the basis for any proposed reductions to the district's maintenance budget based on the effective and efficient standard set forth in the DOE's emergency regulations. If that initial burden is met, the district shall bear the burden of demonstrating that any budgetary reductions are not justified under that standard.

6. The Order of the Court dated July 7, 2003, modifying the Court's scheduling Order of May 20, 2003 in order to provide the [OAL] thirty days within which to determine and issue initial decisions in the twenty-three pending budget appeals, is hereby superseded by this Order. The [OAL] shall issue initial decisions on district appeals from the DOE's preliminary maintenance budget figures for the 2003-2004 school year within 30 days of the dates of those decisions as set forth in Paragraph 4 of this Order.

7. To the extent that monies are deleted by the DOE in the districts' non-instructional programs based on the effective and efficient standard, those monies shall be made available to the districts as follows: an *Abbott* district may apply for and the State may award such aid for demonstrably needed programs or services. The allocation of such available funds shall not be viewed as inconsistent with this Court's approval of use of a maintenance budget for Fiscal Year 2003-2004.

The Supreme Court also set a schedule for new DOE decisions on supplemental funding and the administrative appeal and hearing process and ordered the DOE to promulgate emergency regulations governing the process. The DOE, relying on the

Fiscal Year 2004 Appropriations Act and the Supreme Court's July 23, 2003, Order, promulgated emergency regulations amending *N.J.A.C.* 6A:10, including *N.J.A.C.* 6A:10-1.2, 3.1, -4.2, and -4.7. The regulations are effective August 22, 2003, and expire June 30, 2004. Among these emergency regulations, *N.J.A.C.* 6A:10-1.2 states:

> "Maintenance budget" means, for the 2003-2004 school year, a budget funded at a level such that the district can implement 2002-2003 approved and provided programs, services, and positions and includes documented increases in non-discretionary expenditures and adjustments for actual 2002-2003 expenditures. Examples of non-discretionary expenditures are increases in contracted salaries, health benefits, and special education tuition. Maintenance does not include the restoration of programs, positions, or services that were provided in previous years or new programs, positions, or services unless necessary to meet paragraph 2c of the Supreme Court's order of June 24, 2003 in *Abbott v. Burke.* Maintenance also does not include non-recurring 2002-2003 expenditures.

This matter was subsequently reassigned to this ALJ.

Pursuant to Provision 4 of the Supreme Court's Order dated July 23, 2003, the DOE was required to issue to each district "preliminary maintenance budget" figures for the 2003-2004 school year by August 22, 2003. On that date, the DOE sought leave before the Supreme Court for a three (3) day extension of time – until August 27, 2003— to issue notices to each respective district. The Supreme Court granted this extension by order of August 26, 2003.

Prior thereto, a telephone pre-hearing conference was conducted in this matter. The pre-hearing letter order limited discovery and set peremptory hearing dates for September 4, 5 and 8, 2003.

On August 27, 2003 a Notice of Preliminary Maintenance Budget Figure for 2003-2004 and Estimate of Discretionary Additional *Abbot v. Burke State Aid Award*

was forwarded to Annette Knox, the school district's superintendent. A supplemental letter order issued by this ALJ provided, in relevant part, a reminder to district's counsel that pursuant to the special adopted amendments, *N.J.A.C.* 6A:10-4.7(a) required counsel to contact the assigned ALJ within one business day of receipt of the preliminary notice to seek a pre-hearing conference in which the issues on appeal could be identified by the district. Since that supplemental order scheduled a continued pre-hearing conference on August 29, 2003, counsel agreed to await that conference rather than schedule it on August 28, 2003.

By letter of September 3, 2003, district's counsel advised, the district:

> continues the appeal of the issues stated in its Petition dated June 5, 2003 with the following two exceptions: 1) the appeals of legal fees is deleted; and 2) the appeal regarding excessive Supervisory Staff remains, but is amended from $725,000 to $867,564 contained in the DOE letter dated August 27, 2003. ...
>
> In its order of June 24, 2003, the Supreme Court required the restoration of Whole School Reform Models to elementary schools that did not have them in the 2002-2003 school year. The Camden Board of Education has such schools. At $75,000 per school this amounts to $1,800,000. The Camden City Board of Education requests that its Petition be amended to include the funds necessary for restoration of Whole School Reform Models in schools that did not have them in the 2002-2003 school year.[1]

[1] The language of the district letter indicating that the appeal is based in part on the issues defined in the DOE May 30, 2003 letter is relevant because DAG Walters participated in all pre-hearing matters through September 10, 2003. Prior to the actual commencement of the hearing on September 14, 2003, when DAG Walters was replaced by DAG Eck and Asher, due to his appearance in another *Abbott* matter subject to a peremptory schedule, the DOE never contended the school district could no longer base its appeal, in part, on the May 30, 2003 letter. The first time the DOE sought to bar any appeal based on the issues set forth in the May 30, 2003 letter was on September 14, 2003. DOE requested a written order in that regard so that it may move forward on interlocutory appeal. However, prior to the issuance of such an order and on the same date, DAG Walters briefly appeared during the hearing and advised the DOE did not contest the district's right to pursue the issues set forth in the May 30, 2003 which set the basis for the Petition filed on June 6, 2003. This ALJ explained during the course of argument on this issue on September 14, 2003 that since the matter had not previously been objected to by DOE counsel and certainly to the extent the August 27, 2003 Notice letter did not specifically address a particular issue on appeal, it could not be deemed to supercede the May 30, 2003 letter in its entirety. It is also interesting to note that the September 3, 2003 letter by the district memorializing the issues on appeal was previously discussed with DOE counsel also

On the basis of this mutual request, the peremptory hearing date of September 4, 2003 was adjourned in order to allow the parties to engage in meaningful settlement discussions. Due to the mutual request of the parties and based on the progress of their discussions, on September 4, 2003 I adjourned the peremptory hearing date of September 5, 2003 but scheduled a conference call on the afternoon of September 5, 2003 in order to ascertain the status of the discussions and because a final peremptory hearing date was scheduled for September 8, 2003. Based on the results of that conference call, counsel were advised to contact the undersigned ALJ over the weekend so that I could make an informed decision on whether to proceed with the hearing for September 8, 2003. As a result of that call and due to further reasonable time necessitated by the district in convening an emergent board meeting and meeting with the School Construction Corp (SCC), I adjourned the final peremptory hearing date of September 8, 2003. A conference call was scheduled for September 10, 2003 in order to ascertain the status of this matter. As a result, the matter was scheduled for new peremptory hearing dates of September 16, 17 and 18, 2003 and a final pre-hearing order was entered.

During the course of the September 10, 2003 conference call, district's counsel advised petitioner was seeking a ruling with regard to the issue of the "maintenance budget definition" as set forth in the Supreme Court Order of July 23, 2003 vis-à-vis that set forth in the Special Adopted Amendments, effective August 22, 2003 at *N.J.A.C.* 10:6A:10-1.2. In the interest of efficiency and economy, the parties were advised this ALJ concurred with the ruling on this issue as set forth by John Tassini, ALAJ on September 4, 2003 in connection with the Asbury Park Abbott school district appeal. Judge Tassini's order relative to the maintenance budget issue was provided to the parties. Nonetheless, district counsel was permitted to raise that issue with regard to this matter and counsel were advised briefs were due on September 12, 2003. The final briefs were received on September 17, 2003. The Education Law Center (hereinafter "ELC") sought and was granted intervenor status, pursuant to *N.J.A.C.* 1:1-16.1 *et seq.* for purpose of an *amicus curiae* filing only. The submissions were considered during an

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indicated that the District and DOE were seeking to adjourn the first scheduled hearing date in order to attempt to resolve this matter. Presumably then, the DOE was on notice on all issues on appeal.

extended break in the context of the September 17, 2003 hearing and the parties were verbally advised on the record that in consideration of the briefs submitted, I concurred with the ruling set forth by both ALJs Tassini and Martone, respectively.[2]

This matter was heard peremptorily on September 16-18, 2003 inclusive. The parties were permitted to submit initial post hearing briefs no later than 10:00 a.m. September 22, 2003 and reply briefs no later than September 23, 2003 at 10:00 a.m. Due to a local power outage that affected the Trenton OAL offices, final submissions were received on September 24, 2003 and the record closed on that date. Pursuant to Supreme Court Order of July 23, 2003, as modified on August 26, 2003, this initial decision is due on September 26, 2003.

ISSUES PRESENTED

Based on the June 6, 2003 petition as amended by letter of September 3, 2003 and joint stipulation of the parties (J-1), the following represents the issues on appeal:

1. Restorations not approved in the amount of $12,570,164;
2. Capital outlay;
3. Vacancies in the amount of $1,603,000;
4. Health benefits (in part);

[2] Although the parties were advised that a written order memorializing this order would be provided to the parties, due to time constraints and in consideration of when the briefs were submitted, that ruling is memorialized herein. Petitioner school district contends that *N.J.A.C.* 6A:10-1.2's maintenance budget definition is contrary to the Supreme Court's Order of July 23, 2003, provision 4. Petitioner asserts that as such, an ALJ may disregard the regulation and apply the Supreme Court's Order which defined "maintenance budget" at provision 4. In its *amicus* filing, ELC contends that the Supreme Court in the "Abbott V" and "Abbot I" respective rulings vested in the OAL, the responsibility to "initially adjudicate" all disputes between the DOE and the Abbott districts. ELC asserts the Supreme Court did not specifically "limit or restrict the scope of the factual or legal issues to be determined." Thus, ELC contends an ALJ may disregard the definition as promulgated through the adoption of emergency regulations since the ALJ is charged with an "initial review" on "all issues." DOE asserts any challenge to the validity of the "maintenance budget" definition as promulgated through the Special Adopted Amendments, specifically at *N.J.A.C.* 6A:10-1.2, is not appropriately heard before the OAL. My order with regard to this motion heard during the course of the hearing was that respondent DOE is correct. R. 2:2-3(a)(2) provides that an appeal to challenge the validity of any regulation promulgated by a state administrative agency should be brought in the Superior Court, Appellate Division. Thus, the "maintenance budget" definition set forth at *N.J.A.C.* 6A:10-1.2 shall apply in this case.

5. Vocation program funds in the amount of $334,455;
6. Supervisory staff in the amount of $867,564; and
7. Various fund 11 accounts -- technology, school-based non-salary accounts and aid in lieu of transportation which were not approved above the 02-03 level.

FACTUAL DISCUSSION

The following discussion of testimony is not intended to represent a verbatim transcription of the testimony presented at the hearing but a synopsis of relevant testimony. Although respondent DOE contended much of the testimony presented by petitioner school district was not relevant and beyond the scope of the issues to be decided pursuant to the Order of the Supreme Court, all such testimony has been summarized in order to fully set forth the record before me.[3]

Respondent's witnesses included Allen Tyrone Dupree, Beth Ann Coleman and Keith S. Balla.

Dupree is employed by the DOE as the Division of Finance, Manager in charge of Finance Analysis. His responsibilities include developing research and finance analysis on school financing issues. He attained a Bachelor's degree in Political Science from Swathmore and a Master's in Public Affairs from Princeton University. He has worked with the DOE for two years. He was previously employed for a non-profit agency in Washington DC evaluating income security issues associated with such welfare programs as TANF (Temporary Aid to Needy Families). Prior to that he was a Research Assistant while a graduate student. His background in statistics is in research and quantitative analysis.

[3] Although the Findings of Fact support, in part, the DOE's contention with regard to this testimony, as relevant yet ancillary issues not part of the Supreme Court's dictate were presented, I deemed them noteworthy to set forth insofar as the some of the district's concerns with regard to its "ability" to create its budget.

With regard to projecting enrollment for the Camden school district, Dupree testified that each school district receiving state aid is required to provide Kindergarten through twelfth grade enrollment data each year in November and this is the only way that the DOE can determine how to allocate financing.

As part of the appeal process, analysis was conducted by an outside firm, Rosenfarb Winters. Each Abbott school district provided information to the audited firm contracted with the state to determine inefficiencies.

He is familiar with the calculations for Camden.

Dupree testified with regard to the projected growth calculation formula he developed. Referring to R-1, the K-12 enrollment for years 1997-2002 inclusive was considered. The enrollment for those years is:

October 2002	17,258.0
October 2001	17,530.0
October 2000	17,974.0
October 1999	18,722.5
October 1998	19,193.5
October 1997	19,773.5

To arrive at the projected enrollment for academic year 2003-2004, a figure that will be known in November, Dupree's growth rate calculation formula involved:

> Adding the totals for October 2002, 2001 and 2000 respectively (52,762.0). The totals for October 1999, 1998 and 1997 respectively are then separately added (57,689.5). 52,762 is then divided by the number 3 (17,587.3) and 57,689.5 is separately divided by the number 3 (19,229.8). 17,587.3 are then divided by 19,229.8 for a total of .9146. The cube root of this number is then calculated (.970677)

> and "one" is subtracted from this number -.029323. This number is then calculated as a percentage -2.9323%. This number represents the total decline in students over the past six years in the Camden City school district for grades K-12. The October 2002 modified district enrollment for pupils "on roll full time" is 16,551.0. That number is multiplied by –2.93% and yields a total of 484.94 which is then deducted from the October 2002 modified district enrollment and yields a total of 16,066 which represents the projected 2003-2004 enrollment for the Camden City School District. (R-1)

This growth rate formula was utilized for all Abbott school districts.

On cross-examination Dupree testified the October 2002 data reflecting a resident enrollment of 17,258 reflects resident enrollment K-12 for school age students that live in Camden but may not go to Camden schools. They are however, all under the supervision of the Camden Board of Education. (R-2)

He testified that it is a fair assumption that the declining rate of enrollment is lessening.

The growth rate calculation he utilized is an established formula. When CEIFA (Comprehensive Education Improvement and Financing Act) was passed, the Commissioner was given the authority to determine the growth rate calculation formula.

He also testified that the cube root was included as part of the equation to "smooth the growth rate" so that a "spike" in one year would not significantly impact the district in projecting future enrollment.

With regard to the distinction between "on roll" students and "enrolled students", Dupree testified that 16,066 represents the 2003-2004 projected on roll students while 16,752 represents the 2003-2004 projected enrolled students which includes students living in the district but not attending in district schools. While the DOE had access to the total "enrolled" students data, the "on roll" students' data was utilized uniformly in the growth rate calculation. But there is no reason to believe that both numbers would not run in tandem and that the projection would be substantially different.

DOE Budget Examiner Beth Ann Coleman testified next. She has worked with the Department for 8 years. She is a member on the Camden and Asbury respective school district task forces serving in the capacity of fiscal specialist/internal auditor. Prior to her employment with the DOE, she worked for 2½ years as an auditor for Thomas Havey & Co. and 2½ years as an auditor for Coopers & Lybrand. He has a Bachelor's degree in Accounting and a Masters in Public Administration from Rutgers.

She drafted the August 27, 2003 DOE correspondence to the Camden Abbott schools district which is the subject of this appeal. (R-2) Prior to drafting this letter, she performed the maintenance calculation pursuant to the Supreme Court's Order and also considered the district's surplus funds. The preliminary maintenance budget figure for 2003-2004 school year is $253,811,577. Abbott school districts are permitted to retain 2% fund balance. A fund balance represents which each district may have left over at the end of the school year. The DOE identified an additional $13,836,606 in fund balance that must be appropriated in the 2003-2004 revised budget. (R-2) The 2% ($5M) the district is permitted to retain does not have to be budgeted. Any excess surplus above the 2% must be budgeted as revenue for the next school year. Camden identified $4M fund balance that they would have to budget. Further, due to the delayed June payment of $3.9M in accounts receivable, the revenue is reduced. (R-2) The new budget fund balance is then $17,836,606.

With regard to supervisors, and specifically the salary expenditures for non-instructional supervisors, the revised Comparative Spending Guide for Abbott Districts

indicates Camden is inefficient in the area of administrative costs. Out of 30 Abbott school districts, Camden was ranked 23. The schools are ranked lowest to highest. Upon receipt of this information, known as FTE (Full Time Equivalents) from the CPA firm retained by each respective Abbott district, payroll was reviewed and non-instructional supervisors was identified as an area to be addressed with the Camden City Abbott district. Once the auditor's reports are received in November more precise figures will be known.

R-3 represents the calculations performed in order to draft the August 27, 2003 letter addressing the preliminary revised budget for 2003-2004. Coleman testified all Abbott school districts were subject to review by this formula after the Supreme Court's Order requiring the utilization of a maintenance standard. Thus, in arriving at the preliminary revised budget, the school district's budget for 2002-2003 was reviewed and provided the supporting data to create same. (R – 4) Thus, the following calculation was performed:

> The following are added: line 9470 (General fund), line 13300 (Early Childhood Program Aid), the Demonstrably Effective Program Aid and line 13900 (Total Distance Learning Network Aid). The total of $255,973,307 is the total state and local program budget.
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> Adjustments are then made. Camden receives Title 1 aid from the federal government. This is blended into Fund 15. Federal aid for Camden is calculated at approximately 9%. Once this reduction is made, the 2002-2003 state program budget is determined to be $234,775,926.71. But Early Childhood Program Aid was increased from 2002-2003 to 2003-2004 by $1,977,219 so this was added back to the budget.

Other considerations in arriving at the preliminary revised budget included the following. Salaries of instructional staff were included at the contracted rate with the additional 4.5% rate increase that was the subject of bargaining. She had been advised in March 2003 that this was the rate increase agreed upon. Consumer Price Index (CPI) of 2.11% was added to the base on such non-salary items as textbooks, etc. Health benefits were subject to a 14.5% increase and she was advised of this by telephone conference with the State Health Benefit Plan (SHBP). Based on information provided her by the DOE Director of Finance, she increased the base of $9M for the Charter Schools to $11M. (R-4, line 9465) With regard to Special Education, a five-year trend analysis had been performed on Abbott school districts. (R-5) The purpose of this analysis was to show increases or decreases in enrollment and she wanted to make sure she factored the appropriate amount of IDEA dollars. Based on this analysis, Camden showed an increase of 19 additional children classified under IDEA. So she applied $40,000 for each respective child and netted $1.3M. (R-3) With regard to utilities, Camden had overspent their 2002-2003 budget by $115,081 and so she added that increase to the 2003-2004 budget. A decrease in Title 1 funding for the No Child Left Behind Act caused a decrease in federal funding to the district in the amount of $577,723, so in order to keep the district whole, state aid was increased in at amount. The total of adjustments made in non-discretionary items is $19,035,650 and this was added to the base reflecting a total 2003-2004 maintenance budget of $253,811,576.71.

With regard to the 2003-2004 budget and the advertised revenues (R-6), Coleman testified that line 410(total general fund) is anticipated to be $278,674,814. To this, line 425 (Early Childhood Program Aid (ECPA)) $13,699,807 is added. The amount in line 421 (Early Childhood Program Aid – Prior Year Carryover) of $76,321 is considered revenue based on the figures provided by Camden. In addition, the amount in line 422 (Demonstrably Effect Program Aid (DEPA) Prior Year Carryover) of $419,516 is considered revenue. The subtotal is $301,785,740. This is further reduced by Camden's request for additional *Abbott v. Burke* aid in the amount of $71,764,004. This reduction is made because the amount is already included in the General Fund Revenue in line 284. (R-6) The amount available then becomes $230, 021, 736.

Other adjustments made include the "extraordinary aid" to support Special Education. Camden was entitled to $59,518. In addition, the excess fund balance of $13,836,606 (R-2) must be considered as revenue. The total budgeted revenue available is then $243,917,860. The difference then is $8,776,153 representing the district's estimated need for discretionary additional *Abbott v. Burke* State Aid based on the revenues available to the district for 2003-2004 and the reductions to the maintenance budget as indicated.

With regard to the 2003-2004 maintenance calculation, maintenance of facilities was included as it had been in the 2002-2003 budget. In the 2003-2004 budget, an additional 2.11% was provided, representing the CPI. This is represented on line 7625 in the amount of $4,975,262. (R-7) In March 2003 the Camden City BOE requested the ability to spend $13M in projected surplus on maintenance ($10.5M) and ($2.5M). The DOE intervention team refused to allow Camden to amend the budget.

On cross-examination, Coleman testified that she worked directly with the Camden BOE as part of the Commissioner's Intervention Team. The DOE interceded after Camden's estimated a budget deficit of $14M in 2001-2002 school year. Wayne Thomas, a then state DOE employee was assigned to work with the Camden City school district. Spending was frozen and at the end of the year, Camden had a surplus of approximately $9M. She has worked with the Camden district for three years. To her knowledge, Camden did not have a projected deficit in 2002-2003. She met with Wayne Thomas on a bi-weekly basis in 2002-2003 and met quite often during the last six to seven months of his tenure.

She was directly involved in meetings with Camden District Superintendent Annette Knox, County Supervisor Dr. Mastrobuono and Wayne Thomas in the Spring of 2003. For example, she recalls the "Immediate Needs" itemization of the School District being discussed at the March 27, 2003 meeting. (P2a) Camden sought to utilize a projected surplus to fund various district-wide "immediate needs" in the amount of $7.66M. At the conclusion of the meeting it was determined Camden did not follow the

appropriate procedure as an Abbott school district and had to apply to the state School Construction Corporation (SCC) to order to have these items addressed. The Camden Division of Plant Services Revised March 26, 2003 request to spend $10.615M on capital projects throughout the district was also reviewed many times during the meeting. (P2c) Some of the items were approved by SCC. She was involved in the meeting with SCC. She recalled some specific items that were approved by SCC such as HVAC and gym floors in both high schools. She also recalled that Camden Plant Services Manager Robert Banscher was to continue working with DOE facilities person Mr. Gonzalez in order to fast track getting to SCC so it would expedite the decision of what SCC would fund. Knox requested that she be allowed to spend down the surplus for the items listed as immediate needs by the district. (P2a) That request was denied because many of those items could be funded by SCC had Camden followed proper procedure. Of the capital improvement projects totaling $10.6M (P2c), she never received a list from SCC indicating what projects it would fund. With regard to the Abbott school districts, if SCC does not fund a project, additional funding mechanisms are looked at; Abbotts get a second tier review.

Knox requested that the 2002-2003 approximate $10.6M projected surplus be utilized for maintenance/capital projects and the purchase of textbooks. (P2b) Coleman testified that you don't increase the level of spending at the end of the fiscal year. However, when asked if this practice is allowable, she responded she did not know. When Knox requested $2.3M in order to purchase textbooks (P2b), it was recommended that they would need to review the budget textbook line in order to determine if she could make this purchase.

With regard to the Commissioner's intervention team, County Superintendent Dr. Mastrobuono conducted the meetings and she was involved to the extent there would have been a budgetary impact on the city.

The DOE required Camden BOE to hire additional employees. (P-8) (The parties have stipulated to all the DOE directed positions listed on P-8 as part of J-1 with the

exception of two assistant superintendents.) When asked if the two assistant superintendents salaries' were funded in full for 2003-2004, Coleman responded that to the extent they were included in the 2002-2003 budget, they were included in the 2003-2004 maintenance budget. The problem, however, is that these employees were hired in January 2003.

When asked if R-3 incorporates salary increases for non-union employees, Coleman responded that it did not because she was not provided any information with regard to this. However she explained she counted everyone in the district regardless of whether a union member or not and provided for the contracted union agreement salary increase of 4.5% for each district employee.

With regard to health benefits, Coleman testified at the time she drafted the May 30, 2003 letter to the district (P-14), she did not know what rate increase to apply. However, she had this information when she drafted the August 27, 2003 letter (R-2) as SHBP communicated the information to her and so the increase was included in the revised preliminary budget for 2003-2004.

Further, with regard to the issue of the inefficiency of salary expenditures for non-instructional staff in the amount of $867,564, Coleman testified that although the salary guide for these individuals lists them by heading as "instruct/directors" (R-11), a review of the account numbers to the left of that listing proves that those employees are actually "non-instructional" staff. Coleman explained that after the May 30, 2003 letter (P-14) was forwarded to the district, Camden requested an explanation with regard to the alleged inefficiency. By referring to the columns on the left of the document, Coleman explained that "11" meant these employees were listed in the General Fund 11 account, "000" meant these employees were non-instructional staff and "221-102" meant these employees were supervisors. Camden BOE originally provided this document to the DOE so Coleman essentially provided the district information it had originated and forwarded to the DOE. After the Supreme Court order of July 2003, the DOE reviewed the issue again and that explained the change from the alleged inefficiency in this

category increasing from $725,000 to $867,564. When the May 30, 2003 letter was sent to the district, the Rosenfarb Winters report (R-8, R-9) was not available and the information included in its report provided further back-up to explain the increase in the inefficiency. In addition, she testified that when the May 30,2003 letter was forwarded, she did not have the FTE (full time equivalents) available to her. These were available prior to the issuance of the August 27, 2003 correspondence.

On cross-examination on this specific issue, Coleman was asked to refer to Rosenfarb Winters report (R-8, R-9) and specifically lines 221 and 223. Line 221-102 (Personal Salaries of Supervisors of Instruction) shows a total unfavorable variance of $983,837.19. Line 223-102 (Personal Salaries of Supervisors of Instruction) shows a total favorable variance of $747,648.84. While Coleman agreed that if these figures were netted, it would yield a negative total variance of approximately $200,000, she testified that the DOE distinguished between line 221 and 223. She also explained that Camden had no one budgeted in 2002-2003 in the "223" supervisory category and therefore, the two lines cannot be appropriately compared or netted. The $747,648 positive variance in this category, for which Camden did not have any employees budgeted, was derived from multiplying Camden's enrollment by the average spending per Abbott school district student (46.54) and thus, line 223 represents what other Abbott benchmarks budgeted in this category. She further testified that Wayne Thomas, a former state DOE employee, helped develop the 2002-2003 Camden budget. Any reclassification of employees would have to meet GAAP (Generally Accepted Accounting Principles). The assignment of a supervisor to a specific line, 221 or 223, would depend on the description of that person's function. If a district erroneously classifies someone as a supervisor, this would be considered an inefficiency.

On re-direct, Coleman testified that if a BOE wished to use available funds for small maintenance issues and the purchase of textbooks and wished to transfer funds from one fund to another in order to accomplish this, the district BOE would fill out a request form and forward it to the DOE for approval. To her knowledge, the DOE never

received such a request from Camden with regard to the purchases of textbooks Knox wished to make.

She distinguished her role on the Fiscal Intervention Team from that of Wayne Thomas. She was responsible for reviewing the Camden City budget to make sure it was complete and accurate. Thomas would have helped to prepare the budget. Further, on rebuttal, Coleman testified that the purchases of textbooks was not permitted under guidance of the DOE and pursuant to instructions received at the end of the school year in April/May 2003, none of the Abbott districts were permitted to increase spending. They were to build these proposed expenditures into the 2003-2004 budget.

With regard to the personnel listed on R-11, she testified that based on her discussion with Camden Program staff that reviewed the lists with her, to her knowledge none of the positions are instructional. The payroll information provided that none of these supervisors are instructional.

With regard to the carry over issue reflected on page 2 of R-3, specifically line 421 (ECPA carry over calc. by state) and line 422 (DEPA carry over calc. by state), the overall net effect of these adjustments is a net increase in Abbott state aid to Camden.

Respondent's final witness was Keith S. Balla, a partner with Rosenfarb Winters, a forensic accounting firm. He is the managing director of the Public Trust Group and works with municipalities and school boards. He is a CPA licensed in both New Jersey and New York. He holds a Bachelor's degree in Accounting and Finance from Rutgers University and has been employed at Rosenfarb Winters for 22 years. As managing director, he supervises managers and partners in conducting operational reviews and deficiencies as well as fraud investigations. He has worked with a variety of school districts in New Jersey including Princeton, Newark, Jersey City and Union. The projects he has worked on with these school districts has varied from evaluation of teachers' salaries to litigation regarding accounting of funds.

The DOE recently retained his firm to assist in litigation with the Abbott districts by developing standards that would flesh out operational deficiencies. The audited financial information provided by each district was reviewed in addition to enrollment and test score data. Based upon information provided, the firm developed what was considered "benchmark Abbott districts" *i.e.*, those falling in the middle range in consideration of students' scores and dollars spent. Typically, the most efficient schools are those having the highest scores and spending the least money.

The methodology applied for each review conducted was the same for each district.

He testified that Camden's inefficient spending on "object code 100 – personal services salaries total" did not exceed that of the benchmark districts. (R-8, exhibit 1, page 3 of 23.) Code 100 covers the salaries for all employees regardless of specific assigned function. (R-9) Specifically with regard to account 221-102 (which is one of the issues on appeal), it was determined that Camden had an unfavorable variance of $61.24 per pupil; Camden's 2003 budget per pupil is $254.01 compared with the standard for Abbott Districts 2003 budget of $192.77. Camden's total 2003 budget for salaries in this category is $4,080,846.51 compared with the standard for the Abbott school districts in the 2003 budget of $3,097,009.32 producing a total unfavorable variance for Camden in the amount of $983,837.19. (R-9)

On cross-examination, Balla testified the benchmark districts were considered Elizabeth, Long Branch, Gloucester and Phillipsburg. In determining benchmarks, the firm considered non-instructional spending per pupil and correlated it with educational test scores. (R-8a) No other factors, including level of impoverishment, nationalities, racial make-up, diversity, or quantity of languages spoken were considered.

On re-direct, Balla testified that the information gleaned in developing the benchmarks was then plotted on a graph. (R-8a) Those schools falling in the lower right

of the graph represent the most efficient schools. The benchmarks consistently fell in the middle quadrant.

On all three charts comprising R-8a, representing 2000-2001, 2001-2002 and 2002-2003, Camden fell almost on the same line each time as a high cost, low performance Abbott school district.

Petitioner's witnesses included: Superintendent of Camden City BOE Annette Knox, Robert Banscher and Dr. Fred Reiss.

Knox has been the superintendent for two years, seven months. When she arrived in Camden, the state intervention team was already working at the central office. Initially, its role could be categorized as advisory with respect to the budget. Four people from the state team were assigned to work in the central district BOE office. They could give advice but the district did not have to follow it. Approximately six to nine months later, their role changed in that they could approve or disapprove of budgetary issues. A change occurred in January 2001 and then a "drastic" change with the new administration.

The Commissioner's report of July 2002 was based on an extensive review by the intervention team. (P-1a) At the time this report was rendered, the intervention team's role had already changed and it had developed the budget for the district and had authority to approve or disapprove of requests. Wayne Thomas had a lead role in the team and also made decisions regarding expenditures including as it related to learning. For example, he would make decisions with regard to programs and textbooks.

This past Spring the district wanted to use funds that it knew would be surplus. She presented a plan to purchase textbooks (P-2b) and Mr. Banscher prepared the plans regarding proposed capital improvements. (P-2c, P-3a) Wayne Thomas told her they could not go forward with these plans; she was told the purchase of textbooks had to be made from the 2003-2004 budget. However, when she met with Thomas and Mastrobuono in March of 2003, there was a $12M surplus. She was also told to apply for

13a funding for the capital projects reflected in P-2a and P-2c. Thomas did not approve the adjustment of the budget to allow for the expenditure of the surplus. With regard to the expenditure of the AGS textbooks, she testified this was important because there were approximately 175 students who have been in the 9th grade for two years and the textbooks were needed for their "readability" level.

On cross-examination, she testified that the textbooks she requested during the course of the March 2003 meeting with Thomas and Mastrobuono were for the 2003-2004 school year.

With regard to the list of "Immediate Needs" she prepared in advance of the March 2, 2003 meeting, the costs listed for each respective item was derived either through a bid or a contract estimate. No supporting documentation for these amounts was attached to this document. (P-2a)

The district did apply for 13A funding for some of the projects and funding was approved for some of the projects. She did not have the supporting documentation at the hearing with regard to what had been approved.

Thomas left the district in June 2003.

On re-direct, she testified that Wayne Thomas directed that certain positions be created. (P-19) In addition, this document reflects that a series of positions were to be transferred or subject to RIF (Reduction in Force) for a net estimated savings of $1,125, 264. With regard to the position of Assistant Superintendent of Curriculum and Instruction, Thomas directed that a second position be created. As a result, both individuals were hired in January 2003. They were both on the payroll for the last six months of the 2002-2003 school year so only part of their salary would be included in the 2003-2004 maintenance budget as prepared by the DOE.

Robert Banscher, an in-house BOE architect testified next on behalf of petitioner. He worked with the schools in requesting funds to be included in the budget for maintenance of facilities and capital projects. He also worked with construction consultants.

He assisted in preparing the list of "Immediate Needs (P-2a) in preparation for the March 27, 2003 meeting. This was submitted to Superintendent Knox in preparation for the meeting with the state EDA (Economic Developmental Authority) and SCC and Dr. Mastrobuono. During the meeting, Mastrobuono suggested applying for 13A funding on projects under $500,000. The Proposed Budget Expenditures for school year 2003-2004 requesting $10.6M in funds was discussed during this meeting. (P-2c) This was revised after the meeting with a reduced request of $7.4M as some of the projects were submitted and granted 13A approval. (P-3a) Some of the 13A requests were denied because they were maintenance issues rather than capital projects. Banscher testified at length with regard to each specific school within the district and with regard to each specific project description and the budget estimate. (P-3a) No documentation supporting the budget estimate for each respective project was provided, nor was any supporting documentation made available at the hearing as to project items that were labeled "in house" or "state." Banscher testified from memory with regard to his recollection as to what he was told by the DOE representatives or Mastrobuono should be handled "in house" as part of the regular facilities maintenance budget, what should be or was granted as approved 13A funding and what should be part of the long range plan with SCC capital projects. But no supporting documentation was presented at the hearing to support Mr. Banscher's recollection. Some of the items Banscher characterized as "critical." For example, he cited to intercoms at schools that did not work properly and stressed that post-Columbine, intercoms should work properly so that announcements can be heard in all classrooms. He was advised that those matters that could be handled in-house should be taken care of through the 2003-2004 budget.

On cross-examination, he testified that the "in house" items were then deleted from the budget submission as these were to be factored in as part of the "regular

maintenance budget" which was factored in the DOE's 2003-2004 preliminary revised budget. (R-7)

Further, the SCC has approved 2003-2004 projects, 13 of which have been approved for the Camden BOE but he does not know which ones they are.

He is not sure whether Camden sought emergent appropriation funds for such issues as heating problems. He was told at the March meeting to prioritize health and safety issues. Thomas left the district after that meeting and Banscher has not been involved in any subsequent meetings.

He recalls that there exists a letter from the state indicating what SCC projects had been approved but he did not have it with him at the hearing.

Petitioner's final witness was Fred Reiss, Assistant Superintendent for Administrative Support Services. He is responsible for day-to-day operations and other ancillary functions including supervising the department that collects data and provides it to the BOE. He holds a Bachelor's degree in Physics from Rutgers, two Master's degrees including one in Computer Science from NJIT and a Ph.D. in Education Administration from Rutgers. He utilized statistics extensively in the Ph.D. program.

He prepared a logarithmic analysis of the enrollment trend of Camden schools because he was concerned when he reviewed the August 27, 2003 DOE letter that the conclusions of inefficiencies was based on erroneous enrollment information. (P-4a – P-4d, P-4f-P-4g) His major concern was how the enrollment figure was determined.

He reviewed the DOE's method of calculation as conducted and testified to by Mr. Dupree. (R-1) According to Reiss, Dupree used a linear method but in his growth rate calculation formula, all the data disappeared when the average of three years and the second set of three years left only two dots to form a line. Dupree testified that the "cube root" was taken in order to "smooth the line" and it appeared to Reiss to have been done

to the detriment of Camden. So he created his graph (P-4a et seq.) which he described as the "method of least squares." By drawing a straight line through all six points (representing 1997-2002 enrollment), a projected enrollment for 2003-2004 of 16,576.19 is established. (Dupree conceded during cross-examination that drawing a straight line through six points would represent a better projection of 2003-2004 enrollment.) Reiss also plotted out projected enrollment to reflect a three year trend through a five-year trend, respectively. The DOE in contrast, used a straight line through two points to predict a trend. So the DOE's projected 2003-2004 enrollment of 16,066 will be wrong and this impacts Camden because that was the projected enrollment figure used to project inefficiencies and determine the budget. Reiss then looked at a three-year trend by logarithmic analysis and projected 2003-2004 enrollment at 17,074.2. (P-4d) He then projected pupils on roll for October 2003 at 16,407 yet indicated the actual enrollment will be neither 16,066 (DOE projection) nor 16,407 but it will be a lot closer to the latter number. He noted that the district is responsible for other students "on roll" that the DOE did not factor in its growth rate calculation, *i.e.*, pre-school students (approximately 1,300), Adult Education (approximately 200) and out-of-district Special Education placements (approximately 300).

He also testified with regard to his concern that numerous other factors were not taken into consideration to determine inefficiencies or benchmark districts so he prepared a monthly summary for secondary schools reflecting the languages spoken at those schools. (P-16) By law, if ten students speak the same foreign language, the school is required to provide an instructor in that language. This places a burden on the district. In addition, he noted the diverse community represented at the Camden city schools (P-5) and indicated that as a result there are numerous cultural and language issues that require a great deal of in-service programs requiring more supervisors than a homogenous community. These supervisors are required in different languages as reflected in the numerous languages spoken at the Camden city school district. (P-16) There are 34 schools in Camden and several thousand students that are participating in English as a Second Language (ESL) programs. In addition, there are 12,000 middle and high school

students that qualify for free lunch based on income and family size. His experience is that the impoverished need more support.

LEGAL ANALYSIS AND FINDINGS OF FACT

In its July 23, 2003 Order, the Supreme Court limited petitioner Abbott districts respective appeals to "any reductions to their maintenance budgets by the DOE's application of the effective and efficient standard." Pursuant to that Order, the DOE was required to promulgate an emergency regulation establishing the standard for evaluating the effectiveness and efficiency of the districts' non-instructional programs. In addition, the Order and subsequent emergency regulations, set forth the burden of proof in any such appeal as follows: the DOE shall bear the burden of moving forward to establishing the basis for any proposed reductions to the district's maintenance budget based on the effective and efficient standard set forth in the DOE's emergency regulations. If that initial burden is met, the district shall bear the burden of demonstrating that any budgetary reductions are not justified under that standard. *N.J.A.C.* 6A:10-4.7.

In furtherance of the Supreme Court's Order, the DOE promulgated a regulation setting forth the methodology in application of the effective and efficient standard.

> The effectiveness and efficiency of non-instructional expenditures in the 2002-2003 budget shall be determined by: i. A comparative analysis on non-instructional expenditures to those of other school districts and/or historical spending patterns in the district; ii. An analysis of staffing needs including but not limited to comparative data of ratios of non-instructional/administrative staff to instructional staff as well as district-specific information regarding staffing needs; iii. A review of non-instructional programs to identify expenditures that are included that may be funded through other funding sources or that alternative funding is not available because the expenditure is not essential to the provision of a thorough and efficient education. Such expenditures include, but are not limited to, capital costs that could be funded pursuant to the Education Facilities Construction and Financing Act or that

> exceed the facilities efficiencies standards established pursuant to that Act; and iv. Cost savings and/or inefficiencies identified or proposed by the district or by the State Auditor or Office of Legislative Services Audit. (*N.J.A.C.* 6A:10-3.1(c)(1).

As previously indicated, the maintenance budget definition as promulgated by the Commissioner's emergency regulations shall be the basis of my initial decision.

> Maintenance budget means, for the 2003-2004 school year, a budget funded at a level such that the district can implement 2002-2003 approved and provided programs, services, and positions and includes documented increases in non-discretionary expenditures and adjustments for actual 2002-2003 expenditures. Examples of non-discretionary expenditures are increases in contracted salaries, health benefits, and special education tuition. Maintenance does not include the restoration of programs, positions, or services that were provided in previous years or new programs, positions, or services unless necessary to meet paragraph 2c of the Supreme Court's Order of June 24, 2003 in *Abbott v. Burke*. Maintenance also does not include non-recurring 2002-2003 expenditures. (*N.J.A.C.* 6A:10-1.2)

The Camden City school district is subject to the Municipal Rehabilitation and Economic Recovery Act. *N.J.S.A.* 52:27BBB-1 *et seq*. As such, the state exercises significant control over the Camden City School Board. The statute authorized the governor to directly appoint three members to the nine member school board. *N.J.S.A.* 52:27BBB-63(h) and the governor has unconditional veto over any action taken by the school board. *N.J.S.A.* 52:27BBB-64(b). As part of the control, the DOE caused an intervention team to work with Camden in an advisory capacity which later increased to the creation of budgets and decision making authority over the budget and proposed expenditures. Former DOE employee Wayne Thomas was a pivotal point person for the DOE in relation to the operation of the Camden City school district including budgetary, personnel and program issues.

As indicated previously, the following issues are the subject of this appeal in consideration of the original petition filed appealing from the May 30, 2003 letter, petitioner's September 3, 2003 amendment to the original petition as required by the emergency regulations and stipulation by the parties (J-1):

1. Restorations not approved in the amount of $12,570,164;
2. Capital outlay;
3. Vacancies in the amount of $1,603,000;
4. Health benefits (in part);
5. Vocation program funds in the amount of $334,455;
6. Supervisory staff in the amount of $867,564; and
7. Various fund 11 accounts -- technology, school-based non-salary accounts and aid in lieu of transportation which were not approved above the 02-03 level.

With regard to the first issue on appeal, restorations in the amount of $12, 570,164, petitioner's appeal is **DENIED.** The maintenance standard as ordered by the Supreme Court and defined at *N.J.A.C.* 6A:10-1.2 clearly indicates that the restoration of programs is excluded. (Petitioner did not define the nature of this restoration. What is clear is that the denial of this restoration in the amount of $12,570,164 does not pertain to the restoration of Whole School Reform programs as set forth in the Supreme Court's Order of June 24, 2003 and as stipulated to by the parties in J-1.)

With regard to the issue of capital outlay, *N.J.A.C.* 6A:10-3.1(c) iii provides that in applying the effective and efficient standard, the DOE must

> review non-instructional programs to identify expenditures that may be funded through other funding sources.... Such expenditures include, but are not limited to, capital costs that could be funded pursuant to the Education Facilities Construction and Financing Act or that exceed the facilities efficiencies standards established pursuant to the Act....

Significant testimony was presented at the hearing with regard to Camden BOE's desire in the Spring of 2003 to use a then projected $12M surplus to purchase textbooks and for capital expenditures. The ability of Camden to use those funds and the denial by the Risk Intervention Team is not an appropriate issue before me. Both Ms. Coleman and Ms. Knox indicated that Wayne Thomas and other member of the state's Risk and Fiscal Intervention Team did not approve this expenditure in the Spring of 2003. Camden was directed to pursue other means of funding for the capital projects, *e.g* applying for emergent funds for maintenance issues relating to heat, applying for 13A grants for projects estimated at less than $500,000 and applying to the School Construction Corporation for other capital projects. Maintenance funding was awarded to the school district and CPI was applied. I **FIND** the DOE has met its initial burden with regard to this issue on appeal. However, the district has not demonstrated sufficiently that any reduction is not justified under the effective and efficient standard of a maintenance budget. The district seeks to rely on lists of projects for each respective school, initially seeking approximately $10M and later $7M. No supporting documentation for the estimates was provided at the hearing. The district was advised in the Spring that other funding sources should be considered. No credible, competent evidence was presented at the hearing which would indicate the results of those efforts. It should be noted that the district did submit some information as part of post hearing submissions to document some 13A grants that were approved. This should not be construed to indicate that Mr. Banscher's testimony was not credible. He in fact was a credible and compelling witness. His testimony regarding inoperable intercoms in a post-Columbine era is a frightening reality. The district should certainly consider applying for aid in accordance with provision 7 of the July 23, 2003 Supreme Court Order. The district's appeal on the issue of capital outlay is **DENIED.**

With regard to the issue of vacancies, the parties have stipulated to certain positions being funded.(J-1). As part of the Risk and Fiscal Intervention Team and under the auspices of the Municipal Rehabilitation and Economic Recovery Act, Wayne Thomas directed certain positions be the subject of Reduction in Force (RIF) or

transferred. However, he directed the BOE to hire two Assistant Supervisors of Curriculum and Instruction. Those individuals were hired in January 2003. According to the testimony of Ms. Coleman, all positions funded in the 2002-2003 budget were maintained at the same level plus the contracted salary increase of 4.5% regardless if the employee was union or non-union (and not subject to that negotiated salary increase.) These were entirely new positions and not the filling of any vacancy. Thus a clear application of a "maintenance" standard would operate to not fully fund these specific two positions. I **FIND** that the district has demonstrated that any budgetary reduction that would operate to partially fund these two positions created at the direction of the DOE is not justified under the maintenance standard and **GRANT** petitioner's appeal with regard to the full funding of these two specific positions.

Petitioner indicated at the hearing that the issue of health benefits had been resolved in part but did not present any proofs with regard to any remaining outstanding issue. Ms. Coleman testified that when she drafted the May 30, 2003 letter to the district, she did not have access to any increase from the State Health Benefits Plan (SHBP). She also testified she obtained this information prior to the issuance of the August 27,2003 letter to the district and that the preliminary revised 2003-2004 budget incorporated this increase in health benefits. Therefore I **FIND** the DOE has met the burden with regard to this issue and **DENY** petitioner any further relief in this regard.

The issue of vocation program funds in the amount of $334,455 was based on the May 30,2003 letter to the district and petitioner indicated at the hearing that this "might" still be an issue. No specific proofs were presented however by petitioner and the appeal on this issue is therefore **DISMISSED.**

The August 27, 2003 letter to the District indicated that a review of salary expenditures for non-instructional supervisors (11-000-221-102) for fiscal year 2002-2003 found inefficient expenditures in the amount of $867,564. The determination was made based on the district's total administrative cost per pupil as reported in the March 2003 Comparative Spending Guide for the Abbott Districts. In addition, the analysis of

the forensic accounting firm, Rosenfarb Winters was considered. Ms. Coleman testified that although the document listing those supervisors indicated "salary/supv of instruct/directors" (R-11), the fact that they are listed in this account code is proof that they are "non-instructional supervisors." Based on a review of these individuals' respective functions, they were each placed in this category. Ms. Coleman was a competent and very credible witness. I **FIND** that these employees are non-instructional supervisors. I **FURTHER FIND** that as such, the negative variance indicating an inefficiency of $983,837 cannot be adjusted by the favorable variance of instructional supervisor in the 223-102 account number because these positions cannot be compared and because the favorable variance in that category represents the standard for Abbott Districts and not a true number for Camden as Camden did not have any employees serving in the job functions comprising that account code. In determining the inefficiency, cost per pupil was also considered. I **FIND** that the conclusions reached by Rosenfarb Winters were not arbitrary or capricious and each Abbott District was evaluated based on the same criteria. Although I found Dr. Reiss to have been a sincere and credible witness, the mandate from the Supreme Court does not permit me to consider any evidence of whether Camden might be a "needier" district than other Abbott districts based on any factors, including those cited by Dr. Reiss. The growth rate calculation formula in order to calculate projected enrollment for 2003-2004 utilized by the DOE is of concern. While I **FIND** that Dr. Reiss' logarithmic analysis to have been based on a better statistical formula, that finding is of no import. *N.J.S.A.* 18A:7F-5(a) provides in pertinent part:

> ...Beginning in the 1998-99 school year, unless otherwise specified within this act, aid amounts payable for the budget year shall be based on budget year pupil counts, which shall be projected by the Commissioner using data from prior years. Adjustments for the actual pupil counts of the budget year shall be to State Aid amounts payable during the school year succeeding the budget year.

The statute specifically authorizes the Commissioner to project pupil counts and does not require the Commissioner to promulgate regulations regarding the creation of a growth

rate calculation formula and as such, the statistical model utilized by the DOE was not required to be the subject of rulemaking. While I agree with Dr. Reiss that the DOE formula dilutes six years of enrollment figures to two points and then allows a "smoothing" so as to not penalize Camden for a year that showed a downward spike in enrollment, I may not disturb it.

As a result, I **FIND** the DOE has met the initial burden in this regard but the District has not demonstrated an unjustifiable budgetary reduction despite a more sound projection formula and petitioner's appeal with regard to this issue is **DENIED.**

Finally, with regard to the "various fund 11" accounts issue as presented in petitioner's initial petition based on the May 30, 2003, letter, I **FIND** that the May 30, 2003 letter specifically indicated that these accounts were not approved above the 2002-2003 level. Therefore, I **FIND** their provision in the preliminary revised 2003-2004 budget meets the maintenance standard and therefore petitioner's appeal on this issue is **DENIED.**

DECISION AND ORDER

Based on the foregoing, I hereby **GRANT** petitioner's appeal seeking full funding for the two Assistant Supervisors of Curriculum and Instruction and hereby **DENY** the remainder of petitioner's appeal as more fully set forth above as to: restorations (not including Whole School Reform pursuant to the June 23, 2003 Supreme Court Order and the parties stipulation); capital outlay, vacancies, supervisory staff and various Fund 11 accounts. I hereby **DISMISS** petitioner's appeal with regard to health benefits "in part" and vocation program funds as no proofs were advanced by petitioner on those issues.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within the time allowed under the existing orders of the New Jersey Supreme Court and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Notwithstanding the provisions of any rule to the contrary, exceptions to Initial Decisions of the Office of Administrative Law in *Abbott* District budget appeal matters shall be filed within five (5) days of the date of mailing of the Initial Decision, and reply exceptions shall be filed within two (2) days of receipt of exceptions. File written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 26, 2003
DATE

Ana C. Viscomi
ANA C. VISCOMI, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

September 26, 2003
DATE

E-mailed Initial Decision to the parties on:

September 26, 2003
DATE

APPENDIX

Witnesses:

For Petitioner:

Annette Knox

Robert J. Banscher

Fred Reiss, PhD

For Respondent:

Allen Tyrone Dupree

Beth Ann Coleman

Keith S. Balla

Exhibits

For Petitioner:

P-1a Camden Public Schools Fiscal and Intervention Report dated July 2002 attached to Commissioner Librera's press release

P-1b December 11, 2002 status report -- Fiscal and Educational Intervention Team report

P-2a Superintendent Knox March 27, 2003 list of "Immediate Needs" for Camden schools

P-2b Knox's list of Text Books to be purchased in 2002-2003 budget

P-2c March 26, 2003 Division of Plant Services request of $10.615M to be spent from 2002-2003 budget

P-3a June 19, 2003 revision of document 2c

OAL DKT. NO. EDU 4157-03
AGENCY DKT. NO. 187-6/03

BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The Department's exception to the Administrative Law Judge's (ALJ) recommendation with respect to inclusion of full salaries for certain positions filled part-year in 2002-03[1] was duly submitted in accordance with the schedule established in response to the Court's order for expedition. The Board filed neither exceptions nor a reply to the Department's submission.

Initially, the Commissioner concurs with the ALJ that the Department's methodology in reviewing the District's budget fully comports with the "maintenance" standard, as established by the Court and implemented by regulations promulgated in accordance with *P.L.* 2003, *c.* 122. The Commissioner concurs that the OAL does not have jurisdiction to determine directly or indirectly the validity of *N.J.A.C.* 6A:10-1.2,

[1] The Department also seeks, parenthetically, to clarify its position as mentioned in the Initial Decision, page 8, footnote 1. The Department's actual position is that the Board may pursue issues related to the Department's May 30, 2003 letter, but the subject of the instant appeal is the August 27, 2003 letter determining the Board's preliminary maintenance budget and additional *Abbott v. Burke* State aid. (Department's Exceptions at 1, footnote)

such determination being solely within the jurisdictional purview of the Appellate Division or the Supreme Court. R. 2:2-3(a); *see, also, Pascucci v. Vagott,* 71 *N.J.* 40, 51-52 (1976); *Wendling v. N.J. Racing Com'n*, 279 *N.J. Super.* 477, 485 (App. Div. 1995). However, to the extent that he may appropriately do so in an administrative proceeding, the Commissioner also opines that the Department's definition of "maintenance budget," as set forth in *N.J.A.C.* 6A:10-1.2, is fully consistent with the language and intent of the Court. Thus, like the ALJ, the Commissioner finds the regulatory definition controlling herein, with no conflict between it and the underlying Court order.

The Commissioner further concurs, for the reasons fully set forth in the Initial Decision, that programs not provided in 2002-03, proposed capital outlay expenditures, health benefits, unspecified vocational programs, salary expenditures for noninstructional supervisors, and various "fund 11" accounts (technology, school-based non-salary accounts and aid in lieu of transportation) above 2002-03 levels, were properly excluded from the 2003-04 maintenance budget or reduced under regulatory standards of effectiveness and efficiency.[2]

However, with respect to increasing salary accounts to accommodate the filling of vacancies, the Commissioner cannot agree with the Initial Decision to the extent that it recommends, based on a "maintenance" analysis, additional funding to fill two specific all-year positions that were filled for only part of the year in 2002-03. Rather, the Commissioner notes that the Department preliminarily established the District's

[2] The Commissioner does not find issues arising from the Department's May 30, 2003 budget determination germane to the instant appeal, since the August 27, 2003 maintenance budget was developed through a superseding methodology, based on an explicit regulatory standard not in existence during the prior determination, and additionally took account of previously unavailable information. (See, for example, Initial Decision at 19-20.) However, to the extent that the ALJ permitted issues arising from the May 30 determination to be litigated in the present context, the Commissioner concurs with the Initial Decision's specific recommendations as set forth herein.

2003-04 cost of providing positions at maintenance level in a more global fashion, by determining, as nearly as possible without benefit of audit, the actual approved cost of providing positions in 2002-03 and then adjusting for the 4.5% salary increase of the current union contract. While it is true that dollar amounts actually paid out for staffing prior to June 30, 2003 will not perfectly predict the cost of providing comparable staffing in the next, it is *equally* true that vacancies, retirements, resignations, substitutes, part-year positions and the like occur every year, so that the Commissioner finds it entirely appropriate for a preliminary district-wide salary budget to be based on the assumption that staffing is a flexible and continuous process, with ebbs and flows that generally permit the projection of one year's overall experience onto the next. Thus, the Commissioner holds that no special consideration is warranted for two positions in particular, and he rejects the ALJ's recommendation to the contrary.[3]

Accordingly, the Initial Decision of the OAL is adopted, for the reasons expressed therein, in all respects except as to its recommendation for additional salary amounts, which is rejected as set forth above. The Petition of Appeal is dismissed.

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: 10/20/03

Date of Mailing: N/A

[3] In this context, the Commissioner also notes the availability of a mechanism for Abbott districts to address needs, arising during the year due to unanticipated expenditures or unforeseen circumstances, for additional resources to implement Department-approved programs and services. *N.J.A.C.* 6A:10-3.1(g).

[4] Pursuant to *P.L.* 2003, *c.* 122, "*Abbott*" determinations are final agency actions appealable directly to the Appellate Division of the New Jersey Superior Court.

584-04

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning "Abbott" district appealed the Department's determination of its 2003-04 preliminary "maintenance budget," alleging that the Department's review was not in accordance with the July 23, 2003 order of the Supreme Court. The District also challenged the Department's reduction, as part of its review of noninstructional expenditures for ineffectiveness or inefficiency, of 53 custodial positions.

The ALJ found that the Department appropriately applied the duly promulgated rule implementing the Court's order for "maintenance." The ALJ further upheld the Department's methodology and determination with respect to custodial positions, but suggested that, because the determination was based on older data, it be considered for adjustment based on more current figures.

The Commissioner adopted the ALJ's decision in most respects, but directed the Department to increase the number of allowed custodial positions based on the District's current, verified square footage exclusive of certain leased preschool spaces, making, however, no special allowance for "satellite" locations as requested by the District.

October 20, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO.EDU 5496-03

AGENCY DKT. NO. 196-6/03

STATE-OPERATED SCHOOL DISTRICT OF
THE CITY OF JERSEY CITY, HUDSON COUNTY,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION,

Respondent.

Charlotte Kitler, General Counsel, for petitioner

Allison Colsey-Eck, Deputy Attorney General, for respondent
(Peter C. Harvey, Attorney General of New Jersey, attorney)

Record Closed: September 22, 2003 Decided: September 26, 2003

BEFORE **STEPHEN G. WEISS**, ALJ:

In this matter, the petitioner, the State-Operated School District of Jersey City (hereinafter the "Jersey City Board" or "Jersey City"), has appealed the August 27, 2003, letter determination of the respondent, New Jersey State Department of Education (hereinafter "DOE"), establishing the amount fixed by the DOE as Jersey City's "preliminary maintenance budget" for the 2003-2004 school year (Ex. J-5). The events leading up to that letter had their most recent genesis in March 2003 when the DOE moved before the New Jersey Supreme Court for an order modifying its decision in *Abbott v. Burke*, 153 *N.J.* 480 (1998) (*Abbott* V) to limit the amount of discretionary

additional *Abbott v. Burke* State Aid (supplemental aid) that it would be required to provide to *Abbott* districts in 2003-2004 in an amount sufficient to support those programs, positions and services in the district's approved budget for 2002-2003. In essence, DOE's motion sought a one year extension of the one year relaxation of remedies which the New Jersey Supreme Court granted in its ruling in "Abbott IX" (*Abbot v. Burke*, 172 *N.J.* 294 (2002)).

Subsequently, in a letter dated March 30, 2003, the DOE, applying the maintenance standard for which it was seeking approval, issued a letter to Jersey City advising the District that its expenditure budget for 2003-2004 was approved, except for certain designated areas that either did not comply with the DOE's version of "maintenance", or for which there was insufficient information for that determination to be made (Exh.J-3). In early June 2003, Jersey City appealed that determination and the case was transmitted to the Office of Administrative Law (OAL) for hearings which, in Jersey City's case, originally were conducted by the undersigned on July 2, 3 and10, 2003. Those hearings took place, of course, while the DOE's motion for Supreme Court approval of its use of the maintenance standard it had adopted for 2003-2004 was still pending before the Court.

On July 23, 2003, the Supreme Court issued an Order granting the Department's application to treat the 2003-2004 school fiscal year as a maintenance year for purposes of calculating Additional *Abbott v. Burke* State aid for the Abbott districts and stated that the Statewide aggregate amount of "Additional" *Abbott* State aid was to be presumptively calculated at the total amount of Additional *Abbott* State aid approved for the Abbott districts for 2002-3003, as adjusted.

The Order of July 23, 2003, further provided that the DOE also could review an Abbott district's non-instructional programs to evaluate their effectiveness and efficiency, but the agency must first promulgate an emergency regulation defining the standard for evaluation. "Non-instructional" programs were defined by the Court as, "office/administrative expenditures and programs, positions, services and/or expenditures that are not school based or directly serving students".

The DOE also was directed by the July 23, 2003 Order to notify each *Abbott* District of its preliminary maintenance budget figures and estimated supplemental funding within 30 days. The Order further noted that if DOE's application of the "effective and efficient" standard for non-instructional programs resulted in a reduction in an *Abbott* district's presumptive amount of Additional *Abbott* State aid, the DOE must include in its notification to any affected *Abbott* district the expenditure which the DOE was deleting and provide a specific statement explaining why the program or part thereof no longer was effective and/or efficient.

The Order then went on to provide for appeals by *Abbott* districts and held that DOE would have the burden of "moving forward to establish the basis for any proposed reductions to a district's maintenance budget based on the effective and efficient standard set forth in the DOE's emergency regulations." It stated that, "If that initial burden is met, the District shall bear the burden of demonstrating that any budgetary reductions are not justified under that standard." The Order also indicated that if monies for a district's non-instructional programs were deleted under the effective and efficient standard, it could still apply for State aid "for demonstrably needed programs or services."

The OAL was allowed thirty days from the date of the DOE's revised determinations to issue initial decisions in any pending Abbott appeals. Although these determinations initially were due on August 22, 2003, the DOE received an extension of time, until August 27, 2003, to issue its determination so that the thirty days for initial decisions by the OAL began to run on that date and will terminate on September 26, 2003, unless further extended.

On August 22, 2003, consistent with the authority granted in the FY 2003 Appropriations Act, the Commissioner promulgated emergency regulations. *See* FY 2003 Appropriations Act, *L.* 2003, c. 122. In them, DOE defined "maintenance budget" as a standard for reviewing the *Abbott* Districts' 2003-2004 applications for additional supplemental funding as follows:

> For the 2003-2004 school year, a budget funded at a level such that a district can implement 2002-2003 approved and provided programs, services and positions and includes documented increases in non-discretionary expenditures and adjustments for actual 2002-2003 expenditures. Examples of non-discretionary expenditures are increases in contracted salaries, health benefits and special education tuition. Maintenance does not include the restoration of programs, positions or services that were provided in previous years or new programs, positions or services unless necessary to meet paragraph 2c of the Supreme Court's order of June 24, 2003 in Abbott v. Burke. Maintenance also does not include non-recurring 2002-2003 expenditures. *N.J.A.C.* 6A:10-1.2.

The DOE then issued a decision on August 27, 2003, establishing a preliminary maintenance budget for Jersey City in the amount of $487,961,547 (Exs. J-1; R-2). The letter advised that the DOE had found approximately $2.1 million in "inefficient" expenditures in the employment of an excessive number (53) of custodians. Jersey City continued to pursue its appeal and an additional hearing was held on September 18, 2003. Testimony was received that day on the State's behalf from Mary Byrne, a CPA employed by the Office of Management and Budget in the Department of Treasury primarily concerned with DOE, and from Benjamin D. Rarick, DOE's Director of State-Operated School Districts, who was the person primarily involved in the review of Jersey City's 2003-2004 budget and who had testified previously in July 2003 prior to the DOE's adoption of emergent regulations. The District's sole witness on September18, 2003 was Joanne Gilman, its Business Administrator who, like Rarick, previously testified in July.

As noted, the Supreme Court's July 23, 2003 Order, and the emergency regulations implemented pursuant to it, permitted DOE to reduce Jersey City's 2003-2004 budget by those amounts deemed to be ineffective or inefficient. Thus, in his testimony, Rarick addressed the sum of $2.1 million dollars for 53 fulltime equivalent ("FTE") positions for custodians which was deemed to be an "ineffective" expenditure for such services. Rarick explained that a guide which listed comparatively sized urban school districts ranked Jersey City 99th out of 101, making it the school district with the third highest costs in the maintenance, custodians and security category – a marker which he believed was significant. Rarick noted that a forensic accounting firm (Rosenfarb and Winters) hired by DOE to measure inefficiencies among the *Abbott* districts concluded

that Jersey City also spent approximately $4 million more than certain "benchmark" *Abbott* districts, which he defined as districts which are the "median spending" and "median performing" districts. As he pointed out, while the benchmarks may not the best or most efficient districts, they represent a "middle performing group" that reasonably could be identified as representing a standard every *Abbott* district could meet.

Rarick also compared three reports of "industry standards" dealing with the amount of square footage a custodian should be able to maintain in a school building. He concluded from the data that a ratio of 16,100 square feet/per custodian represented the square footage per day a custodian in Jersey City should be able to maintain. Indeed, he explained he actually modified the figure slightly to account for whole numbers rather than fractions of custodians, which resulted in a slight benefit to the District. This methodology was based, in part, on a Deloitte Touche report prepared by Newark for the New York/New Jersey Zone (Ex. P-23). Rarick also compared Jersey City's costs for custodians with other large Abbott districts. He primarily compared Jersey City to Newark, and determined Jersey City was spending more per square foot on custodians than Newark ($3.22 v. $3.14). He agreed that the total square footage he used in making his calculation was based on 1999 data and did not take into account any changes or additions since then.

Another area about which Rarick testified, mainly at the July 2003 hearings, had to do with the proposed expenditure of $300,000 for radon testing. The District estimated that since the total cost of such testing would be about $600,000 ($35 per classroom), it determined to complete one-half the testing in 2003-2004, and the balance in 2004-2005. According to Rarick, he could not give a separate approval for $300,000 even though the testing was mandated to be completed by 2005 (*N.J.S.A.* 18A:20-40) because the funds estimated to be needed were too high in terms of cost per classroom and numbers of rooms and/or areas to be tested, and the District could request an exemption to allow its own employees to be trained to perform the testing. In any case, the monies could be found in other accounts that could be reallocated to this item and, moreover, some if not all the funds could be taken from a 2.11% CPI allowance provided by DOE for 2003-2004 which, in Jersey City's case, totaled over $712,000 (Ex. R-2).

Another area about which Rarick testified in July 2003, and which remained in issue, had to do with Jersey City's having budgeted almost a $515,000 increase for "medical provider" costs consisting of contracted increases for providers of physical examinations of students and staff and for rendering medical care for injuries. Here, too, Rarick testified that it was an amount that was capable of being funded from reallocation from other accounts and, like the radon testing expenditure, was not a "substantial built-in cost driver," such as professional salaries, health benefit premiums, utilities and the like which essentially were beyond the ability of the District to control.

Finally, both in July 2003, and to a lesser extent in September 2003, Rarick opined that his approach as the primary reviewer of Jersey City's 2003-2004 budget included a belief that the District appeared to be experiencing unwarranted increases in administrative and non-instructional areas which were beyond those for instructional purposes. As he put it, this situation was the opposite of what the DOE was hoping to achieve.

Testimony on behalf of Jersey City was offered in both July 2003 and September 2003 by its Business Administrator, Ms. Gilman, Michael Littlejohn, Director of Whole School Reform and Testing (July 2003 only), and Adele Macula, Assistant Superintendent for Curriculum and Development (July 2003 only). The latter two witnesses primarily had addressed what they viewed as the devastating impact that the DOE's budget limitations have on Jersey City's ability to carry out its mandate to provide a thorough and efficient education to its students.

Gilman's testimony was specific to the budget items in issue, both in July 2003 and September 2003. As to the 53 custodial reductions proposed by the DOE, she had several points to make. First, the square footage component used by Rarick is five years old. Since 1998 here have been school additions and rental of trailers and other facilities, all of which require custodial and maintenance attention. She calculated there is about 400,000 more square feet which, even using DOE's own formula, would require 320 custodians, not the 298 proposed. Moreover, the use of 16,100 square feet per

custodian is too high – Jersey City uses 14,000 square feet as a standard. Thus, since Rarick used 16,100 derived from data which may or may not include public school buildings, she believed the District's square footage per custodian at least should be the same as Newark's (Exh. P-23).

Finally, Gilman stressed that Jersey City has special requirements impacting custodial services – very aged buildings (Ex. P-15) and many pre-school age children.

As to radon testing, Jersey City, she said, is mandated to complete it by 2005 (Exh. P21, P-22) and the $300,000 estimate ($35 per classroom) is within the DOE's own estimate of $20-$50. Therefore, it is not reasonable to expect the $300,000 to be taken from other accounts and/or the 2.11% CPI allowance.

Although Gilman did not directly address the "medical provider" issue at the September 2003 hearing, she did testify in July 2003 that the $515,000 represented increased costs over which the District had no control, and without the funds the District could not continue to provide the full panoply of health services needed.

The foregoing covers, I believe, the essential testimony offered at the hearings, exclusive of the philosophic points urged by the State in terms of the need to intelligently marshal available resources to first provide for critical school-based needs, and the counterpoints urged by Jersey City *vis-à-vis* its inability to deliver even these minimally adequate services without the full amount of funds it requested.

The threshold issue in this case is whether DOE's implementation of the emergency regulations adopted on August 22, 2003, insofar as its definition of a "maintenance budget" is concerned, was appropriate. Two administrative law judges previously have addressed the issue and both determined that any challenge to a duly adopted regulation such as *N.J.A.C.* 6A:10-1.2 must be brought in the Superior Court, Appellate Division, pursuant to *R.* 2:2-3(a)(2) and that no jurisdiction exists to do so at the OAL. *See Board of Educ. of the City of Asbury Park v. New Jersey Department of Education*, OAL Dkt. EDU 4095-03, Decision by Hon. John R. Tassini, ALJ, on Order

Relative to "Maintenance Budget" (Sept. 4, 2003); *Board of Education of the Township of Neptune v. State of New Jersey, Department of Education*, OAL Dkt. EDU 4096-03, Decision by Hon. Joseph F. Martone, ALJ, on Order Relative to "Maintenance Budget" (Sept. 10, 2003). I agree with my colleagues for, as Judge Tassini noted:

> The OAL, created by statute, is an administrative forum for hearings on contested cases transmitted to it by administrative agencies and for issuance of IDs, containing recommended findings of fact and conclusions of law, by administrative law judges. *N.J.S.A.* 52:14B-2(b),-10(c). Administrative adjudication in the OAL is governed by principles of notice, due process and fundamental fairness. *N.J.S.A.* 52:14B-9, -10; *Juzek v. Hackensack Water Co.*, 48 *N.J.* 302, 314-315 (1966); *Department of Envtl. Protection v. Stavola*, 103 *N.J.* 425, 436 n.2 (1986). In administrative adjudication in the OAL, in the interest of equity, judicial principles such as the estoppel doctrine are applicable and safeguards include the opportunity to be heard and an opportunity for cross-examination, defense and rebuttal, which a re essential for reliable fact finding. *City of Hackensack v. Winner*, 82 *N.J.* 1, 16-24 (1980). However, the OAL, established in the executive branch, is not a court and has no jurisdiction to determine the validity of a rule. *N.J.S.A.* 52:14F-1; *Wendling v. New Jersey Racing Comm'n,* 279 *N.J. Super.* 477, 495 (App. Div. 1995) (holding that the Appellate Division and not the OAL has jurisdiction for a challenge to the validity of a rule); *In re 1999-2000 Abbott Implementing Regulations, N.J.A.C.* 6:19A-1.1 *et seq.*, 348 *N.J.* Super. 382 (App. Div. 2002) (a previous challenge to rules implementing *Abbott* decisions brought in the Appellate Division). *Board of Educ. of the City of Asbury Park, supra* at pp. 8-9. [Emphasis added.]

Jersey City also argues that the implementing regulation's definition of "maintenance budget" is inconsistent with the July 23, 2003 New Jersey Supreme Court Order upon which it presumably is based, and to that extent it is within the province of an ALJ to make findings and recommendations as to the definition. I disagree. On its face, the DOE's methodology reasonably comports with the New Jersey Supreme Court's guidance and will not be second-guessed in this forum.

A second "legal" issue involves Jersey City's challenge to the DOE's determination that $2.1 million dollars in expenses for custodians should be deleted as being inefficient, resulting in the elimination of 53 full-time equivalent positions. Jersey City argues that

reductions for "ineffective" and "inefficient" non-instructional programs means only those programs, positions, services and/or expenditures that are not school based or not directly serving students in the attainment of the core curriculum content standards (*N.J.A.C.* 6A:10-2.1). Thus, since custodians are assigned to work in or at the District's schools, they fall outside the scope of the regulation.

I disagree with this notion as well. Working in or at a school building surely is not what the Court or the DOE had in mind within the language set forth above.

Regarding the methodology used by Rarick to arrive at the $2.1 million reduction, while I might disagree with some of the source data upon which he chose to rely (industry publications vaguely described), and outdated square footage (1998 v. 2003), I cannot say that his approach was unreasonable or illogical. Although I was somewhat disturbed by the subjectivity of the system whereby different reviewers could bring different ideas to the equation, thereby possibly introducing elements inconsistent with uniformity,[1] I believe that he did the best he could given the time frame and the circumstances. Perhaps in the future uniform standards can be developed to eliminate the risk different reviewers may come to different results based on the same data.

The fact that Rarick used a 16,100 square foot average for Jersey City, whereas Newark's average is 14,000 feet, and Jersey City claimed it always used that lower figure as well, is not critical. Simply put, Jersey City was spending millions of dollars more for custodians than "benchmark" *Abbott* districts and a reduction on the basis of inefficiency is perfectly proper. I would suggest, however, that if time and circumstances permit, and if updated square footage figures can be verified, that the DOE consider an adjustment in that regard.

The next issue, the expenditure of $300,000 for radon testing, may be disposed of with dispatch. On its face, since no money was spent on that item in 2002-2003, none qualify for 2003-2004 approval. The testing can fully take place in 2004-2005 in

[1] Rarick was the DOE person reviewing the Newark, Jersey City and Paterson school budgets. He conceded he did not know if other reviewers always used the same methodology he did.

compliance with statutory mandate, the District can scale back the cost (less per classroom, perhaps less classrooms since upper floors and other areas may not be implicated) and training the District's own personnel can save further funds. Finally, the CPI allowance of $712,000 also can serve as a source for partial, if not full, funding for this item.

The final issue has to do with the DOE's reduction of $515,000 for medical provider costs attendant to physical examinations, treating injuries, etc. Again, this is an area which the DOE's representative described as a "cost driver" which was not "so substantial" as to warrant approval of any increase. The DOE believes monies for these services can be found in other areas and reallocated if really needed. While I personally might disagree with that notion, it is not my province to second-guess the DOE's view, so long as it has a degree of reasonableness. Here, as the DOE points out, no affirmative proof to support the claim of contracted increases was provided, other physicians perhaps could be found whose rates are lower, the potential need is highly variable, and the CPI allowance can be used as a source of payment.

In reaching the decision I do in this case, which essentially is to reject Jersey City's appeal for restoration of funds beyond those the DOE concluded is adequate to support a maintenance budget for 2003-2004, I am not unmindful of the nature and extent of the special needs that school districts like Jersey City have. On the other hand, the thrust of the *Abbott* cases, the message they deliver, is that allocation of a possibly shrinking resource base in the area of public education funding requires a determined effort to make sure that available resources are devoted with utmost care to those needs which command primary attention – the effective delivery of educational services to the students. In that respect, Rarick made several pertinent observations during the July 2003 hearings, albeit before the new "maintenance" standard was promulgated. However, he articulated the DOE's approach to *Abbott* district budgets during the last few years in particular and which I believe to be instructive regardless of the standard to be used. They are (A) through (J) as follows:

(A) In developing the maintenance standard, we talked about a few things. We talked about, first of all, whether or not a cost is beyond a District's control, but secondly, also whether or not a cost is substantial enough that the districts cannot be reasonably be expected to reallocate from it.

There are, indeed - - I mean, it's a matter of degree here. There are certainly increases in the District's budget that are beyond their control, but somewhat nominal, maybe – take an example, 50,000 dollars here or there. That is not something that maintenance addressed.

What maintenance addressed are those factors that were believed to impact on the District substantially enough that we really couldn't expect the District to reallocate, given the size of the increase, and certainly the things that we've discussed that fall into that category are salary and benefits and insurance and, indeed, Special Ed, and some of those issues were part of maintenance.

Physical exams were not. So therefore, I don't feel that I can approve that amount at this time. (Tr. July 3, 2003, pp. 83-3 to 84-19).

(B) THE COURT: So, there are some cost drivers that are more substantial.

THE WITNESS: Indeed.

THE COURT: Okay.

THE WITNESS: And I guess - -

THE COURT: So not every - - not every built in fixed increase entitle the District to have that approved.

THE WITNESS: I believe that what it means is that there are certain cost increases that the District reasonably can't be expected to be allocated from.

You know, there - - the ones that are big enough, that are substantial enough, that are true for in conversation today, insurance, health benefits, things of this nature.

I also will say, I hasten to add, that during this process, I left myself open to consideration at any cost effort. I said, "if you bring it before me, I will consider it."

There was only - - to my knowledge, to the best of my knowledge at this point, there was only really one that I did not consider that was brought to me, and that was the argument that there were increased costs associated with the evening school program, I believe it was, that they were arguing was a cost driver, and I could not accept the argument.

I collected information on all the various areas that we talked about through the cost drivers. Physical exams did not come up, perhaps because it's such a normal cost, relatively speaking. (Tr. July 3, 2003, pp. 86-13 to 87-18.)

(C) THE COURT: Okay. So there was a - - seems to me, a lot of discretion going on here.

THE WITNESS: Discretion in terms of what's considered as part of maintenance?

THE COURT: What's considered a substantial cost driver.

THE WITNESS: Well, individually, I would argue, no, that there was not. I mean, these were not conversations I was having with myself. These were conversations that were had at the State level in terms of all right, put this on the table, insurance. How do we feel about insurance? Is it – is this something that's going to materially impact out-of-districts? We discuss it. We say, "yeah."

We're keeping – you know, keeping an informal list of those, and like I said - - you know.

THE COURT: So every district is treated the same in that regard.

THE WITNESS: Well, I can't respond. I'm going to have 27 other districts.

THE COURT: Yeah, but you just said, we'll look at, you know, what do [*Abbott*] districts need or what need. I mean, but Jersey City is not Paterson, is not Camden, is not Plainfield, is not Elizabeth, is not East Orange, and they are different.

THE WITNESS: They are indeed.

THE COURT: They have different needs, right?

THE WITNESS: They do.

THE COURT: Okay. I'm not trying to beat you up here, because I know, you know, you have to have some flexibility to deal with this situation. I'm just trying to understand your thinking of the concept.

THE WITNESS: And those are certainly the same questions that we entertain. You know, what's the best way to do this, and I guess, for purposes of my testimony today, I can't respond on behalf of 20 other budget managers.

I employ the maintenance standard as it was explained to me at those hearings. I can't testify as to what the other budget managers did, although I have some familiarity with it, but all I can say is I - - you know, have to apply the standard as I - -

THE COURT: Okay. (Tr., July 3, 2003, pp. 93-9 to 95-1).

(D) THE WITNESS: Okay. Again, it's the same standard that comes up over and over again. As a Budget Manager, I was not - - as your Honor pointed out, I didn't interpret this as something where I'm out these using a lot of discretion about what things were part of maintenance and what things were not.

I was confining myself to the standard that was set at the higher policy level, and increases of this nature were not part of that, for the same reasons I discussed.

The were not - - they were not something that was believed to be substantial enough that a District cannot reasonably be expected to reallocate from them. (Tr., July 7, 2003, pp. 95-20 to 96-7.)

(E) Q. (by Ms. Eck): All right. What is - - I guess, you identified in the letter "approximately 3 million for Administrative Excess."

What does that mean in your report? Or what were you disallowing?

A. Well, it's based on a determination, based on some research and some discussions with the District that based on some findings that were of significant concern to me as a Budget Manager and something that I'm – you know, it's my job to be concerned about, and that is a significant increase in administrative costs compared to instructional costs over the last two years.

During the time when we are trying to do, essentially, the exact opposite, which is that, you know, in ramping up funding, we are

trying to direct more dollars to the classroom and direct less to administrative costs.

My general concern, obviously, is that if we see an increase that is substantial, that it sends - - it sends a difficult message. It sends the wrong message, and it's something that we need to take to be very vigilant about.

Given all of the concerns about the budget and given that this is a public issue, we need to be able to demonstrate that the increases in money that we're awarding are going to classroom expenses. (Tr. July 3, 2003, pp. 110-8 to 111-4).

(F) THE WITNESS: And the concern there is that indeed you heard testimony yesterday about the increases in this budget, administrative to instructional, which are not significantly overlapped.

The concern here is that there was a very substantial increase in the prior year, and we see, not necessarily – we see some leveling out, but still yet another increase.

My concern is that we just obviously were in very difficult economic times this year, but we also were last year. And we went through a budgetary cycle in which we sent out guidance to [*Abbott*] districts which would be, I think, R-19 and R - - I'm sorry. They're numbered sequentially here, so it's actually R-21, and this is a copy of the guidance that went out last year.

The guidance that went out to districts was "you need to be cutting and priority – cutting central office first, and cut school level stuff second."

The concern that arises when you see these administrative increases at times like this is that well, if it's true that we had testimony that the District cut in excess of 200 positions last year at the school level, and yet we saw a substantial increase in administrative costs, that's a real concern for me, because it appears to me, that that's essentially a violation of that guidance.

Now, at the time that the budget was reviewed last year, I did raise this concern. But it's important for your Honor to understand that the review that occurred last year is different than the review that is occurring this year.

Last year, because of the agreement that was sought by apparently the Law Center and all the interested parties, we used a level spending formula. Districts got the money that was entitled to them via level spending.

It did not entail the same kinds of reviews we're doing here, which is more of a line by line review.

Now, we were obviously faced with a very difficult decision last year, and it was - - I remember having this conversation. I remember having it with the District, and I remember having it with my boss, which is that we're - - here's a District that's showing a significant administrative increase, but on the other side, they've been very compliant in a sense that, in fairness to the District, they were one of the first districts to submit their budget, and they came in under level spending.

Again, as long as a district came under level spending, you know, that budget was essentially approved, okay?

So I looked at this year's budget, and I told the District – I said, "this is a concern of mine, that we would be showing these kinds of administrative increases during these difficult times, and that these are times during which we've also had classroom reduction." And that - - that doesn't necessarily jibe with the guidance that I'm aware of . . . . (Tr., July 7, 2003, pp. 111-8 to 114-9).

(G) . . . . So I took a look at the spreadsheet and, you know, I said, all right, well, I'm very - - I'm concerned about these increases. I want to - - I want to put those administrative increases back on a course that's similar to the instructional increases. (Tr., July 3, 2003, pp. 114-22 to 115-1).

(H) THE COURT: That's [Administration] 31 percent?

THE WITNESS: Right. Right. Instruction had increased only 19%. Now, again, these are years during which the guidance to the [Abbott] districts was major cuts in central and in administration before the classroom.

As I said previously, your Honor, you've heard testimony yesterday about a loss of 200 - - of more than 200 positions in the schools last year, and yet we saw these increases in administration. So that's a concern of mine. (Tr., July 3, 2003, pp. 115-18 to 116-3).

(I) THE WITNESS: So, to summarize the point, your Honor - - I mean, this only shows that I took the extra step to look at this year. It really doesn't change the argument. Really, the argument here, your Honor, is that this is certainly no reflection on anybody in the District, and I want to make that perfectly clear. But as a professional Budget Manager, working in an [*Abbott*] district, one of

the largest [*Abbott*] districts, this is something we have to be concerned about.

We can't not raise this issue, as far as I'm concerned, because not to raise the issue implies that despite whatever rhetoric we raise about cutting from administration and not schools, that we're not willing to follow up on it, that we're not willing to do the extra work, and that ultimately, I think the success or failure of this - - this movement will depend on our ability to enforce rules like this, so there is.

THE COURT: Except it seems to me that, in effect, you're sort of punishing them for their past sins. You're not rewarding them for the leveling off that appeared. Is that fair to say?

When you're talking about a pattern going back, you're - - and it's true. I mean, there was a 30 percent plus increase, and I don't want to revisit that, and your explanation to that is well, that's the way we looked at it then, and we wouldn't do it there now. That's for sure. But that shows us something and so forth and so on. But they shaped up, didn't they?

THE WITNESS: That's true in part. And there's a part that I think that you need to factor in, which is that we now have information that we didn't have then, in the form of the CAFR for the fiscal year, and that tells you something, I think, material, and it tells you that there were amounts in those accounts that went unspent.

Now, is that unusual? No. It's not unusual. It happens in all [*Abbott*] districts, maybe not to this extent. I'm not trying to portray that there's these large sums of money in Jersey City that go unspent, but if we're going to have an administrative increase and a year in which it's made, as far as I'm concerned, plainly clear that cuts should be coming from administration and you have evidence that in a prior fiscal year, there were amounts in those accounts that went unspent, that seems to me to be a problem. (Tr., July 3, 2003, pp. 127-29 to 129-14).

(J) THE WITNESS: Okay? And these are non-salary costs above and beyond just the normal [cost] of living adjustment

THE COURT: That's where that 5 percent, that 2.11 came in before, is that it?

THE WITNESS: Exactly. So, I'm trying to distinguish – I mean, the most important thing to me is the distinguished, but this is not a dissatisfaction with the way the District does business, because I have a lot of confidence in the District.

> This is what I feel is a fulfillment of my professional responsibilities that to hold the standards that are employed and to be vigilant about administrative increases in years where we're going through very difficult times and every dollar that we get presumably needs to be directed towards those. (Tr., July 3, 2000, pp. 133-17 to 133-22).

Although, as noted, those comments by Rarick were made prior to both the Court's July 23, 2003 Order and its subsequent ruling in August 2003, as well as the DOE's adoption of the new emergency regulations, they reflect the DOE's consistent approach to what *Abbott* districts should be doing in terms of managing their budgets in such a way as to emphasize classroom needs. Thus, if too many instructional positions had to be eliminated, perhaps closer attention could and should be given to finding funds in other accounts which could be reallocated to save those jobs. Hopefully, the somewhat Draconian maintenance standard to be used for 2003-2004 is not fixed in stone, and when and if the strictures are relaxed it is expected that funds made available to *Abbott* districts will be spent in areas where they can do the most good even though the process may be fiscally if not politically painful. That, however, is Rarick's (and DOE's) message to Jersey City, a call for fiscal prudence and an emphasis on school based needs that must be honored to the greatest possible extent regardless of the funding mechanism employed and regardless of finely tuned definitions. If that is the price to be paid for effectively implementing the State Constitution's imperative, so be it.

Thus, for the reasons set forth above, I **ORDER** that the determination made by the DOE with respect to Jersey City's 2003-2004 budget, as set forth in Assistant Commissioner MacInnes' letter of August 27, 2003, be **AFFIRMED** and the appeal be **DENIED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within the time allowed under the existing orders of the New Jersey Supreme Court and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Notwithstanding the provisions of any rule to the contrary, exceptions to Initial Decisions of the Office of Administrative Law in Abbott District budget appeal matters shall be filed within five (5) days of the date of mailing of the Initial Decision, and reply exceptions shall be filed within two (2) days of receipt of exceptions. File written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500, marked "Attention: Exceptions."** A copy of any exceptions must be sent to the judge and to the other parties.

September 26, 2003
DATE

STEPHEN G. WEISS, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

September 26, 2003
DATE

E-mailed Initial Decision to the parties on:

September 26, 2003
DATE
mvh

APPENDIX

Witness List:

For Petitioner

Joanne Gilman
Michael Littlejohn
Adele Macula

For Respondent

Benjamin D. Rarick
Mary Byrne

Exhibit List:

J-1	Proposed 2003-2004 Jersey City School District budget
J-2	Jersey City Public Schools' application for Additional Supplemental Aid for 2003-2004, dated March 4, 2003
J-3	Letter dated May 30, 2003 from Gordon MacInnes, Assistant Commissioner to Dr. Charles T. Epps, State District Superintendent of Schools
J-4	Department of Education answers to interrogatories, June 30, 2003
J-5	Letter dated August 27, 2003 from Gordon MacInnes, Assistant Commissioner to Dr. Charles T. Epps, State District Superintendent
P-1	Chart of Jersey City Public Schools Student Statistics
P-2	Chart of Jersey City Public Schools 2003-2004 Budget
P-3	Jersey City Public Schools Budget Comparison
P-4	Jersey City Public Schools Vacancy Report, May 1, 2003

P-5	Chart of Effect of Funding on Academic Performance and PS-30 ESPA Language Arts Proficiency (1999-2002)
P-6	Chart of PS-30 Effect of Funding on Academic Performance ESPA Mathematics, (1999-2002)
P-7	Chart of Jersey City Public Schools PS-30 ESPA Language Arts Proficiency, etc. (1999-2002)
P-8	Chart of Jersey City Public Schools P-30 ESPA Mathematics Proficiency (1999-2000)
P-9	Chart of Jersey City Public Schools ESPA Language Arts Proficiency (1999-2002)
P-10	Chart of Jersey City Public Schools ESPA Mathematics Proficiency (1999-2002)
P-11	Chart of Jersey City Public Schools GEPA Language Arts Proficiency (1999-2003)
P-12	Chart of Jersey City Public Schools GEPA Mathematics Proficiency (1999-2003)
P-13	New Jersey DOE Core Curriculum Content Standards, adopted July 2, 2002
P-14	New Jersey Assessment of Skills and Knowledge Parent, Student and Teacher Information Manual, Spring 2003
P-15	Five Year Elementary/Middle School/High School Curriculum Cycle with Approved Text Book/Curriculum Detail Charts
P-16	Chart of Proposed Text Book/Technology District Adoptions (2003-2004)
P-17	Letter dated July 2, 2003 from Senior Deputy Attorney General Michelle Lyn Miller to Acting Director and Chief ALJ Jeff S. Masin, with attachment
P-18	Chart of Jersey City Public Schools 2002-2003 Budget, Central Office Reductions
P-19	Chart re selected accounts in Administrative Cost Analysis(2001-2002 through 2003-2004)
P-20	Calculation by Ms. Gilman of Maintenance Budget
P-21	Memorandum dated January 29, 2003 from Richard Rosenberg, Assistant Commissioner to Chief School Administrators and Business Administrators

P-22	Memorandum dated September 5, 2003 from Richard Rosenberg, Assistant Commissioner to Chief School Administrators and Business Administrators
P-23	Extract from DeLoitte Study re Industry Standards for Custodians
P-24	(For Identification) Jersey City Public Schools Custodian/square foot comparison
P-25	Chart of age of Jersey City Public School buildings
R-1	Extract from Jersey City Public Schools Professional Development Plan, 2003-2004, p. 66
R-2	OMB budget calculation used for August 27, 2003 letter

OAL DKT. NO. EDU 5496-03
AGENCY DKT. NO. 196-6/03

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The District's exception to the Administrative Law Judge's (ALJ) recommendation with respect to custodial positions,[1] and the Department's reply, were duly submitted in accordance with the schedule established in response to the Court's order for expedition.

Initially, the Commissioner concurs with the ALJ that the Department's methodology in reviewing the District's budget fully comports with the "maintenance" standard, as established by the Court and implemented by regulations promulgated in accordance with *P.L.* 2003, *c.* 122. The Commissioner concurs that the OAL does not have jurisdiction to determine directly or indirectly the validity of *N.J.A.C.* 6A:10-1.2, such determination being solely within the jurisdictional purview of the Appellate Division or the Supreme Court. R. 2:2-3(a); *see, also, Pascucci v. Vagott,* 71 *N.J.* 40, 51-52 (1976);

[1] The District reserves its objections to the Department's definition of "maintenance budget" and "school-based positions," but concedes that these "will not be resolved in the District's favor unless and until court action is taken on appeal." (District's Exceptions at 1-2)

Wendling v. N.J. Racing Com'n., 279 *N.J. Super.* 477, 485 (App. Div. 1995). However, to the extent that he may appropriately do so in an administrative proceeding, the Commissioner also opines that the Department's definition of "maintenance budget," as set forth in *N.J.A.C.* 6A:10-1.2, is fully consistent with the language and intent of the Court. Thus, like the ALJ, the Commissioner finds the regulatory definition controlling herein, with no conflict between it and the underlying Court order.

The Commissioner further concurs that the Department used an entirely lawful and reasonable approach in concluding that the District's custodial costs were excessive under standards of inefficiency and ineffectiveness. Notwithstanding that concurrence, however, the Commissioner is also persuaded that some adjustment to the Department's calculation is warranted based on the availability on record (Exhibits P-24 and P-25) of significantly updated and, apparently, undisputed square footage figures. In its exceptions, the District urges the Commissioner to make the adjustment suggested by the ALJ by applying the Department's methodology to current square footage and building configuration figures (Exhibit P-24, page 5), so as to restore 22 of the 53 custodial positions eliminated by the Department for a total budget increase of $871,706. (District's Exceptions at 3-4) This calculation, however, takes special account of custodians assigned to cover "satellite" locations ("extra sites" in P-24), a circumstance which the District believes to warrant positions over and above those generated by the District's square footage figure. Because the Commissioner does not find adequate support in the record for this contention, he finds, instead, that the appropriate resolution is to have the Department apply its formula to the District's current, verified square footage exclusive of leased preschool space receiving custodial funding through Early Childhood, taking

account of partial positions with the requisite increase in fulltime equivalent positions (FTEs) but with no additional allowance for "satellite" coverage. Based on the information provided in Exhibit P-24, this would appear, subject to the requisite deduction of the aforementioned preschool space and verification of square footage figures, to generate approximately 318 positions, or 20 more than allowed by the Department. Such adjustment, in the Commissioner's view, should amply enable the District to meet its legitimate custodial needs in accordance with appropriate Department standards of effectiveness and efficiency.[2]

Finally, the Commissioner concurs with, and the District appears to accept, the ALJ's analysis and conclusion upholding the Department's exclusion of costs for radon testing, which may be deferred until 2004-05 and scrutinized for greater savings, and for a medical provider, for which the potential need is variable and costs may be absorbed by efficiencies and the increase in the District's budget attributable to Consumer Price Index (CPI) allowances.[3]

Accordingly, for the reasons expressed herein, the Initial Decision of the Office of Administrative Law is modified with respect to its recommended upholding of the Department's full reduction in custodial positions, but adopted in all other respects. The Petition of Appeal is dismissed, except as to the Department's restoration of 20

[2] In so holding, the Commissioner is unpersuaded by the Department's Reply submission, which urges the Commissioner to uphold the full amount of the Department's reduction, reasoning that, regardless of the square footage used, it is clear that the District's "custodial cost center" reflects inefficiency. (Department's Reply Exceptions at 1-3) Indeed, the Commissioner notes that his determination herein appears consistent with the position taken by the Department in its Post-hearing Brief at 17.

[3] In this context, the Commissioner also notes the availability of a mechanism for Abbott districts to address needs, arising during the year due to unanticipated expenditures or unforeseen circumstances, for additional resources to implement Department-approved programs and services. *N.J.A.C.* 6A:10-3.1(g).

custodial positions, subject to preschool adjustment and verification of square footage, as set forth above.

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: 10/20/03

Date of Mailing: N/A

[4] Pursuant to *P.L.* 2003, *c.* 122, "*Abbott*" determinations are final agency actions appealable directly to the Appellate Division of the New Jersey Superior Court.

586-03

BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning "Abbott" District appealed the Department's determination of its 2003-04 preliminary "maintenance budget," alleging that the Department's review was not in accordance with the July 23, 2003 Order of the Supreme Court.

ALJ determined that the OAL does not have jurisdiction to determine the validity of *N.J.A.C.* 6A:10-1.2, as such determination is solely within the jurisdictional purview of the Appellate Division or the Supreme Court.

The Commissioner concurred with the ALJ's findings and conclusions and adopted the Initial Decision.

October 20, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4093-03

AGENCY DKT. NO. 197-6/03

TRENTON BOARD OF EDUCATION,

MERCER COUNTY

Petitioner,

v.

NEW JERSEY DEPARTMENT OF EDUCATION,

Respondent.

Richard E. Shapiro, Esq., (Richard E. Shapiro, L.L.C.) for Petitioner, Trenton Board of Education

Michael C. Walters, Deputy Attorney General, for Respondent, New Jersey Department of Education (Peter C. Harvey, Attorney General of New Jersey, attorney)

Record Closed: September 25, 2003 Decided: September 26, 2003

BEFORE **ISRAEL D. DUBIN**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter involves an appeal by the Trenton Board of Education, the operator of an urban special needs "*Abbott*" school district, from the New Jersey State Department of

Education's initial review of the district's 2003-2004 expenditure budget. *N.J.S.S.* 18A:7F-3; *N.J.A.C.* 6A:10-1.1 *et seq.*

On March 24, 2003, the Department moved before the Supreme Court for an order modifying the decision in *Abbott v. Burke,* 153 *N.J.* 480 (1998) *(Abbott V). See also Abbott v. Burke,* 172 *N.J.* 294 (2002) (*Abbott IX*). The Department requested that the discretionary Additional *Abbott v. Burke* State Aid (supplemental aid) that it would otherwise be required to provide to *Abbott* districts in 2003-2004 be limited to an amount sufficient to support those programs, positions and services in the districts' approved budgets for 2002-2003.

On April 8, 2003, the Education Law Center (ELC) cross-moved for an order setting an expedited schedule for the Department's decisions on the respective districts' budgets and requiring the DOE to conduct a formal evaluation of the implementation of Whole School Reform (WSR), etc. On April 29, 2003, the Supreme Court ordered the Department and the ELC to participate in mediation before the Hon. Philip S. Carchman, J.A.D., to attempt to resolve the issues raised by their motions.

With the exception of the 2003-2004-budget process, the mediation before Judge Carchman resolved all of the issues raised. Therefore, the Department's motion for an order extending by an additional year the one-year relaxation of remedies granted in *Abbott IX* remained outstanding. The parties then agreed to an expedited schedule for budget approvals and appeals, beginning with the Department's reviews and approvals of districts' budgets by May 30, 2003. The Districts' appeals from the Department's reviews were to be transmitted to the OAL, where administrative law judges (ALJs) were to issue initial decisions (IDs) within 50 days of the appeals. The Commissioner of Education was to issue final decisions within 25 days of the IDs. On May 20, 2003, the Supreme Court issued an order incorporating the parties' mediation agreement and providing that the schedule would remain in effect until further order of the Court.

On May 30, 2003, the Department issued its decisions on the *Abbott* districts' budgets. In this particular case, a letter from Gordon MacInnes, Assistant Commissioner, Division of Abbott Implementation, notified Dr. James H. Lytle, Superintendent of the Trenton School District, that the Department had completed its initial review and, with certain exceptions specified in the

letter, approved the district's 2003-2004 expenditure budget. On June 5, 2003, the district filed its Verified Petition of Appeal with the Department. *N.J.S.A.* 18A:6-9. The Department, in turn, transmitted the contested case to the OAL, where it was filed on June 9, 2003. *N.J.S.A.* 52:14B-2(b). The Department filed its Answer directly with the OAL on June 12, 2003.

On June 24, 2003, the Supreme Court issued an order approving the mediated agreement and scheduling argument on the Department's motion for an order extending the relaxation of remedies granted in *Abbott IX.* On July 1, 2003, the Department filed an additional motion seeking an order amending the schedule for processing the appeals to allow the Court to rule on the standard to be applied in the appeals before hearings were commenced and initial decisions were issued. On July 10, 2003, the Supreme Court heard oral argument on the budget process and on July 23, 2003, issued an Order granting the Department's motion and relaxing *Abbott v. Burke,* 153 *N.J.* 480 (1998) *(Abbott V)* remedies as they applied to the 2003-2004 budget process. In so doing, the Court ordered the following:

> 1. The DOE's application to extend the relaxation of remedies granted in *Abbott V* is granted as follows: The DOE shall have the authority to treat the 2003-2004 school fiscal year as a maintenance year for purposes of calculating Additional *Abbott v. Burke State* Aid for the *Abbott* districts. During 2003-2004, K-12 programs provided for in the 2002-2003 school year will be continued, subject to conditions set forth in this Order.
>
> 2. The Statewide aggregate amount of Additional *Abbott v. Burke* State Aid shall be presumptively calculated as the total amount of Additional *Abbott v. Burke* State Aid approved for the *Abbott* districts for Fiscal Year 2002-2003, subject to adjustment as required for a maintenance budget. A maintenance budget shall mean that a district will be funded at a level such that the district can implement current approved programs, services, and positions and therefore includes documented increases in non-discretionary expenditures. Examples of non-discretionary expenditures are increases in contracted salaries, health benefits, and special education tuition. Maintenance does not include the restoration of programs, positions, or services that were reduced in 2002-2003, or new programs, positions, or services, except in respect of Paragraph 2c of the Court's Order of June 24, 2003 (pertaining to those elementary schools without a whole school reform developer in place in 2002-2003 and permitting whole school reform contracts in certain circumstances), irrespective of the timing for the promulgation of regulations governing that provision.

3. For purposes of calculating Additional *Abbott v. Burke* State Aid and in furtherance of its pre-existing duty to implement administrative controls, the DOE shall promulgate an emergency regulation establishing the standard for evaluating the effectiveness and efficiency of the districts' non-instructional programs. (Non-instructional programs are defined as office/administrative expenditures and programs, positions, services and/or expenditures that are not school based or directly serving students.) Insofar as any *Abbott* district has not been informed of its total amount of last year's approved Additional *Abbott v. Burke* State Aid, the DOE shall provide written notice of that amount within two weeks of the date of this Order. The DOE's application of the effective and efficient standard in its review of a district's maintenance school budget may result in a reduction to a district's presumptive amount of Additional *Abbott v. Burke* State Aid.

4. Within 30 days of the issuance of this Order, the DOE shall provide in a Notice to each district preliminary maintenance budget figures for the 2003-2004 school year consisting of the 2002-2003 approved budget and an estimate of the supplemental funding that will be needed to support that currently approved budget. If the DOE deletes an expenditure from a district's 2002-2003 budget related to the district's non-instructional programs and based on the effective and efficient standard, the DOE must include in the written notice to the district the expenditure deleted along with a specific statement explaining why the program or part thereof is no longer effective and efficient.

5. *Abbott* districts may appeal any reductions to their maintenance budgets by the DOE's application of the effective and efficient standard, which appeals shall be heard by the [OAL]. In those appeals, the DOE shall bear the burden of moving forward to establish the basis for any proposed reductions to the district's maintenance budget based on the effective and efficient standard set forth in the DOE's emergency regulations. If that initial burden is met, the district shall bear the burden of demonstrating that any budgetary reductions are not justified under that standard.

6. The Order of the Court dated July 7, 2003, modifying the Court's scheduling Order of May 20, 2003 in order to provide the [OAL] thirty days within which to determine and issue initial decisions in the twenty-three pending budget appeals, is hereby superseded by this Order. The [OAL] shall issue initial decisions on district appeals from the DOE's preliminary maintenance budget figures for the 2003-2004 school year within 30 days of the dates of those decisions as set forth in Paragraph 4 of this Order.

7. To the extent that monies are deleted by the DOE in the districts' non-instructional programs based on the effective and efficient standard, those monies shall be made available to the districts as follows: an *Abbott*

> district may apply for and the State may award such aid for demonstrably needed programs or services. The allocation of such available funds shall not be viewed as inconsistent with this Court's approval of use of a maintenance budget for Fiscal Year 2003-2004.

The Supreme Court also set a schedule for new departmental decisions on supplemental funding and the administrative appeal and hearing process and ordered the Department to promulgate emergency regulations governing the process. Relying on the Court's Order and the Fiscal Year 2004 Appropriations Act, the Department then promulgated emergency regulations amending *N.J.A.C.* 6A:10-1 *et seq.*, including *N.J.A.C.* 6A:10-1.2, -3.1, -4.2, and -4.7. Among these emergency regulations that became effective August 22, 2003, and expire June 30, 2004, is *N.J.A.C.* 6A:10-1.2, which defines a "maintenance budget" as follows:

> "Maintenance budget" means, for the 2003-2004 school year, a budget funded at a level such that the district can implement 2002-2003 approved and provided programs, services, and positions and includes documented increases in non-discretionary expenditures and adjustments for actual 2002-2003 expenditures. Examples of non-discretionary expenditures are increases in contracted salaries, health benefits, and special education tuition. Maintenance does not include the restoration of programs, positions, or services that were provided in previous years or new programs, positions, or services unless necessary to meet paragraph 2c of the Supreme Court's order of June 24, 2003 in *Abbott v. Burke.* Maintenance also does not include non-recurring 2002-2003 expenditures.

The school district contends that the definition of "maintenance budget" found in *N.J.A.C.* 6A:10-1.2 is contrary to the New Jersey Supreme Court's Order; that its maintenance budget should be considered its approved 2002-2003 budget; and that it is not limited to expenditures for actually provided programs, positions, or services, plus non-discretionary expenditures. In other words, the district contends that to the extent the definition of the rule is contrary to the Supreme Court's order, it is inapplicable in the proceedings in the Office of Administrative Law, where the appeal will be heard.

The Department's position is that the regulation's definition of "maintenance budget" is consistent with the Supreme Court's order. It also argues that the district's contention is essentially a challenge to the regulation and that, consistent with *R.* 2:2-3(a)(2), such a challenge

must be brought in the Appellate Division. Since their adoption, no challenges to the regulations have been appropriately filed and the regulations have not been held invalid. Consequently, the OAL lacks jurisdiction to consider the issue and the emergency regulation is the applicable standard in this and any other *Abbott* cases presently pending in the OAL.

FINDINGS OF FACT

By letter dated September 22, 2003, Mr. Shapiro stated that he agreed with Senior Deputy Attorney General Miller that the factual issues in this matter had been resolved. Therefore, "the only remaining issue in this case is Trenton's claim that Your Honor should follow the Supreme Court's definition of maintenance budget instead of the contrary definition in the DOE regulations." He also asked that the DOE's revised letter of September 22, 2003, and the attached budget maintenance worksheet be appended to the initial decision. No objection having been raised, the request has been granted and the letter and worksheet are appended as Exhibits P-1 and P-2, respectively.

CONCLUSIONS OF LAW

In *Board of Education of the City of Asbury Park v. New Jersey Department of Education,* OAL Docket No. EDU 4095-03, the Hon. John R. Tassini, ALAJ, entered an Order Relative to Maintenance Budget (September 4, 2003). In that Order, Judge Tassini found that the school district's contention concerning the definition of "maintenance budget" found in *N.J.A.C.* 6A:10-1.2 was essentially a challenge to the validity of the emergency regulation itself. Relying on *R.* 2:2-3(a)(2), he further found that any such challenge of an administrative agency's regulation should have been and could only be brought in the Superior Court, Appellate Division.

Judge Tassini went on to explain that the OAL is an administrative forum for hearings on contested cases transmitted by administrative agencies. ALJs, in turn, are called upon to hear these cases and issue Initial Decisions containing recommended findings of fact and conclusions of law. *N.J.S.A.* 52:14B-2(b), -10(c). However, since the OAL was created by statute and placed in the executive branch, it is not technically a court and has no jurisdiction to determine the validity of a rule. *N.J.S.A.* 52:14F-1; *Wendling v. New Jersey Racing Comm'n,* 279 *N.J. Super.*

477, 485 (App. Div. 1995) (it is the Appellate Division and not the OAL that has jurisdiction to hear a challenge to the validity of a rule). *See also In re 1999-2000 Abbott Implementing Regulations, N.J.A.C. 6:19A-1.1 et seq.*, 348 *N.J. Super.* 382 (App. Div. 2002) (previous challenge to rules implementing *Abbott* decisions brought in the Appellate Division). He therefore concluded that the school district's challenge to the validity and applicability of *N.J.A.C.* 6A:10-1.2 could not be heard in the OAL and that the regulation as promulgated had to be applied in these cases.

While acknowledging that his opinion was not dispositive of the issue, Judge Tassini further opined that the Court's Order of July 23, 2003 "appears to provide a reasonable basis for *N.J.A.C.* 6A:10-1.2's 'maintenance budget' definition" and did not see "a basis for invalidating the regulation." It therefore followed that "application of the regulation appears to be consistent with the Order."

Having had an opportunity to review Judge Tassini's Order Relative to "Maintenance Budget" and the legal authorities cited therein, I am in full agreement with his analysis and do not believe it necessary, nor do I intend, to reexamine that issue. I therefore **CONCLUDE** that the legal principles enunciated by Judge Tassini in *Board of Education of the City of Asbury Park v. New Jersey Department of Education, supra,* OAL Docket No. EDU 4095-03, are applicable to this matter and adopted in this Initial Decision.

Nevertheless, the district asserts that it is not seeking to have the OAL overturn the emergency regulation. Rather, it characterizes this matter as one involving a choice of law, that is, whether to apply the Supreme Court's explicit definition of "maintenance budget" or the different regulatory definition adopted by the Department in *N.J.A.C.* 6A:10-1.2. It is the district's contention that the Supreme Court has, in its many *Abbott* decisions, been quite clear that all budget disputes related to the implementation of its *Abbott* remedies should be initially adjudicated by the OAL. Therefore, it is the responsibility of the OAL to assess whether the Department has properly implemented the *Abbott* educational remedies and mandates, and that the legal authority set forth in the Supreme Court's Order is binding on the OAL in carrying out its duty.

The district's argument would be more persuasive were it not for the fact that the regulatory definition of "maintenance budget" adopted by the DOE does not differ in any significant way from the definition of "maintenance budget" set forth in the Supreme Court's Order of July 23, 2003, and I so **FIND**. Therefore, I **CONCLUDE** that I need not determine whether to follow the dictates of the Supreme Court on the one hand, or the direction of the DOE on the other, as the district would have me do.

In its Order of July 23, 2003, the Supreme Court states, "During 2003-2004, K-12 programs provided for in the 2002-2003 school year will be continued, subject to conditions set forth in this Order." The Court then expressly states that "Maintenance does not include the restoration of programs, positions, or services that were reduced in 2002-2003, or new programs, positions, or services, except in respect of Paragraph 2c of the Court's Order of June 24, 2003." Read together, these provisions make it abundantly clear that programs, positions, or services must already be in existence if they are to be included in the maintenance budget.

The Supreme Court also stated:

> A maintenance budget shall mean that a district will be funded at a level such that the district can implement current approved programs, services, and positions and therefore includes documented increases in non-discretionary expenditures.

If the district's interpretation of this language is correct, the word "current" must be viewed as referring to, describing and modifying the word "approved." Therefore, any programs, services, and positions that are currently approved, even if not yet in existence, are to be funded. However, as the Hon. Joseph Martone stated in his Order Relative to "Maintenance Budget" in *Board of Education of the Township of Neptune v. New Jersey Department of Education*, OAL Docket No. 4096-03, (September 10, 2003), "the word 'current' is more properly viewed as referring to, describing and modifying the words 'programs, services, and positions.'" Judge Martone therefore found that the Supreme Court intended that the programs, services, and positions are to be current, that is, currently in existence. I totally agree and therefore **CONCLUDE** as did he that the use of the adjective "current" rather than the adverb "currently"

implies that the programs, services, and positions must be in existence in order to be funded.[1]

Still, the district argues that in describing the Department's required notice to the districts, the Supreme Court stated that the notice must contain "preliminary maintenance budget figures for the 2003-2004 school year consisting of the 2002-2003 approved budget and an estimate of the supplemental funding that will be needed to support that currently approved budget." In other words, it was the Court's intention that the preliminary maintenance budget figures would encompass funding for the "currently approved" programs, services and positions in the 2002-2003 school year.

However, that provision is but one small part of a much larger whole. The focus of that provision appears to be on the "supplemental funding" necessary to support and maintain those programs, services and positions already in place under the 2002-2003 budget. Stated another way, "supplemental funding" relates to the non-discretionary expenses such as raises or escalator clauses associated with currently existing programs, services and positions for which the district is contractually obligated. I therefore once again **CONCLUDE** that the programs must already be implemented, the services provided, and positions filled in order to be funded.

The language ultimately adopted by the Supreme Court to define "maintenance budget" is also reflective of the language contained in the Department's proposal attached to the Report of The Abbott Mediation (Order of April 29, 2003). The language proposed by the Department is as follows:

> Maintenance means that a district will be funded at a level that will enable it to *continue implementing* the current approved programs, services and positions and therefore includes actual documented increases in non-discretionary expenditures.
>
> [Emphasis added.]

[1] As Judge Martone explained, the words "current" and "approved" are both adjectives in form, and adjectives are used to modify nouns. Adverbs such as the word "currently" are used to modify verbs, adjectives or other adverbs. Thus, under the generally accepted rules of grammar, the adjective "current" cannot be considered to be a modification of the word "approved," but can only be considered a modification of the terms "programs, services, and positions".

The Department's proposed language expressly provides that if the approved programs, services and positions are to be continued, they must be currently in existence in order that their *continued* implementation may be enabled through funding. I **CONCLUDE** that the language ultimately used by the Supreme Court to define "maintenance" is entirely consistent with the DOE's proposal.

DECISION AND ORDER

Based upon the foregoing, I **CANNOT FIND** that the definition of "maintenance budget" found in *N.J.A.C.* 6A:10-1.2 is inconsistent with the definition established by the Supreme Court in its Budget Order of July 23, 2003. Having made that finding, I **CONCLUDE** that the Supreme Court's Order provided a reasonable basis for the Department's definition. I therefore further **CONCLUDE** that the Department's application of the definition of "maintenance budget" found in *N.J.A.C.* 6A:10-1.2 was appropriate.

Accordingly, it is **ORDERED** that the Department of Education's action in applying the definition of "maintenance budget" found in *N.J.A.C.* 6A:10-1.2 in its review and approval of the district's 2003-2004 expenditure budget be and is hereby **AFFIRMED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within the time allowed under the existing orders of the New Jersey Supreme Court and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Notwithstanding the provisions of any rule to the contrary, exceptions to Initial Decisions of the Office of Administrative Law in *Abbott* District budget appeal matters shall be filed within five (5) days of the date of mailing of the Initial Decision, and reply exceptions shall be filed

within two (2) days of receipt of exceptions. File written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 26, 2003 — DATE

ISRAEL D. DUBIN, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

9-26-03

DATE

E-mailed Initial Decision to the parties on:

9-26-03

DATE

/lam

APPENDIX

WITNESSES

For Petitioner:

None

For Respondent:

None

EXHIBITS

For Petitioner:

P-1 Letter from Gordon MacInnes to Dr. James H. Lytle dated September 22, 2003

P-2 Budget Maintenance Worksheet

For Respondent:

None

OAL DKT. NO. EDU 4093-03
AGENCY DKT. NO. 197-6/03

BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

The record of this local "Abbott" District's appeal of the Department's decision on its supplemental funding request for the 2003-2004 school year, and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Trenton's exceptions and the Department's reply thereto were duly submitted in accordance with the schedule established in response to the Court's order for expedition and were considered by the Commissioner in reaching this decision.

Upon careful and independent review of the record, the Commissioner concurs with the Administrative Law Judge (ALJ), that the OAL does not have jurisdiction to determine, directly or indirectly, the validity of *N.J.A.C.* 6A:10-1.2, as such determination is solely within the jurisdictional purview of the Appellate Division or the Supreme Court. R. 2:2-3(a); *see, also, Pascucci v. Vagott*, 71 *N.J.* 40, 51-52 (1976); *Wendling v. N.J. Racing Com'n.*, 279 *N.J. Super.* 477, 485 (App. Div. 1995). Even if it were to be assumed, *arguendo*, that the OAL has jurisdiction to determine "a choice of law" as argued by the District, the Commissioner agrees with the ALJ that the Department's definition of "maintenance budget," as detailed in *N.J.A.C.*

6A:10-1.2, does not differ in any appreciable way from the Supreme Court's definition of that term contained in its Budget Order of July 23, 2003. Consequently, the Department's application of such regulatory definition in its review and approval of the District's 2003-2004 budget is wholly appropriate.

Accordingly, the Initial Decision of the OAL is adopted for the reasons expressed therein.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 10/20/03

Date of Mailing: N/A

* Pursuant to *P.L.* 2003, *c.*122, "Abbott" determinations are final agency actions appealable directly to the Appellate Division of the New Jersey Superior Court.

587-03

BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY,

PETITIONER,

V.

NEW JERSEY STATE DEPARTMENT OF EDUCATION,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning "Abbott" District appealed the Department's determination of its 2003-04 preliminary "maintenance budget," alleging that the Department's review was not in accordance with the July 23, 2003 order of the Supreme Court. The District challenged the inefficiencies identified by the respondent; namely, supervisors of instruction, legal fees and noncertificated staff.

The ALJ determined, by interim Order dated September 4, 2003, that the OAL does not have jurisdiction to determine the validity of *N.J.A.C.* 6A:10-1.2. In these proceedings, the ALJ found: (1) costs relative to legal expenses should be deleted from the District's budget, as proposed by respondent; and (2) the costs relative to noncertificated staff should not be deleted from the District's budget. The District withdrew its appeal relative to supervisors of instruction. ALJ also determined that a 3.00 percent Consumer Price Index (CPI) is applicable to the District's budget.

The Commissioner concurred with the ALJ's findings and conclusions with respect to the inefficiencies identified by respondent. However, the Commissioner determined that a CPI adjustment of 2.11 percent was properly applied and that petitioner did not demonstrate that the adjustment for preschool expansion aid was "double counted" on the Department's 2003-04 calculations.

October 20, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4095-03

AGENCY DKT. NO. 199-6/03

BOARD OF EDUCATION

OF THE CITY OF ASBURY PARK,

Petitioner,

v.

STATE OF NEW JERSEY,

DEPARTMENT OF EDUCATION,

Respondent.

Richard E. Shapiro, Esq., for petitioner

Kathleen Asher, Deputy Attorney General, for respondent (Peter Harvey, Attorney General of New Jersey, attorney)

Record closed: September 25, 2003 Decided: September 26, 2003

BEFORE **JOHN R. TASSINI**, ALJ:

STATEMENT OF THE CASE

The Board of Education of the City of Asbury Park (school district or district), operator of an urban special needs "Abbott district" school system, applies to the Department of Education (DOE) for aid for the 2003-2004 school year. N.J.S.A. 18A:7F-3 "Abbott district."

The New Jersey Supreme Court's July 23, 2003, Order states, "The DOE shall have the authority to treat the 2003-2004 school fiscal year as a maintenance year for purposes of calculating Additional Abbott v. Burke State Aid for the Abbott districts." Abbott v. Burke, __ N.J. __, 2003 WL 21700375, at *1 (July 23, 2003) (emphasis added). That is, during 2003-2004, K-12 programs provided for in the 2002-2003 school year will be continued, subject to conditions set forth in the Order and in N.J.A.C. 6A:10-1.1 to -4.7, the regulations promulgated pursuant to the Order and the Fiscal Year 2004 Appropriations Act. The "maintenance budget" is to fund a district sufficiently to implement current approved programs, services, and positions and therefore the maintenance budget includes documented increases in non-discretionary expenditures. N.J.A.C. 6A:10-1.2 "maintenance budget." "Maintenance does not include the restoration of programs, positions, or services that were reduced in 2002-2003, or new programs, positions, or services, except in respect of Paragraph 2c. of the Court's Order of June 24, 2003." Abbott v. Burke, __ N.J. __, 2003 WL 21700375, at *2 (July 23, 2003). Abbott districts may appeal from the DOE's notices of preliminary reductions to budgets, etc., and such appeals are heard here in the Office of Administrative Law (OAL). N.J.A.C. 6A:10-4.7. In such appeals, the DOE bears the burden of moving forward "to establish the basis for any proposed reductions to the district's maintenance budget based on the effective and efficient standard" set forth in N.J.A.C. 6A:10-3.1(c), and, if that initial burden is met, the district bears the "burden of demonstrating that any budgetary reductions are not justified under that standard." N.J.A.C. 6A:10-4.7(a)(3).

The DOE issued a "Notice of Preliminary Maintenance Budget Figure for 2003-2004 and Estimate of Discretionary Additional Abbott v. Burke State Aid Award," stating that it reduced or deleted some of the school district's proposed expenditures related to (1) "Supervisors of Instruction," (2) "Legal Fees," and (3) "Non-Certificated Staff." R-1. The school district appealed, identifying issues. N.J.A.C. 6A:10-4.7. Each of the parties contends that it has met its respective burden.

PROCEDURAL HISTORY

On March 24, 2003, the DOE moved before the Supreme Court for an order modifying

the remedies ordered in Abbott v. Burke, 153 N.J. 480 (1998) (Abbott V). The DOE requested that the discretionary Additional Abbott v. Burke State Aid (supplemental aid) that it would be required to provide to Abbott districts in 2003-2004 be limited to providing support for those programs, positions and services in the districts' approved budgets for 2002-2003. On April 8, 2003, the Education Law Center (ELC) cross-moved for an order setting an expedited schedule for the DOE's decisions on districts' budgets and requiring the DOE to conduct a formal evaluation of the implementation of Whole School Reform (WSR), etc. On April 29, 2003, the Supreme Court ordered the DOE and the ELC to participate in mediation before the Hon. Philip S. Carchman, J.A.D., to attempt to resolve issues raised by their motions.

Mediation resolved all issues except the 2003-2004 budget process, so the DOE's motion for an order extending by an additional year the one-year relaxation of remedies granted in Abbott v. Burke, 172 N.J. 294 (2002) (Abbott IX), remained outstanding. However, the parties agreed to an expedited schedule for budget approvals and appeals, beginning with the DOE's reviews and approvals of districts' budgets by May 30, 2003. Districts' appeals from the DOE's reviews were to be transmitted to the OAL, where administrative law judges (ALJs) were to expeditiously issue initial decisions (IDs), and, thereafter, the DOE's Commissioner was to expeditiously issue final decisions. On May 20, 2003, the Supreme Court issued an Order incorporating the parties' mediation agreement and providing that the schedule would remain in effect under further order of the Court.

The districts submitted their budgets and the DOE issued initial reviews on them. In this case, by letter dated May 30, 2003, the DOE's Assistant Commissioner for Abbott Implementation notified the district that the DOE had completed its initial review of the district's 2003-2004 expenditure budget dated May 5, 2003, that the expenditure budget had passed all required edit checks with no errors, and that the budget was approved except as noted in the letter. On June 5, 2003, the district's verified petition of appeal was filed with the Department. N.J.S.A. 18A:6-9. The DOE transmitted the contested case to the OAL, where it was filed on June 9, 2003. N.J.S.A. 52:14B-2(b). On June 12, 2003, the Department's answer was filed in the OAL. The attorneys and I held several conferences on issues and schedules, including schedules for discovery. (Based on the Supreme Court's orders, the schedules for discovery were adjusted.)

On June 24, 2003, the Supreme Court issued an Order approving the mediated agreement and scheduling argument on the DOE's motion for an order extending the relaxation of remedies granted in Abbott IX. On July 1, 2003, the DOE moved for an order amending the schedule for processing the appeals to allow the Court to rule on the standard in the appeals to the OAL before hearings and issuance of IDs.

On July 23, 2003, the Supreme Court issued the above-quoted Order, granting the DOE authority to treat the 2003-2004 school year as a maintenance year; requiring the DOE to promulgate regulations for purposes of calculating Additional Abbott v. Burke Aid; and setting an expedited schedule for new DOE decisions on supplemental funding and governing the administrative appeal and hearing process, etc.

On August 22, 2003, the DOE promulgated the regulations governing processing of the Abbott cases relating to the 2003-2004 budgets and issued notices to the districts relative to their budgets. N.J.A.C. 6A:10-1.1 to -4.7.

On August 27, 2003, the DOE issued the "Notice of Preliminary Maintenance Budget Figure for 2003-2004 and Estimate of Discretionary Additional Abbott v. Burke Aid." R-1. By letter dated August 28, 2003, the district identified the issues that it was appealing: (1) Did the DOE properly calculate the district's maintenance budget for the 2003-2004 school year? (2) Did the DOE properly reduce or delete funding for supervisors of instruction? (3) Did the DOE properly reduce or delete funding legal services? (4) Did the DOE properly reduce or delete funding for non-certificated staff in the district? (5) Did the DOE properly determine the district's estimated need for discretionary Additional Abbott v. Burke State Aid? N.J.A.C. 6A:10-4.7.

During the case's August 28, 2003, prehearing conference, the district contended that N.J.A.C. 6A:10-1.2's "maintenance budget" definition is inconsistent with the Supreme Court's June 23, 2003, Order, so that the regulation should not be applied. In response to my question, the district advised me that it had not challenged the regulation in court pursuant to R. 2:2-3(a)(2), and it did not know of any other party that had challenged the regulation in court.

The parties submitted briefs, and on September 4, 2003, I issued an order with the following conclusions. The district's contention was essentially a challenge to the regulation. Pursuant to R. 2:2-3(a)(2), a challenge to a regulation should be filed in the Superior Court, Appellate Division. The OAL is part of the executive branch and not a court and I do not have jurisdiction to ignore and essentially invalidate a rule. N.J.S.A. 52:14F-1; see Wendling v. New Jersey Racing Comm'n, 279 N.J. Super. 477, 485 (App. Div. 1995); see also In re 1999-2000 Abbott Implementing Regulations, N.J.A.C. 6:19A-1.1 et seq., 348 N.J. Super. 382 (App. Div. 2002), where a previous challenge to rules implementing an Abbott decision was brought in the Appellate Division. Although my determination was not dispositive, it appeared to me that the June 23, 2003, Order did provide a basis for N.J.A.C. 6A:10-1.2's "maintenance budget" definition. I would apply the regulation in this case.

On September 15, 2003, the case was heard and, as detailed below, on the hearing record, the school district withdrew from its appeal the issue related to "Supervisors of Instruction" and agreed that $127,534 was eliminated from its maintenance budget. R-1. The hearing was to continue to allow the DOE to present its witness to support admission into evidence of the Rosenfarb Winters, LLC, report. R-21. However, the district withdrew its objection to admission of the report and the district submitted an exhibit in support of its contention that the consumer price index (CPI) for Northern New Jersey is applicable to the district's budget. P-9. I submitted my draft findings of fact and conclusions of law to the attorneys and invited them, as part of their written summations, to notify me of any mistake or omission in the draft, and, thereafter, I received the written summations with suggested corrections, etc. I then notified the parties of my findings of fact and requested that the DOE submit calculations consistent with my findings and conclusions. With the submission of the calculations, the record was closed and I show the calculations in the "Conclusions of Law" below. I thank the DOE staff for this submission and note that its submission does not constitute any admission or waiver.

FINDINGS OF FACT

Evaluation of Operational Efficiency and Effectiveness of Abbott School Districts

The DOE engaged Rosenfarb Winters, LLC (Rosenfarb) to assist in evaluation of the

operational efficiency and effectiveness of the Abbott school districts (Abbotts) related to non-instructional expenses and Rosenfarb prepared a report in that regard.

The Rosenfarb report noted that the July 23, 2003 Order required that DOE promulgate regulations establishing the standard for evaluating the effectiveness and efficiency of the Abbotts' non-instructional programs. Rosenfarb analyzed information and data supplied by the DOE for the 2001 to 2003 fiscal years. Rosenfarb prepared a report with a model of generally efficient spending districts as "Standards" or "Benchmarks." R-21. On the basis of the Benchmarks, Rosenfarb identified inefficient and ineffective non-instructional spending for the 2002-2003 school year budgets.

The Rosenfarb report for the Asbury Park district includes the following exhibits: (1) "Asbury Park District Inefficient Spending on Non-Instructional Expenses by Object Code in Total Dollars"; (2) "Appealing Abbott School Districts Non-Instructional Spending Inefficiencies, 2002-2003 Budgeted Average Cost per Pupil by Object Code"; (3) "Appealing Abbott School Districts Non-Instructional Spending Inefficiencies Comparison of 2003 Budget to 2003 Anticipated Actual for Non-Instructional Costs"; (4) "Appealing Abbott School Districts Non-Instructional Spending Inefficiencies Calculation of Benchmark Cost per Pupil by Object Code"; (5A) "2000-01 ESPA LA General Student Proficiency Rates by Total Annual Non-Instructional Spending Per Pupil"; (5B) "2001-02 ESPA LA General Student Proficiency Rates by Total Annual Non-Instructional Spending Per Pupil"; (5C) "2001-02 ESPA LA Total Student Proficiency Rates by Annual Non-Instructional Spending Per Pupil"; (A) a statement that the report was prepared under the direction of Keith S. Balla, CPA and PSA, Sam Rosenfarb, CPA, CFE, CVA, CBA, ABV, and others; (B) the résumé of Mr. Balla; (C) the July 23, 2003, Order; and (D) the Uniform Minimum Chart of Accounts (Handbook 2R2) for New Jersey Public Schools, effective July 1, 1993. R-21.

Mr. Balla received a bachelor of science degree in accounting from Rutgers University and is a certified public accountant (CPA). He has more than twenty years' experience in private industry and public accounting and is a partner in Rosenfarb. He has mastered auditing and investigative accounting and he has been extremely successful in utilizing those skills for state, county and numerous local public entities. R-21.

The Rosenfarb report states:

> The Benchmark Abbotts were developed based upon our analysis of two criteria, i.e., their non-instructional spending, and the results of their Elementary School Proficiency Assessment – Language Arts ("ESPA LA") fourth grade reading tests. The most efficient Abbott districts were those that incurred the lowest level on non-instructional expense while achieving the highest test results. Rather than selecting the most efficient districts as representative of "generally efficient spending," we selected those four districts that were consistently in the middle of the range for all Abbott districts – Elizabeth, Gloucester, Long Branch and the Phillipsburg school districts. Therefore, the spending efficiency of all of the Abbotts is compared to a mid-range level of spending of an Abbott district, making the Benchmark Abbotts a fair and reasonable indication of generally efficient spending.
>
> Based on the report herewith, our education, skill, expertise, training, experience and knowledge, the 2002-2003 school year budgets for each of the Abbotts include inefficient and ineffective non-instructional spending as identified in the accompanying Exhibits.
>
> The accompanying Exhibits include the results of our calculation and application of the Standards. We recognize that each Abbott district is unique, however, their individual characteristics were not taken into account in the development of the Standards. We recommend that further investigation and review be conducted to determine the causes of ineffectiveness and inefficiencies and to determine the appropriateness of additional reductions in order to limit waste, conserve assets and eliminate inefficiency and ineffectiveness.
>
> [R-21.]

The "Notice of Preliminary Maintenance Budget Figure for 2003-2004 and Estimate of Discretionary Additional Abbott v. Burke Aid"

The DOE's August 27, 2003, "Notice of Preliminary Maintenance Budget Figure for 2003-2004 and Estimate of Discretionary Additional Abbott v. Burke State Aid Award" for the Asbury Park school district states:

Pursuant to the July 23, 2003 Order of the Supreme Court of New Jersey in Abbott v. Burke, the Department has determined that your district's preliminary maintenance budget figure for the 2003-2004 school year is $65,045,366 inclusive of the district's General Fund Budget and restricted ECPA and DEPA revenue accounts. This number reflects the instructional and non-instructional programs approved and provided in the 2002-2003 school year and includes increases to the 2002-2003 budget to reflect non-discretionary costs and adjustments to the 2002-2003 budget based on actual 2002-2003 expenditures as informed by information provided by the accounting firm retained by the Treasurer to review your district's financial information. A copy of the information provided by that accounting firm is available upon request.

In addition, the Department has reviewed the expenditures in your 2002-2003 budge related to your district's non-instructional programs in light of the effective and efficient standard established by the Commissioner in emergency regulations. These regulations can be accessed at www.nj.gov/njded/code/title6a/chap10/. Listed below are the expenditures reduced or deleted and a statement explaining why the reduction or deletion was made:

[1] Supervisors of Instruction – The Department of Education reviewed expenditures for administrative salaries in the district for the fiscal year 2002-2003 and found inefficient expenditures for supervisors of instruction in an amount equal to $127,534. This finding is consistent with an independent analysis performed by a forensic accounting firm in which Abbott district "benchmarks" were established that represent a reasonable expenditure for various types of school district costs. The "benchmark" per pupil expenditure for supervisors of instruction is $193 per pupil, while the accounting firm determined that Asbury Park spent $341 per pupil, an amount that exceeded the "benchmark" amount by $149. Asbury Park's total spending for supervisors of instruction in 2002-2003 was determined to be $1,154,936. This amount exceeds total "benchmark" spending (enrollment multiplied by $149) by $502,802. After reducing spending for supervisors of instruction by $127,534, the amount for supervisors of instruction is $1,004,936, an amount that exceeds 'benchmark" spending by $352,802. This amount is still significantly higher than the average pupil spending for supervisors of instruction in "benchmark" Abbott districts.

[2] Legal Fees – The Department of Education reviewed legal fee expenditures for the district for the fiscal year 2002-2003 and found inefficient expenditures for Legal Services in an amount

equal to $350,000. This finding is partially based on actual expenditures at June 30, 2003 compared with the amount of legal fees appropriated in the district's 2003-2004 budget. This finding is also consistent with an August 2003 report by the Department of Education in which DOE auditors from the Division of School Finance and the Office of Compliance found the district's legal counsel using billing practices that failed to identify specific legal services for which they were being paid. Further, this finding is also based on an independent analysis performed by the forensic accounting firm that determined $34 per pupil to be a reasonable, "benchmark" expenditure for legal services. By reducing the district's approved expenditures for legal fees by $350,000, the Department has decreased the approved amount for legal services expenditures from $755, 986 ($223 per pupil) to $405,986 ($120 per pupil), an amount of which is still significantly higher than the average "benchmark" spending of $34 per pupil. Based on Department of Education budget data, a comparison of per pupil expenditures for Legal Services among Abbott districts indicates that Asbury Park is the highest spending district.

[3] Non-Certificated Staff – The Department of Education reviewed expenditures for on-certificated staff for the fiscal year 2002-2003 and found inefficient expenditures for the salaries for such staff in an amount equal to $1,591,000. The low student-teacher ratio in Asbury Park indicates that there is a sufficient number of teachers to perform the on-instructional classroom tasks, that are typically performed by non-certified staff in districts with large class sizes. In Asbury Park the class sizes are low and there is no basis for maintaining the high level of spending for non-certified staff who are not directly involved with instruction. Spending for non-certificated staff throughout the Asbury Park School District was approximately $5,000,000 in 2002-2003. A comparison of Abbott district expenditures for non-certificated staff indicates that Asbury Park is among the highest spending Abbott districts.

Based on the revenues available to your district for 2003-2004 and the reductions to the maintenance budget identified above, your district's estimated need for discretionary Additional Abbot v. Burke State Aid is determined to be $8,742,709. A revised 2003-2004 budget, consistent with this letter, must be provided to the Department no later than September 26, 2003. It should be noted that the preliminary maintenance budget and the estimated need for discretional Additional Abbott v. Burke State Aid will be subject to further adjustment after submission by your district of the 2002-2003 CAFR.

[R-1.]

As detailed below, the district has withdrawn its appeal relative to "Supervisors of Instruction." R-1.

The DOE's and the District's Spreadsheets and Calculations Compared

The DOE's initial budget spreadsheet calculations, dated August 27, 2003, are shown below on the left and the district's initial budget spreadsheet calculations are shown below on the right. See R-2; P-7. Note that Pre-School Expansion Aid is identified as "PSEA."

Budget: 2002-2003

Line #:		DOE's Calculations	District's Calculations
9470	Approved General fund budget 02-03	55,359,679.00	55,359,679.00
2511	Less: Transfers	(4,063,582.00)	(4,063,582.00)
	Add:		
13300	Early Childhood aid	7,723,902.00	7,723,902.00
13690	DEPA Aid	2,219,068.00	2,219,068.00
13900	Distance Learning network aid	171,071.00	171,071.00
	Adjusted 02-03 State program budget	61,410,138.00	61,410,138.00
	Less:		
Trenton to	Adjust for actual state program spending fund 11**	(753,677.74)	(753,677.74)
9466 & JD1	Adjust for actual state program spending fund 15	(221,644.00)	(221,644.00)
		(975,321.74)	(975,321.74)
	Base 02-03 state program budget	60,434,816.26	60,434,816.26
	(Add/(Subtract) Difference between 02-03/03-04 Plan		
	Less:		
	EC Plan 03-04	7,115,982.00	7,115,982.00
	EC Plan 02-03	(7,762,087.00)	(7,762,087.00)
		(646,105.00)	(646,105.00)
	Add or deduct: Non-discretionary Items:		
	Salaries – Contracted Rate	1,841,985.00	1,841,985.00
	FICA	105,000.00	105,000.00
	Health Benefits	1,250,000.00	1,250,000.00
	Charter School Tuition	786,224.00	786,224.00
	Other utilities	61,770.00	61,770.00
	Special Education	1,075,184.00	1,075,184.00
	Transportation	69,700.00	69,700.00
	CPI at 2.11%/3.00% non-sal net of Util.	66,972.00	827,283.00
	Subtotal	5,256,655.00	6,017,146.00

If applicable	Adjust. For non-recurring items	0.00		0.00	
	Non-cash items	0.00		0.00	
	Other	0.00		0.00	
	Decrease in Federal aids	0.00		0.00	
	Subtotal adjustments		4,610,550.00		5,371,041.00
	FY 03-04 Total State program Budget @ Maint.		**65,045,366.26**		**65,805,857.26**
	Less:				
	Supervisors of Instruction		(127,534.00)		0.00
	Legal Services		(350,000.00)		0.00
	Non-Certificated Staff		(1,591,000.00)		(1,591,000.00)
	Ineffective/Inefficiencies for items that are applicable in 02-03 (Rosenfarb Winters) or Budget Managers				
			(2,068,534.00)		(1,591,000.00)
	FY 03-04 Total State Program Budget @ Maint & Ineff.		**62,976,832.26**		**64,214,857.28**

Budget: 2003-2004

410	Total Gen'l fund reserves	63,343,572.00		63,343,572.00	
425	ECPA	3,160,320.00		3,160,320.00	
426	DEPA	1,644,068.00		1,644,068.00	
421	ECPA carryover	500,000.00		500,000.00	
	DLNA Aid carryover	41,195.00		41,195.00	
422	DEPA carryover	69,780.00		69,780.00	
	Subtotal state program aid	68,758,935.00		68,758,935.00	
00284	Less Request for AAvBA for 03-04	(15,024,160.00)		(15,024,160.00)	
	Base GF revenue 03-04		53,734,775.00		53,734,775.00
	Add/(Subtract): Revenue Adjustments:				
	Other: Ext. aid	29,686.00	29,686.00		
	PSEA Adjustment	469,662.00	0.00		
	Excess Fund Balance	0.00			
	Subtotal		$499,348.00		29,686.00
	FY 03-04 GF Total Budgeted Revenues Available		54,234,123.00		53,764,461.00
	Difference: Need for Supplemental aid		**8,742,709.26**		**10,450,396.26**
	ECPA Carryover differential		**0.00**		**0.00**
	Need with differential		**8,742,709.26**		**10,450,396.26**

****lines 7580, 8340, 9460 (in budget) less actual exp's from sch. A CPA reports**

Scott Henry

The district called Scott Henry as a witness.

Mr. Henry received a bachelor of science degree in accounting from Rider University. He is a CPA and certified as a school business administrator (BA). Until September 14, 2003, he worked as the district's BA and he prepared the district's 2002-2003 and 2003-2004 budgets. Since September 14, 2003, he has worked as the assistant director of the DOE's Office of Budget and Accounting.

As a CPA and BA, Mr. Henry has utilized the consumer price index (CPI) in preparing the district's budgets. See N.J.S.A. 18A:7F-3 "CPI." The United States Department of Labor, Bureau of Statistics' "Consumer Price Index for All Urban Consumers (CPI-U)" lists CPIs for selected areas, e.g., "U.S. city average," "Northeast urban," "Midwest urban," "South urban," and "West urban." P-1. Among "selected local areas," for "New York-Northern N.J.-Long Island, NY-NJ-CT-PA," the CPI percent change is 3.00% from July 2002 to July 2003. Ibid., emphasis added. The CPI-U shows no CPI for the central New Jersey area and, between northern and southern New Jersey, Asbury Park is closer to northern New Jersey and more influenced by New York than "Philadelphia-Wilmington-Atlantic City," which is among the "selected local areas." Ibid. Among the Bureau of Labor Statistics' definitions are two New Jersey areas: one area lists Monmouth County (in which Asbury Park is located) with New Jersey's northern counties and another area lists New Jersey's southern counties (and does not include Monmouth County). P-9.

Mr. Henry has utilized the CPI for northern New Jersey in preparing the district's budgets, and in preparation of the district's 2003-2004 budget, he utilized the 3.00% CPI. That is, he disagreed with the DOE's preliminary calculations (printed above) utilizing a CPI factor of only 2.11%. R-2.

The district's Reduction in Force (RIF) list shows the names, 2003-2004 salaries and benefits of non-certificated staff members whose positions the district has eliminated. By way of the RIF, the district has already eliminated $2,304,456 in non-certificated staff. The total for

teachers' aides is $1,260,373 and the total dollar amount is $2,304,456. P-5.

Mr. Henry testified that, consistent with the DOE budget instruction, he included the PSEA in other State aids income, and other State aids income is included in the Total General Fund. Consequently, the district's budget spreadsheet above, line 410, the Total General Fund Revenues, includes the PSEA adjustment. However, the DOE's budget spreadsheet mistakenly shows the PSEA adjustment of $469,662.00 as revenue in the district's 2003-2004 budget. See P-7; P-8A. That is, the DOE has counted the PSEA adjustment of $469,662.00 twice and the PSEA adjustment should be deleted from the DOE's budget spreadsheet under "**Budget: 2003-2004**."

John A. White

The DOE called John A. White as a witness.

Mr. White received a bachelor of arts degree in history from Rutgers College. He completed coursework to qualify for a certificate of eligibility as a school business administrator and completed doctoral examinations in educational theory, policy and administration at Rutgers University's Graduate School of Education. "New Jersey's System of Financing Elementary and Secondary Education," which he and others wrote, appears in Public School Finance Programs of the United States and Canada, published by the National Center of Educational Statistics, 4th Edition. He has taught school finance to doctoral candidates in Rutgers University's Graduate School of Education. He has served as secretary to the Joint Committee on the Public Schools, senior fiscal analyst in the Local Government Section of the Office of Legislative Services, and senior fiscal analyst for education in the Office of Legislative Services. Since the 1980s he has examined state trends in districts' spending. Since 1999 he has served as budget manager for Abbott districts in the DOE, responsible for the Asbury Park, Keansburg and Neptune school districts. R-18.

Mr. White reviews local districts' budgets and determines whether funding is sufficient to provide programs and services required by Abbott law with "program drives budget" as the rule.

Mr. White reviewed the district budget for inefficiency and ineffectiveness with reference to the above-described Benchmarks, e.g., for per-pupil expenditures. It was noted that the Rosenfarb report states:

> We defined those districts that clustered within the middle range of these charts as representative of "generally efficient spending" Abbott districts, ("Benchmark Abbotts"). We selected Benchmark Abbotts as those districts that were consistently in the middle-range of all Abbott districts – Elizabeth, Gloucester, Long Branch and Phillipsburg. We then developed an average cost per pupil for non-instructional expenses for the Benchmark Abbotts (see Exhibit 4).
>
> [R-21.]

Mr. White, a resident of Monmouth County, is familiar with the Asbury Park school district. Its number of supervisors exceeds that of similar districts. Its total spending divided by its number of pupils is very high.

(1) Relative to Supervisors of Instruction, the DOE created tables comparing the Asbury Park school district's spending with that of other Abbott districts. "Administrative Staff Costs in Abbott Districts, Table 1, '02 Audited Salary Expenditures: Supervisor of Instruction, Salary Amount Per Pupil in Abbott Districts for Funds 11, 13, 15 and 20 (Ranked Highest to Lowest)," lists twenty-six districts and their respective "Audited Salary Expenditures in '02: Supervisors of Instruction, Res Enrol Oct-01, Amt. Spent Per Pupil." R-26. The Asbury Park district's $317 spent per pupil is by far the highest. For example, the nearby Neptune Township district's amount spent per pupil is only $93, and Long Branch City's amount spent per pupil is only $24. Mr. White noted that Ernest Bio, Ed.D., a supervisor, has retired, and Mr. White stated that, based on other districts, the Asbury Park school district's other supervisors should easily manage his duties. Consequently, Mr. White reduced the district's budget by $127,534, the amount of the retired supervisor's salary and benefits. Hearing this explanation, on the hearing record the district stated that it withdrew the issue from its appeal and agreed that $127,534 was eliminated from its maintenance budget.

(2) Relative to Legal Fees, the DOE's "Table 1, Reporting of Hunt Legal Costs by

Category from Dec '02 thru April '03," lists categories of legal expenditures, hours billed by Hunt, Hamlin & Ridley, the district's law firm, and cost. R-13. "Table 2, Reporting of Hunt Legal Costs from Dec '02 thru April '03," lists dates, descriptions of services, hours, attorneys' names, costs, etc. R-14. The DOE also prepared "Legal Costs in Abbott Districts: '02, '03, and '04 (Sorted by highest to lowest per pupil cost for '04)." R-15. Mr. White testified that the DOE accepts that the Asbury Park school district has had legal costs in excess of the amount that it has approved and he had no evidence that the Hunt law firm had litigated inefficiently on behalf of the district. However, the Hunt firm's bills showed that district employees called upon the firm frequently. Also, the district's legal costs per pupil are grossly higher than those of any other district compared. In '02, the average district's legal cost per pupil was $30; the nearby Neptune Township district's legal cost per pupil was $29; and the Asbury Park district's legal cost per pupil was $205. In '03, the average district's legal cost per pupil was $29; the nearby Neptune Township district's legal cost per pupil was $37; and the Asbury Park district's legal cost per pupil was $146. In '04, the average district's cost per pupil is expected to be $29; the nearby Neptune Township district's legal cost per pupil is expected to be $33; and the Asbury Park district's legal cost per pupil is expected to be $143. R-15. Also, the Hunt firm submitted bills of $30,000 for each of four months, from December 2002 to April 2003, a total of $120,000, for which it itemized (identified) no particular services and relative to which it stated only "Board Office." R-13. On May 15, 2003, the district and the Hunt firm entered an "Agreement to Provide Legal Services," pursuant to which the district would pay $500,000 per year:

> **WHEREAS** the BOARD requires attorneys to provide general legal services, including litigation and labor services . . .
>
> . . . .
>
> **3. Compensation:** For all services rendered by the ATTORNEYS as General Counsel/Litigation Counsel/Employment Counsel/Labor Counsel, the ATTORNEYS shall be paid in an amount not to exceed Five Hundred Thousand Dollars ($500,000), payable in twelve monthly installments of $41,666.66 beginning July 1, 2003. Said payment no later than the last day of each month thereafter. It is expressly understood that counsel's monthly fee is based upon appearance in all litigation matters, appearance at committee meetings as requested, negotiations, arbitrations, unfair labor practice charges and any other matter involving the need for counsel. The firm shall provide

> summaries of matters handled, if same is requested by the board of education.
>
> [P-3.]

Ronald Hamlin, a partner in the Hunt firm, is a longtime friend of Raymond Palmer, president of the Asbury Park Board of Education, and the DOE's Office of Compliance Investigation (OCI) prepared a report, dated August 21, 2003, relative to the BOE's legal fees. The report stated that Asbury Park Board of Education members generally believed that "the current district administration has failed to adequately address matters that directly impact on the health and safety of the staff and students." P-4. The OCI also reported,

> . . . [The Agreement's above-quoted "**Compensation**" provision] is problematic because it initially suggests that the Board may pay less than but no more than $500,000.00. However, the second half of the sentence eliminates that possibility by mandating that the Board pay $500,000.00 in equal payments. Following this logic leads inexorably to the conclusion that the Board is responsible for the monthly payment of $41,666.66 regardless of whether the firm performed services commensurate with that amount.
>
> Discussions between the DOE and DAG have determined that the current legal contract is being executed properly. There is provision for the board requesting appropriate documentation of services. Services have been documented in the business office since the start date of the contract.
>
> [P-4.]

The district's legal fee cost of $120 per pupil grossly exceeds the Benchmark of $34. Mr. White believed that the Agreement did not sufficiently detail the services the law firm would provide. (Although, he is not an attorney and he did not know whether the law firm was itemizing its bills.) Given these circumstances, Mr. White reduced the district's legal fee for '02-'03 by $350,000 (to $405,986), which he noted is still substantially more than the legal costs of most of the districts.

(3) Relative to Non-Certificated Staff, Mr. White testified that the DOE hopes to increase the district's certified teachers and thereby decrease the student/teacher ratio. In 1999, when the

district went through the Abbott reforms, the DOE requested that it reduce its non-instructional aides, but it never did so. The DOE prepared "Table 8a Salaries & Benefits for Non-Certified Positions Not Approved in '04 Budget: Budget: Asbury Park," listing names, titles, and estimated '04 salaries and '04 benefits. R-25. Mr. White considered efficiencies of the non-certificated staff by category and not by individual employee's performance. Mr. White believes that the district's principals could perform "Dropout Prevention" duties, so he eliminated as inefficient costs for the district's 7 "Dropout Prevention" employees. R-25. Mr. White believes that the district is well staffed with secretaries and custodial staff who can perform parent-community coordination duties, so he also eliminated as inefficient costs for teacher aides/community associates and youth services advocate. Mr. White believes that the district has sufficient staff for custodial tasks, so he eliminated as inefficient costs for the district's twelve teacher aides. R-25. Special Education laws and individualized education programs (IEPs) determine what aides will be provided for classified students, so this Abbott budgetary process does not eliminate any aide required by an IEP. See 20 U.S.C.A. § 1400 et seq.; N.J.A.C. 6A:14-1.1 et seq. As a result, the DOE's spreadsheet and calculations (see above) relative to salaries, stipends, etc., for non-certificated staff deleted $1,591,000 from the district's 2003-2004 budget, which Mr. White testified is not over and above the RIF of the 2003 summer. R-2; P-7.

Mr. White agreed that the CPI most relevant to the district should be utilized to calculate the district's budget. He could not give a basis for the DOE's use of the 2.11% CPI. He did not contradict Mr. Henry's testimony that 3.00% was the appropriate CPI and he also did not contradict Mr. Henry's testimony that the DOE had double-counted PSEA and that, therefore, the PDEA should not be considered revenue in the district's 2003-2004 budget.

Antonio Lewis

The district called Antonio Lewis as a witness.

Dr. Lewis received a bachelor of science degree in health and physical education from East Stroudsburg University. He received a master's degree in education from Trenton State College (now The College of New Jersey). He received a doctorate from Rutgers University. He participated in a post master's program at Kean University. He is certified as a teacher,

supervisor, principal, school administrator, and superintendent. He has worked as a teacher, middle school principal, and, since the 1990s, as the district's superintendent.

Dr. Lewis testified that, although the district has had "problems," there has also been "movement . . . in many, many areas" improving the quality of life for students and their families. Dr. Lewis has implemented Abbott remedies for a number of years. This has involved his participation in planning programs, discussions and verification that programs are provided pursuant to Abbott regulations.

Dr. Lewis testified that, under the budget as calculated by the DOE, the district could not fund and continue to provide more than twenty programs, among which are the following: (1) The district could not provide its "Summer Enrichment" program, a summer program for regular students (not classified for Special Education) that provides ninety minutes of reading, integrated reading, mathematics and technology, breakfast and lunch, and recreation with field trips. (2) The district could not provide its "Extended Day" program for K to 12 students, which emphasizes the core curriculum with goals of improving academic achievement and test scores. Dr. Lewis explained that this program is especially important because the district is multi-cultural and many students' parents do not read or write English. (3) The district could not provide its "Enrichment and Advancement" program for high school students who failed and must make up academic courses. (4) The district could not provide its "Visual and Performing Arts" program for K to 12 students. (5) The district could not provide the "Professional Development" program for teachers, involving workshops and in-service.

Dr. Lewis testified that the failure to provide the above-described programs would result in a "major disaster" for the district.

Summary of Findings of Fact Relative to

(1) Supervisors of Instruction, (2) Legal Fees and (3) Non-Certificated Staff and CPI

(1) The school district withdrew from its appeal the issue related to Supervisors of Instruction and agreed that $127,534 was eliminated from its maintenance budget. R-1.

(2) Relative to Legal Expenses, the DOE has shown that the district's costs have been grossly more than those of comparable districts. For example, the Asbury Park district's legal cost is several times more than the Benchmark cost and several times more than the nearby Neptune Township district's cost. Also, as pointed out by the OCI report, the district's Agreement requires it to pay $41,666.66 monthly regardless of whether the law firm performs services commensurate with that amount. That is, the DOE established a basis for the proposed reduction of the district's maintenance budget based on the effective and efficient standard. Further, the district has not demonstrated, e.g., by way of detailed and identifiable services, cases, etc., that the budgetary reductions are not justified under that standard.

(3) Relative to Non-Certificated Staff, Mr. White is familiar with the district, he characterized it as well staffed, and he gave the opinion that its principals and other staff could perform duties previously performed by non-certificated staff. Therefore, the DOE established a basis for the proposed reduction of the district's maintenance budget based on the effective and efficient standard. However, Dr. Lewis is more familiar with the district. The public school system has always been essential to the foundation of our society. In recent decades, old urban centers, now designated as Abbott districts, have suffered from a range of social problems, including reduced opportunity for employment, alcohol and substance abuse, disintegrating families, substandard housing, and violence. In response, the Supreme Court has written that the law requires schools to provide social services as essential to their mission of providing a thorough and efficient education. See, e.g., Abbott v. Burke, 153 N.J. 480, 510 (1998) (Abbott V). Dr. Lewis described programs that hang in the balance here and they provide the services prescribed by the Supreme Court for districts such as Asbury Park's. Further, he testified that the reduction of funding would result in an inability to provide such programs and a "major disaster" for the district. I find Dr. Lewis more credible than Mr. White on this issue and I find that he demonstrated that the budgetary reductions are not justified.

Relative to the Bureau of Labor Statistics' CPI, between the northern New Jersey and the southern New Jersey areas, Asbury Park is closer to New York and northern New Jersey than to Philadelphia and southern New Jersey and, consistent with the testimony of Mr. Henry, who was credible, the 3.00% CPI is applicable in calculating the district's 2003-2004 budget.

Relative to the PSEA, consistent with the testimony of Mr. Henry, the district included that money in the Total General Fund. Consequently, the district's budget spreadsheet, line 410, the Total General Fund Revenues, includes the PSEA adjustment and the DOE's budget spreadsheet mistakenly shows the PSEA adjustment of $469,662.00 as revenue in the district's "**Budget: 2003-2004**." See P-7; P-8A. That is, the DOE counted the PSEA adjustment of $469,662.00 twice and the PSEA adjustment should be deleted from the DOE's budget spreadsheet.

CONCLUSIONS OF LAW

New Jersey's Constitution requires the Legislature to "provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all children in the state between the ages of five and eighteen years." N.J. Const. art. VIII, § 4, ¶ 1.

The Legislature provided for school districts, operated by boards of education, and provided statutory systems of financing districts. See, e.g., N.J.S.A. 18A:10-1. In the Abbott cases, students from poor urban districts challenged the system of school financing and New Jersey's Supreme Court concluded that the quality of education in the poor urban districts was significantly inferior to the quality of education in other school districts and ordered the Legislature to assure that poorer districts' funding would be substantially equal to that of property-rich districts in a way that the funding would not depend on the budgeting and taxing decisions of local school boards. See, e.g., Abbott v. Burke, 100 N.J. 269 (1985) (Abbott I); Abbott v. Burke, 119 N.J. 287 (1990) (Abbott II), relating to the Public School Education Act of 1975, N.J.S.A. 18A:7A-1 to -52. The Legislature responded with further legislation, but the Abbott plaintiffs contended that disparities in financial resources continued to cause constitutional disparities. See, e.g., Abbott v. Burke, 149 N.J. 145 (1997) (Abbott IV), relating to the Comprehensive Educational Improvement and Financing Act (CEIFA), N.J.S.A. 18A:7F-1 to -36.

In Abbott V, the Supreme Court found the State's plan for funding districts facially constitutional, but unconstitutional as applied to special needs districts. The Court ordered the DOE to assure funding for and implementation of programs including those related to school

reform; preschool; full-day kindergarten; health and social services; dropout reduction; summer school, after school, and school nutrition; art, music and special education; and facilities standards and management.

As written above, the Supreme Court's July 23, 2003, Order granted the DOE's motion and relaxed Abbott V remedies as applied to the 2003-2004 budget process. The Order states:

> 1. The DOE's application to extend the relaxation of remedies granted in Abbott V is granted as follows: The DOE shall have the authority to treat the 2003-2004 school fiscal year as a maintenance year for purposes of calculating Additional Abbott v. Burke State Aid for the Abbott districts. During 2003-2004, K-12 programs provided for in the 2002-2003 school year will be continued, subject to conditions set forth in this Order.
>
> 2. The Statewide aggregate amount of Additional Abbott v. Burke State Aid shall be presumptively calculated as the total amount of Additional Abbott v. Burke State Aid approved for the Abbott districts for Fiscal Year 2002-2003, subject to adjustment as required for a maintenance budget. A maintenance budget shall mean that a district will be funded at a level such that the district can implement current approved programs, services, and positions and therefore includes documented increases in non-discretionary expenditures. Examples of non-discretionary expenditures are increases in contracted salaries, health benefits, and special education tuition. Maintenance does not include the restoration of programs, positions, or services that were reduced in 2002-2003, or new programs, positions, or services, except in respect of Paragraph 2c. of the Court's Order of June 24, 2003 (pertaining to those elementary schools without a whole school reform developer in place in 2002-2003 and permitting whole school reform contracts in certain circumstances), irrespective of the timing for the promulgation of regulations governing that provision.
>
> 3. For purposes of calculating Additional Abbott v. Burke State Aid and in furtherance of its pre-existing duty to implement administrative controls, the DOE shall promulgate an emergency regulation establishing the standard for evaluating the effectiveness and efficiency of the districts' non-instructional programs. (Non-instructional programs are defined as office/administrative expenditures and programs, positions, services and/or expenditures that are not school based or directly serving students.) Insofar as any Abbott district has not been informed of its total amount of last year's approved Additional Abbott v. Burke State Aid, the DOE

shall provide written notice of that amount within two weeks of the date of this Order. The DOE's application of the effective and efficient standard in its review of a district's maintenance school budget may result in a reduction to a district's presumptive amount of Additional Abbott v. Burke State Aid.

4. Within 30 days of the issuance of this Order, the DOE shall provide in a Notice to each district preliminary maintenance budget figures for the 2003-2004 school year consisting of the 2002-2003 approved budget and an estimate of the supplemental funding that will be needed to support that currently approved budget. If the DOE deletes an expenditure from a district's 2002-2003 budget related to the district's non-instructional programs and based on the effective and efficient standard, the DOE must include in the written notice to the district the expenditure deleted along with a specific statement explaining why the program or part thereof is no longer effective and efficient.

5. Abbott districts may appeal any reductions to their maintenance budgets by the DOE's application of the effective and efficient standard, which appeals shall be heard by the [OAL]. In those appeals, the DOE shall bear the burden of moving forward to establish the basis for any proposed reductions to the district's maintenance budget based on the effective and efficient standard set forth in the DOE's emergency regulations. If that initial burden is met, the district shall bear the burden of demonstrating that any budgetary reductions are not justified under that standard.

6. The Order of the Court dated July 7, 2003, modifying the Court's scheduling Order of May 20, 2003 in order to provide the [OAL] thirty days within which to determine and issue initial decisions in the twenty-three pending budget appeals, is hereby superseded by this Order. The [OAL] shall issue initial decisions on district appeals from the DOE's preliminary maintenance budget figures for the 2003-2004 school year within 30 days of the dates of those decisions as set forth in Paragraph 4 of this Order.

7. To the extent that monies are deleted by the DOE in the districts' non-instructional programs based on the effective and efficient standard, those monies shall be made available to the districts as follows: an Abbott district may apply for and the State may award such aid for demonstrably needed programs or services. The allocation of such available funds shall not be viewed as inconsistent with this Court's approval of use of a maintenance budget for Fiscal Year 2003-2004.

> [Abbott v. Burke, __ N.J. __, 2003 WL 21700375, at *1-3 (July 23, 2003) (emphasis added).]

The DOE, citing the Fiscal Year 2004 Appropriations Act and the Supreme Court's July 23, 2003, Order, promulgated emergency regulations amending N.J.A.C. 6A:10, including N.J.A.C. 6A:10-1.2, 3.1, -4.2, and -4.7. The regulations are effective August 22, 2003, and expire June 30, 2004.

N.J.A.C. 6A:10-1.2 states:

> "Maintenance budget" means, for the 2003-2004 school year, a budget funded at a level such that the district can implement 2002-2003 approved and provided programs, services, and positions and includes documented increases in non-discretionary expenditures and adjustments for actual 2002-2003 expenditures. Examples of non-discretionary expenditures are increases in contracted salaries, health benefits, and special education tuition. Maintenance does not include the restoration of programs, positions, or services that were provided in previous years or new programs, positions, or services unless necessary to meet paragraph 2c of the Supreme Court's order of June 24, 2003 in Abbott v. Burke. Maintenance also does not include non-recurring 2002-2003 expenditures.
>
> [Emphasis added.]

(1) Consistent with the findings of fact and the school district's withdrawal of the appeal relative to Supervisors of Instruction, no conclusion of law is required.

(2) Consistent with the findings of fact, costs relative to Legal Expenses should be deleted from the district's budget as proposed by the DOE.

(3) Consistent with the findings of fact, the costs relative to Non-Certificated Staff should not be deleted from the district's budget.

The Comprehensive Educational Improvement and Financing Act of 1996 includes among its definitions:

> "CPI" means the average annual increase, expressed as a decimal, in the consumer price index for the New York City and Philadelphia areas during the fiscal year preceding the prebudget year as reported by the United States Department of Labor.
>
> [N.J.S.A. 18A:7F-3.]

Consistent with the findings of fact, a 3.00% CPI is applicable in the district's budget.

Consistent with the findings of fact, the district included the PSEA of $469,662.00 in the Total General Fund. Consequently, the district's budget spreadsheet, line 410, the Total General Fund Revenues, includes the PSEA adjustment and the DOE's budget spreadsheet mistakenly shows the PSEA adjustment as revenue in the district's "**Budget: 2003-2004**." See P-7; P-8A. That is, the DOE has counted the PSEA adjustment of $469,662.00 twice and the PSEA adjustment should be deleted from the DOE's budget spreadsheet.

Consistent with the above findings of fact and conclusions of law, the district's 2003-2004 budget is amended as set forth below (according to the DOE's calculations submitted at ALJ's request.)

CPI at 3.00% non-sal net of Util.	$424,017.00
Subtotal	$5,613,880.00
Subtotal Adjustments	$4,967,775.00
FY-03-04 Total State Budget at Maintenance	$65,402,591.26

Less:

Supervisors of Instruction	($127,534.00)
Legal Services	($350,000.00)

Non-Certificated Staff	$0.00
Subtotal for Ineffective/Inefficiencies	($477,534.00)
FY2003-04 Total State Program Budget at Maintenance and Inefficiencies	$64,925,057.26

Revenue Adjustments:

PSEA Adjustment	$0.00
Subtotal Adjustments	$29,686.00
FY 03-04 GF Total Budget Revenues Available	$53,764,461.00
Difference: Need for Supplemental Aid	$11,160,596.26

ORDER

I **ORDER** the DOE to assure funding and provide supplemental aid for the district's budget for 2003-2004 as described above.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within the time allowed under the existing orders of the New Jersey Supreme Court and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Notwithstanding the provisions of any rule to the contrary, exceptions to Initial Decisions of the Office of Administrative Law in Abbott district budget appeal matters shall be filed within five (5) days of the date of mailing of the Initial Decision, and reply exceptions shall be filed within two (2) days of receipt of exceptions. File written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Sept. 26, 2003
DATE

JOHN R. TASSINI, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

9-26-03
DATE

E-mailed Initial Decision to the parties on:

9-26-03
DATE

EXHIBITS

For petitioner:

P-1 United States Department of Labor, Bureau of Labor Statistics, Table 3, Consumer Price Index for All Urban Consumers (CPI-U): Selected Areas, all items index, September 13, 2003 EV

P-2 Asbury Park Board of Education CPI Calculations

P-3 Agreement to Provide Legal Services between Asbury Park Board of Education and Hunt, Hamlin & Ridley, May 15, 2003 EV

P-4 DOE's Office of Compliance Investigation (OCI) portion of report (review of actions of the members of the Asbury Park Board of Education fulfilling assigned governance tasks in 2002-03 school year), August 21, 2003

P-5 RIF List, Asbury Park Board of Education RIF of Non-certificated Staff, September 13, 2003

P-6 Asbury Park Board of Education, Board Secretary Report, General Fund – Fund 10, Schedule of Revenues, June 2003 EV

P-7 Spreadsheet: Comparison of DOE Budget to Asbury Park Board of Education Budget calculations

P-8 School District Budget Statement for the School Year 2003-2004, Monmouth – Asbury Park City, September 4, 2003

P-8A Revenue Section of Asbury Park Board of Education's 2003-2004 Budget

P-9 U.S. Department of Labor, Bureau of Labor Statistics, Changes in Area Definitions for Published Metropolitan Areas in the 1998 CPI Revision, November 1997 EV

For respondent:

R-1 Notice of Preliminary Maintenance Budget Figure for 2003-2004 and Estimate of Discretionary Additional Abbott v. Burke State Aid Award to Asbury Park School District, August 27, 2003 EV

R-2 DOE's Budget Worksheet, Asbury Park School District, August 27, 2003 EV

R-3 DOE's General Fund Comparative Balance Sheet, Asbury Park School District, as of June 30, 2003 and 2002

R-4 Analysis of Abbott School Districts – 2004, Asbury Park School District, Schedule A – 2003 Total Projected Spending with 2004 Budget

R-5 Analysis of Abbott School Districts –2004, Asbury Park School District, Schedule B – Audited Spending 2000-2002

R-6 Analysis of Abbott School Districts – 2004, Asbury Park School District, Schedule C – Four Year Summary of Budget Appropriations Compared to 2004 Budget

R-7 Analysis of Abbott School Districts – 2004 – Asbury Park School District, Schedule D – 2003 Total Projected Revenue Compared to 2004 Budget

R-8 Analysis of Abbott School Districts – 2004 – Asbury Park School District, Schedule E-2000/02 Revenues Budgeted with Audited Balances

R-9 Analysis of Abbott School Districts – 2004, Asbury Park School District, Schedule F – Four Year Summary of Revenues Compared to 2004 Budget

R-10 Analysis of Abbott School Districts – 2004, Asbury Park School District, Schedule I – Enrollments

R-11 Analysis of Abbott School Districts – 2004, Asbury Park School District, Schedule J

R-12 Analysis of Abbott School Districts – 2004, Asbury Park School District, Schedule G & H – Four Year Summary of Surplus – General Fund with 2004 Projection

R-13 Table 1 – Reporting of Hunt Legal Costs by Category from December 2002 through April 2003 EV

R-14 Table 2 – Reporting of Hunt Legal Costs by Category from December 2002 through April 2003 EV

R-15 Legal Costs in Abbott Districts: '02, '03, and '04 (Sorted by highest to lowest per pupil cost for '04) EV

R-16 Legal Costs Per Pupil in Abbott Districts: 2001-02 (Sorted highest to lowest cost per pupil cost for '02) EV

R-17 School District Budget Statement for the School Year 2003-2004, Monmouth - Asbury Park (detailed appropriations)

R-18 Résumé of John Anderson White, DOE Budget Manager for Abbott Districts

R-19 Non-Certificated Staff Costs in Abbott Districts, Table 7, Asbury Park Student to Staff Ratios

R-20 Asbury Park Board of Education, Board Secretary Report, General Fund – Fund 10, Interim Balance Sheet, June 2003 (upon which the DOE's August 27, 2003, notice was based

R-21 State of New Jersey, DOE, Appealing Abbott School Districts, Non-instructional Spending Inefficiencies, Rosenfarb Winters, LLC, (forensic accounting firm report), August 19, 2003 EV

R-22 Non-Certificated Staff Costs in Abbott Districts, Table 1, Audited Salary Expenditures for Aides: '02, etc., June 29, 2003

R-23 Non-Certificated Staff Costs in Abbott Districts, Table 3, '02 Audited Salary Expenditures: Secretaries, etc., June 29, 2003

R-24 Non-Certificated Staff Costs in Abbott Districts, Table 5, '02 Audited Salary Costs: All Non-Certificated Staff, etc., June 29, 2003

R-25 Table 8a, Salaries & Benefits for Non-Certificated Positions Not Approved in '04 Budget: Asbury Park, September 11, 2003 EV

R-26 Administrative Staff Costs in Abbott Districts, Table 1, '02 Audited Salary Expenditures: Supervisor of Instruction, etc., June 30, 2003

WITNESSES

For petitioner:

Scott Henry
Antonia Lewis

For respondent:

John A. White

OAL DKT. NO. EDU 4095-03
AGENCY DKT. NO. 199-6/03

BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

The record of this local "Abbott" District's appeal of the Department's decision on its supplemental funding request for the 2003-04 school year, and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties' exceptions and replies were duly submitted in accordance with the schedule established in response to the Court's order for expedition and were considered by the Commissioner in reaching this decision.

Upon careful and independent review of the record, the Commissioner initially concurs with the Administrative Law Judge (ALJ) that the OAL does not have jurisdiction to determine directly or indirectly the validity of *N.J.A.C.* 6A:10-1.2, as such determination is solely within the jurisdictional purview of the Appellate Division or the Supreme Court. R. 2:2-3(a); *See also*, *Pascucci v. Vagott*, 71 *N.J.* 40, 51-52 (1976); *Wendling v. N.J. Racing Com'n.*, 279 *N.J. Super.* 477, 485 (App. Div. 1995). Even if it were to be assumed, *arguendo*, that the OAL has jurisdiction to determine the validity and applicability of the regulation at issue, the Commissioner agrees with the ALJ that the Department's definition of "maintenance budget," as

detailed in *N.J.A.C.* 6A:10-1.2, does not differ in any appreciable way from the Supreme Court's definition of that term contained in its Budget Order of July 23, 2003.[1]

With respect to the identified inefficiencies in petitioner's noninstructional expenditures, including the supervisors of instruction,[2] legal fees and the employment of non-certificated staff, based upon the credibility assessments of the ALJ, *N.J.S.A.* 52:14B-10(c), the Commissioner accepts the ALJ's factual findings and determines that his analysis and legal conclusions are consistent with the Supreme Court's Order of July 23, 2003, as well as the Department's regulatory amendments adopted on August 22, 2003.

However, the Commissioner does not concur with the ALJ that a Consumer Price Index (CPI) adjustment of 3 percent, rather than 2.11 percent, should be applied to petitioner's 2003-04 budget because "Asbury Park is closer to New York and northern New Jersey than to Philadelphia and southern New Jersey ***" (Initial Decision at 19), where *N.J.S.A.* 18A:7F-3 specifically defines CPI as:

> the average annual increase, expressed as a decimal, in the consumer price index for the New York City and Philadelphia areas during the fiscal year preceding the prebudget year as reported by the United States Department of Labor.

Thus, in accordance with statute, the CPI calculation in the maintenance budget is an average of the CPI rate for the New York/Northern New Jersey area *and* the Philadelphia/Southern New Jersey area. Therefore, notwithstanding any testimony to the contrary, the Commissioner finds that the Department properly relied upon the 2.11 percent CPI rate calculated pursuant to statute.

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[1] Consequently, pursuant to *N.J.A.C.* 1:1-14.10(j), the Commissioner adopts the ALJ's Interim Order of September 4, 2003.

[2] It is noted that petitioner has withdrawn its appeal relative to this inefficiency.

Finally, it is not clear on this record that the Department, in fact, "double counted" the District's preschool expansion aid adjustment of $469,662, as found by the ALJ at page 17 of the Initial Decision. In this connection, the Department argues that:

> [N]o documentation was provided to show that this amount was included in any other portion of the revenue section of Asbury Park's budget nor was any calculation performed on the record to demonstrate that this was the case. There simply is no basis for this proposition on the record beyond Mr. Henry's belief that the adjustment had been duplicated, thus, overstating the district's revenue and lowering its overall "Need for Supplemental Aid." (Department's Exceptions at 6-7)

Therefore, mindful of the District's burden on this issue, and without any evidence to the contrary, the ALJ's finding in this regard is rejected.[3]

Accordingly, the Initial Decision is adopted with modification, as set forth herein.[4]

IT IS SO ORDERED.[5]

COMMISSIONER OF EDUCATION

Date of Decision: 10/20/03

Date of Mailing: N/A

[3] The Department also notes, by way of correction to the Initial Decision's Exhibit List that it did not enter into evidence Exhibits R-3 through and including R-12, or R-26. The decision is so modified.

[4] The Commissioner so determines, based upon the proofs brought to *this* record, while acknowledging that the presentation of such evidence may have been disadvantaged by both a Court Order to expedite proceedings and the unavailability of the Comprehensive Annual Financial Report until November 2003, which will reveal the District's true audited fund balance and available revenue, if any, as of June 30, 2003. In any event, beyond his determination herein, the Commissioner underscores the availability of a mechanism for Abbott districts to address needs, arising during the year due to unanticipated expenditures or unforeseen circumstances, for additional resources to implement Department-approved programs and services. *N.J.A.C.* 6A:10-3.1(g).

[5] Pursuant to *P.L.* 2003, *c.* 22, "*Abbott*" determinations are final agency actions appealable directly to the Appellate Division of the New Jersey Superior Court.

588-03

BOARD OF EDUCATION OF THE BOROUGH OF KEANSBURG, MONMOUTH COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning "Abbott" District appealed the Department's determination of its 2003-04 preliminary "maintenance budget" and supplemental aid, alleging that the Department's review was not in accordance with the July 23, 2003 Order of the Supreme Court.

The ALJ found that the rule duly promulgated to implement the Court's order for "maintenance" controlled in this proceeding, and that the Office of Administrative Law (OAL) lacked jurisdiction to determine its validity. However, the ALJ further found that, within the framework of that rule, the Department did not offer any factual basis for its calculations and did not dispute the documentation and testimony advanced in support of the Board's claim. The ALJ directed adjustment of supplemental aid.

The Commissioner adopted the ALJ's decision with respect to OAL jurisdiction and application of the "maintenance" rule, as well as certain adjustments in nondiscretionary costs and IDEA revenues. However, the Commissioner rejected the decision in all other respects, dismissing the Petition of Appeal except to direct modification of the Board's preliminary maintenance budget and estimated aid calculation to reflect the specified adjustments.

October 20, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4159-03

AGENCY DKT. NO. 200-6/03

BOARD OF EDUCATION OF
THE BOROUGH OF KEANSBURG,

Petitioner,

v.

STATE OF NEW JERSEY,
DEPARTMENT OF EDUCATION,

Respondent.

Richard E. Shapiro, Esq., for petitioner

Deborah L. Gnatt, Deputy Attorney General, for respondent (Peter Harvey, Attorney General of New Jersey, attorney)

Record Closed: September 22, 2003 Decided: September 26, 2003

BEFORE **ANTHONY T. BRUNO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner ("BOE") appeals the determination by respondent ("DOE") of the BOE's maintenance budget for the 2003-2004 school year, including the BOE's estimated need for discretionary additional *Abbott v. Burke State Aid* (Exhibit P-10)

On March 24, 2003, the DOE moved before the Supreme Court for an order modifying the decision in *Abbott v. Burke,* 153 *N.J.* 480 (1998) *(Abbott V). See also Abbott v. Burke,* 172 *N.J.* 294 (2002) (*Abbott IX*). The DOE requested that the discretionary Additional *Abbott v. Burke* State Aid (supplemental aid) that it would be required to provide to *Abbott* districts in 2003-2004 be limited to an amount sufficient to support those programs, positions and services in the districts' approved budgets for 2002-2003. On April 8, 2003, the Education Law Center (ELC) cross-moved for an order setting an expedited schedule for the DOE's decisions on districts' budgets and requiring the DOE to conduct a formal evaluation of the implementation of Whole School Reform (WSR), and other relief. On April 29, 2003, the Supreme Court ordered the DOE and the ELC to participate in mediation before the Hon. Philip S. Carchman, J.A.D., to attempt to resolve issues raised by their motions. Mediation resolved all issues except the 2003-2004 budget process, and the DOE's motion for an order extending by an additional year the one-year relaxation of remedies granted in *Abbott IX* which remained outstanding. However, the parties agreed to an expedited schedule for budget approvals and appeals beginning with the DOE's reviews and approvals of districts' budgets by May 30, 2003. Districts' appeals from the DOE's reviews were to be transmitted to the Office of Administrative Law (OAL), where administrative law judges (ALJs) were to issue initial decisions (IDs) within 50 days of the appeal. The Commissioner was to issue final decisions within 25 days of the IDs. On May 20, 2003, the Supreme Court issued an order incorporating the parties' mediation agreement and providing that the schedule would remain in effect until further order of the Court.

On May 30, 2003, the DOE issued decisions on the *Abbott* districts' budgets. In this case, by letter of that date, the DOE's Assistant Commissioner, Division of Abbott Implementation notified the district that the DOE had completed its initial review of the district's 2003-2004 expenditure budget dated May 5, 2003, that the expenditure budget was approved except as noted in the letter. On June 5, 2003, the district's verified petition of appeal was filed with the Department. *N.J.S.A.* 18A:6-9. The DOE transmitted the contested case to the OAL, where it was filed on June 9, 2003. *N.J.S.A.* 52:14B-2(b). On June 12, 2003, the Department's answer was filed in the OAL.

On June 24, 2003, the Supreme Court issued an order approving the mediated agreement and scheduling argument on the DOE's motion for an order extending the relaxation of remedies

granted in *Abbott IX.* On July 23, 2003, the Supreme Court granted the DOE's motion and relaxed *Abbott v. Burke,* 153 *N.J.* 480 (1998) *(Abbott V)* remedies as applied to the 2003-2004 budget process. In its Order, the Court gave the DOE the authority to treat the 2003-2004 school fiscal year as a maintenance year for purposes of calculating Additional *Abbott v. Burke State* Aid for the *Abbott* districts. During 2003-2004, K-12 programs provided for in the 2002-2003 school year were to be continued, subject to conditions set forth in the Order. The Court's July 23, 2003 Order also defined the term "maintenance budget" as follows:

> A maintenance budget shall mean that a district will be funded at a level such that the district can implement current approved programs, services, and positions and therefore includes documented increases in non-discretionary expenditures. Examples of non-discretionary expenditures are increases in contracted salaries, health benefits, and special education tuition. Maintenance does not include the restoration of programs, positions, or services that were reduced in 2002-2003, or new programs, positions, or services, except in respect of Paragraph 2c. of the Court's Order of June 24, 2003 (pertaining to those elementary schools without a whole school reform developer in place in 2002-2003 and permitting whole school reform contracts in certain circumstances), irrespective of the timing for the promulgation of regulations governing that provision.

With respect to appeals of the DOE's determinations, the Court's Order provided:

> *Abbott* districts may appeal any reductions to their maintenance budgets by the DOE's application of the effective and efficient standard, which appeals shall be heard by the [OAL]. In those appeals, the DOE shall bear the burden of moving forward to establish the basis for any proposed reductions to the district's maintenance budget based on the effective and efficient standard set forth in the DOE's emergency regulations. If that initial burden is met, the district shall bear the burden of demonstrating that any budgetary reductions are not justified under that standard.

Finally, by its Order, the Supreme Court also set a schedule for new DOE decisions on supplemental funding and the administrative appeal and hearing process. The Court fixed a schedule requiring the OAL to issue initial decisions on district appeals from the DOE's preliminary maintenance budget figures for the 2003-2004 school year within 30 days of the

dates of those decisions as set forth in Paragraph 4 of the Order. It ordered the DOE to promulgate emergency regulations governing the process.

The DOE, relying on the Fiscal Year 2004 Appropriations Act and the Supreme Court's July 23, 2003 Order, promulgated emergency regulations amending *N.J.A.C.* 6A:10, including *N.J.A.C.* 6A:10-1.2, -3.1, -4.2, and -4.7. The regulations are effective August 22, 2003, and expire June 30, 2004. Among these emergency regulations, *N.J.A.C.* 6A:10-1.2 states:

> "Maintenance budget" means, for the 2003-2004 school year, a budget funded at a level such that the district can implement 2002-2003 approved and provided programs, services, and positions and includes documented increases in non-discretionary expenditures and adjustments for actual 2002-2003 expenditures. Examples of non-discretionary expenditures are increases in contracted salaries, health benefits, and special education tuition. Maintenance does not include the restoration of programs, positions, or services that were provided in previous years or new programs, positions, or services unless necessary to meet paragraph 2c of the Supreme Court's order of June 24, 2003 in *Abbott v. Burke.* Maintenance also does not include non-recurring 2002-2003 expenditures.

Prior to the hearing of this matter, ALJ Tassini entered an Order Relative to Maintenance Budget in *Board of Education of the City of Asbury Park v. New Jersey Department of Education,* OAL Dkt. No. EDU 4095-03, concluding that the school district's challenge to the validity and applicability of *N.J.A.C.* 6A:10-1.2's "maintenance budget" may not be heard by the OAL, but must be applied by the OAL in the pending matters. The parties were advised during the prehearing conference that my ruling on the validity and applicability of the DOE regulation would be the same as Judge Tassini's. Counsel for the BOE reserved the right to challenge the ruling in further proceedings in this matter.

The hearing in this matter was held on September 5, 2003 at Mercerville, New Jersey. Witnesses who testified and exhibits admitted into evidence are listed in the Appendix. Leave was granted to the parties to submit post hearing memorandum by September 22, 2003. Memorandum was received and the hearing record closed September 22, 2003.

ISSUES

Counsel for the BOE submitted the following as the issues on appeal:

1. Whether the Department properly determined the District's maintenance budget for the 2003-04 school year on the basis of programs, services and positions approved and provided.

2. Whether the Department properly calculated the maintenance budget for Keansburg.

3. Whether the Department properly calculated the non-discretionary cost adjustments for the 2003-04 school year. (Petitioner will focus on the special education and the CPI cost adjustments).

4. Whether the Department properly determined the increase in IDEA revenues for 2003-04.

5. Whether the Department properly determined the District's estimated need for discretionary Additional Abbott v. Burke State Aid.

For the reasons enunciated in Judge Tassini's Order entered in *board of Education of the City of Asbury Park v. New Jersey Department of Education,* OAL Dkt. No. EDU 4095-03, and subsequented followed by ALJ Martone in *Board of Education of the Township of Neptune v. State of New Jersey, Department of Education,* OAL Dkt. No. EDU 4096-03, I **CONCLUDE** that the Office of Administrative Law does not have the authority to review the DOE's emergency regulation set forth at *N.J.A.C.* 6A:10-1.2.

Consideration of BOE's Estimated Need For Discretionary Additional Abbott v. Burke State Aid

The testimony received into the record during the course of the hearing was directed to the 8 highlighted items of dispute between the calculations of the BOE and the DOE. (Exhibit P-1). The line items in controversy and the contending amounts are:

	BOE Calculation	DOE Calculation
Local Contribution to Special Revenue	$(1,217,210)	$(1,684,267)
Early Childhood aid [ECA]	$ 2,990,025	$ 3,582,082
DEPA Aid [Demonstrably Effected Program Aid]	$ 999,106	$ 1,009,452
EC [Early Childhood] Plan 03-04	$ 3,083,839	$ 2,723,762
EC Plan 02-03	$(2,990,025)	$(3,565,190)
Special Education	$ 426,013	$ 388,375
CPI at 2.11% non-salary other items	$ 132,612	$ 80,298
Increase in IDEA	$ 75,171	$ 89,229

The ultimate difference is the calculated need for Supplemental Aid. The BOE contends that its need is $5,798,227 and the DOE fixed the need at $4,894,321. The difference is $903,906. The BOE, in its post hearing memorandum, submits that the supplemental funding awards should be increased to $8,463,033 in accordance with the maintenance budget definition issued by the Supreme Court.

This Initial Decision is limited to the $903,906 difference.

Robert Finger, Business Administrator/Board Secretary of the Keansburg Public Schools, testified about each of the aforesaid 8 items. He prepared Exhibit P-1, using the number provided by the DOE for the "DOE Calculations" and BOE records, "approved and provided" in the BOE's Budget, for the "District Calculation." Finger corroborated the disputed items with documentation admitted into evidence.

Finger testified that the Local Contribution to Special Revenue was reduced when the BOE did not receive the promised pre-school expansion aid from the DOE. The failure of the DOE to consider the elimination of $467,057 for pre-school expansion aid, together with the reduction of $125,000 carryover accounts for the $592,057 difference at the Early Childhood Aid line item.

The $10,346 difference at the DEPA Aid line item occurred because the DOE did not correctly consider 2002-2003 school year funding of $817,736 and a DEPA carryover of $181,370.

The largest disparity in the comparable calculations occurred at the Early Childhood "EC" Plan adjustments for school years 2003-2004 and 2002-2003. The total variation is $935,242; $31,336 more than the "Difference" in the respective calculations. Finger testified that the BOE's budget for early childhood program aid for school year 2003-2004 was $3,083,839, and the correct revised amount of approved early childhood plan for school years 2002-2003 was $2,990,025. Both of the BOE's calculations include early childhood program carryover funds; the DOE's calculations do not.

The BOE referred to its Budget for school year 2003-2004 to demonstrate that the Special Education line item should be $426,013. At line 06360 of the Budget (Exhibit P-7) the difference between the 2003-2004 Appropriations ($5,042,641) and the 2002-2003 Revised Appropriations ($4,616,628) is $426,013.

The final 2 items, Special Education and Increase in IDEA, are tabulated on page 2 of Exhibit P-1. Finger deducted salaries, health benefits, special education tuition, transportation and utilities from the approved general fund budget of $31,648,524 to reach a net discretionary cost total of $6,284,943. Multiplying $6,284,943 by a 2.11% CPI, Finger arrived at a product of $132,612. The $75,171 IDEA Revenue increase was the difference between the 2003-2004 IDEA flow through and preschool and the 2002-2003 IDEA flow through and preschool amounts.

Finger also testified that the BOE's 2003-2004 salary rolls show a net loss of 9 teaching positions from 2002-2003. The DOE should provide additional money to maintain the faculty at 405. Finger also presented the results he received on August 15, 2003, of the exit conference with State retained auditors. Finger understood from the auditors that Keansburg should receive $6,436,753 in supplemental funding.

John White has been a DOE Budget Manager since 1999. Before entering this position,

White spent 27 years in private business. His present assignment is to ensure that the "Abbott" program is properly funded and properly used. White testified that the DOE used several sources to arrive at its estimated need for supplemental aid for the BOE. Among those sources were the BOE's approved general budget as of May 30, 2003, EC numbers from the Office of Early Childhood, reported revenue figures from the pre-May 30 budget, increases in Extraordinary Aid, the IDEA formula, EC expenditures as approved only, and his estimates of non-discretionary items. White presented a "spread sheet" (Exhibit R-2) which included the same numbers used by Finger in Exhibit P-1.

White testified that the BOE's approved Early Childhood Plan for 2003-2004 totaled $2,700,000. The BOE cannot spend any more than that amount without further approval. May 30, 2003 was the cut off date for reporting all numbers to DOE, and the Early Childhood Program expenditures as of May 30 were reported at $2.7 million.

ANALYSIS AND CONCLUSION

During the consideration of this matter, I am most disturbed by the attitude conveyed by the DOE. Missing completely from the DOE's position is the underlying constitutional mandate that the school children of New Jersey are entitled to a thorough and efficient education The jurisprudential foundation Abbott is that too many communities cannot afford to provide the required level of education and therefore everyone must contribute in order for the goal to be attained. The DOE purports to speak to that end through its promise that upon the statutory audit the DOE will eventually satisfy its financial obligations. What is ignored in this lip-service is the question of how the Abbott districts can fulfill their duties without the money they are entitled – or may eventually be entitled to receive. Do Abbott district students go without a thorough and efficient education until the DOE releases the money owed to those districts? Or do the districts postpone the continuation of programs until the funds are forthcoming?

I **CONCLUDE** that the Supreme Court, recognizing every student's right to a continuing thorough and efficient education, ordered the Abbott cases proceed expeditiously with final decisions issued in advance of eventual audits.

The presentation of the DOE leaves me with an emotion similar to that of the lady in the television commercial of several years ago – "Where's the beef?" In order for a trier of fact to make findings of fact, the hearing record must contain legally competent evidence of the material facts in dispute. I **FIND** that not only has the DOE not disputed the documentation and testimony entered into the hearing record on behalf of the BOE, the DOE also did not offer any factual basis for its calculation of the BOE's need for supplemental aid. The hearing record established by the DOE to this point consists of White's testimony that he, or someone at DOE, used numbers supplied by others, estimates, and preliminary budgets to devine the $4,894,321 need for supplemental aid. None of the corroborating documentation is furnished. Even if White's opinion were entitled to some elite status (and I do not accept his opinion as that of an expert), no foundation exists in the hearing record for his opinion.

I therefore give no weight to White's testimony nor to the DOE's calculation of the BOE's need for supplementary aid. I Find as a Fact that calculations prepared by Finger as contained in Exhibit P-1 to be accurate and applicable in this matter. This finding of fact is not made because the DOE did not refute the numbers, but because the corroborating documentation established the figures which Finger ably explained.

For the foregoing reasons, I **CONCLUDE** that the preliminary maintenance budget prepared by respondent for petitioner is not accurate, and that the Need for Supplemental Aid for petitioner is $5,798,227.

As stated above, because no action can be taken on issues controlled by the definition of "maintenance budget," no findings are made on petitioner's claims for additional funding for teaching positions.

ORDER

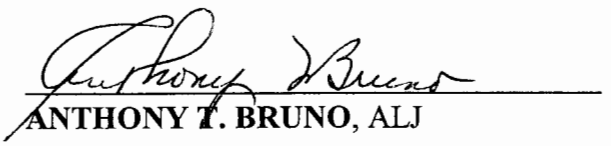
Accordingly it is **ORDERED** that petitioner's estimated need for discretionary additional *Abbott v. Burke State Aid* is determined to be $5,798,227.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within the time allowed under the existing orders of the New Jersey Supreme Court and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Notwithstanding the provisions of any rule to the contrary, exceptions to Initial Decisions of the Office of Administrative Law in *Abbott* District budget appeal matters shall be filed within five (5) days of the date of mailing of the Initial Decision, and reply exceptions shall be filed within two (2) days of receipt of exceptions. File written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 26, 2003
DATE



ANTHONY T. BRUNO, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

September 26, 2003
DATE

E-mailed Initial Decision to the parties on:

September 26, 2003
DATE

/tmp

APPENDIX

WITNESSES

For petitioner:

Robert Finger, Board Secretary/Business Administrator

For respondent:

John White, DOE Budget Examiner

EXHIBITS

For petitioner:

P-1 Calculations of Budgets – SY 2002-03 and SY 2003-04

P-2 Memorandum and attachments from Richard Rosenberg (2/25/03)

P-3 Keansburg BOE Revenue Report

P-4 Correspondence from Assistant to Commissioner (2/19/03)

P-5 Correspondence and attachments from BOE Business Administrator/Board Secretary

P-6 Keansburg BOE Budget Report for Early Childhood Program

P-7 Keansburg BOE Budget Year Statement

P-8 Allocation Notices (2) (4/17/03 and 4/5/03)

P-9 Notice of Final FY 2002-2003 Additional Abbott v. Burke State Aid Award

P-10 Notice of Preliminary Maintenance Budget Figure for 2003-2004 and Estimate of Discretionary Additional Abbott v. Burke State Aid Award

P-11 Documents provided BOE upon exit conference with independent auditors (8/15/03

For respondent:

R-1 Chart of Abbott comparisons

R-2 Spread sheet to input need for supplemental aid

OAL DKT. NO. EDU. 4159-03
AGENCY DKT. NO. 200-6/03

BOARD OF EDUCATION OF THE BOROUGH OF KEANSBURG, MONMOUTH COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions by the Department of Education (Department) and a reply by the Board of Education (Board) were duly submitted in accordance with the schedule established in response to the Court's order for expedition, and both were considered by the Commissioner in reaching his determination herein.

As a preliminary matter, the Commissioner concurs with the Administrative Law Judge (ALJ) that hearing of this matter need not have awaited completion of the District's Comprehensive Annual Financial Report (CAFR), as argued by the Department. Within the appeal framework established by the Court, the Board was clearly entitled to make, prior to the school year in question, the factual and legal record necessary to resolve the substance of its claims, subject to final adjustment of calculations following audit.

The Commissioner also concurs with the ALJ that *N.J.A.C.* 6A:10-1.2, the regulation duly promulgated to implement the Court's July 23, 2003 order, must control in the instant proceeding, and that the OAL does not have jurisdiction to determine its validity, such determination being solely within the purview of the Appellate Division of the Supreme Court. R. 2:2-3(a); s*ee, also, Pascucci v. Vagott,* 71 *N.J.* 40, 51-52 (1976); *Wendling v. N.J. Racing Com'n*, 279 *N.J. Super.* 477, 485 (App. Div. 1995). However, even if the Commissioner were to accept, *arguendo*, the Board's contention that a "choice of law" may be made without passing on the validity of the rule itself, the Commissioner here opines, to the extent that he may do so in an administrative proceeding, that the Department's definition of "maintenance budget," as set forth in *N.J.A.C.* 6A:10-1.2, is entirely consistent with the language and intent of the Court, with no conflict between it and the underlying order.

The Commissioner rejects, however, the ALJ's stance that, within the framework established by *N.J.A.C.* 6A:10-1.2, this matter is appropriately resolved by wholesale acceptance of the Board's claims because the calculations underlying them were explained on record, whereas the Department's purportedly were not. To the contrary, the Commissioner finds that the record does, in fact, reveal the basis for the Department's calculations and, thus, permits more specific determinations as set forth below.

With respect to the Board's claims regarding IDEA revenues and non-discretionary cost adjustments for special education and CPI, the Commissioner finds that the Board's exhibits (P-1, page 2; P-7; and P-8) fully support its proposed revisions to the

Department's calculations, so that the ALJ's recommended adjustments in these areas are adopted as set forth at page 6 of the Initial Decision.[1]

However, with respect to the Board's claims regarding its Local Contribution to Special Revenue, Early Childhood Program Aid (ECPA), Demonstrably Effective Program Aid (DEPA) and Early Childhood Plan budgets, the Commissioner cannot agree with the ALJ's adoption of the Board's position. The ALJ finds the Board's "bottom-line" calculations to be fully supported, and, indeed, they are, in the sense that the underlying numbers on which they are based are plainly set forth in testimony and documentation on record. The parties' arguments and exhibits, however, are equally revelatory with regard to the bases for the Department's calculations, showing the disparity between the Department's figures and the Board's, for the areas in dispute, to be attributable to the use of numbers from the approved 2002-03 General Fund Budget and approved Early Childhood Plan in the Department's case, and later numbers, reflecting transfers, alterations and mid-year adjustments, in the Board's. (See Exhibit P-1, page 1; Exhibit P-2, page 3; and Exhibit R-2.) This points not, as found by the ALJ, to unsubstantiated conclusions on the part of the Department, but rather to a fundamental difference in methodology and approach between the Department and the Board.

In the matter on appeal, the Department's underlying task was to determine for preliminary purposes the 2003-04 budget that would enable the District to continue in a "maintenance" mode, that is, to implement in 2003-04 the programs, services and positions provided in 2002-03, and concomitantly to determine the estimated amount of supplemental aid necessary for it to do so. To accomplish its first goal of identifying and determining the cost of providing 2002-03 programs and services so as to

[1] It is noted that the Department does not take exception to these recommendations.

continue them in 2003-04, the Department began with the approved General Fund Budget for 2002-03, deducting the amount provided by local taxation (Contribution to Special Revenue) and adding dedicated State-aided program amounts (ECPA,[2] DEPA and Distance Learning Network), all as indicated in that budget, to create the total adjusted 2002-03 State program budget; it then made finer adjustments to reflect true spending in key accounts, looking to actual expenditures using the best documentation available in the absence of the CAFR in order to estimate the cost of maintaining programs, services and positions, with reasonable allowance for nondiscretionary cost increases. Had it been necessary to do so, additional adjustments would have been made for items such as nonrecurring expenditures and areas found ineffective or inefficient on review. To project the increase or decrease in costs for Early Childhood Education, the Department compared the 2002-03 approved plan to the 2003-04, then adjusted the base budget for the difference. The end result of this process, fully reflected in the above-noted exhibits, is the Total State Program Maintenance Budget, or the budget preliminarily deemed necessary and sufficient to support programs, services and positions at 2002-03 levels, with the difference between it and 2003-04 budgeted revenues equaling the District's estimated supplemental aid calculation.

In the Commissioner's view, the process used by the Department fully allows for reasonable, fair and consistent preliminary determinations under circumstances where precise calculations must necessarily await the results of the CAFR.[3] That

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[2] It is noted that the District's 2002-03 Early Childhood Aid (Line 13300), stated as $3,582,082, should actually be the same amount as later stated for the approved plan budget ($3,565,190). (See Exhibits P-1, R-2; Department's Exceptions at 6.)

[3] There is absolutely no evidence to support the Board's contention, and the ALJ's speculation, that if the District does not immediately receive the approximately $800,000 still in dispute, the District's children will be deprived of a thorough and efficient education while CAFR adjustment is pending.

original 2002-03 local revenue amounts and amounts supporting restricted programs, such as the ECPA and DEPA disputed herein, may prove different by the year's end does not, in itself, invalidate the Department's method, which is by its very nature based on reasonable assumptions subject to final adjustment by audit. Similarly appropriate, and reasonably based on the only available "like" components for comparison, is the Department's use of approved 2002-03 and 2003-04 Early Childhood Plans in order to determine the change in district need from one year to the next. As well stated by the Administrative Law Judge in the September 26, 2003 Initial Decision in *Board of Education of the City of Plainfield, Union County, v. New Jersey State Department of Education,* OAL Dkt. No. EDU 5502-03, Agency Dkt. No. 206-6/03: [4]

> I have considered the arguments of counsel and must agree with the position espoused by the DOE. (footnote omitted) Although I agree with the District that the consistent use of the DOE's methodology does not in itself make it correct, I do not agree that simply because it does not work to the District's advantage makes it incorrect. The methodology utilized by the Department has been applied to all "Abbott Districts" uniformly and has served to increase maintenance budgets in over half of the Districts. The District has not established that the use of this methodology is *per se* improper, illegal, inconsistent with the New Jersey Supreme Court's Order of July 23, 2003 or violative of any of its constitutional rights. The DOE is obligated only to use an approach that is reasonable and uniformly applied. Here they have done so. If the methodology is to be changed in each area in which an Abbott District is not advantaged, there will be no uniformity or equity to the provision of Abbott funds. Thus, I reject the District's argument and **CONCLUDE** that the DOE's methodology is reasonable and will not be second-guessed. (*Id.* at 8)

In holding thus, the Commissioner is also mindful that, to the extent that the results of the Department's reasonable approach may be imperfect, even after adjustment following audit, *N.J.A.C.* 6A: 10-3.1(g) provides a mechanism for the District to obtain additional supplemental funding where unanticipated expenditures or

[4] Final Commissioner decision issued on October 20, 2003.

unforeseen circumstances warrant. The Commissioner, therefore, wholly endorses the Department's methodology, subject to the correctness of its application based on the evidence presented in any particular instance, as occurred herein with respect to special education, CPI and IDEA calculations.

Accordingly, for the reasons set forth above, the Initial Decision of the OAL is adopted insofar as it concludes that the present matter was appropriately heard prior to audit, that the OAL lacks jurisdiction to determine the validity of the rule promulgated to implement the order of the Court, and that specified adjustments to nondiscretionary costs and IDEA revenue are warranted. However, it is rejected in all other respects, so that the Petition of Appeal is dismissed except insofar as the Board's preliminary maintenance budget, and its concomitant aid calculation, are to be modified to reflect the adjustments ordered herein.

IT IS SO ORDERED.[5]

COMMISSIONER OF EDUCATION

Date of Decision: 10/20/03

Date of Mailing: N/A

[5] Pursuant to *P.L.* 2003, *c.* 122, "Abbott" determinations are final agency actions appealable directly to the Appellate Division of the New Jersey Superior Court.

589-05

BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning "Abbott" District appealed the Department's determination of its 2003-04 preliminary "maintenance budget," alleging that the Department's review was not in accordance with the July 23, 2003 order of the Supreme Court.

The ALJ determined, by interim Order dated September 10, 2003, that the OAL does not have jurisdiction to determine the validity of *N.J.A.C.* 6A:10-1.2. In these proceedings, the ALJ found: 1) the Department correctly excluded tuition and maintenance reserves in its calculation of the District's projected fund balance; 2) the District's additional $2 million tax levy is an "available resource" to the District and the Department properly allocated and reduced the District's discretionary aid by the amount of this tax revenue; 3) the District is not entitled to the initial preschool expansion aid award of $204,210; 4) the action of the Department in adding to the District's fund balance a receivable in the amount of $594,001, representing the last payment of Additional *Abbott v. Burke* State Aid for the 2002-2003 school year is correct; and 5) the Department's method of calculating the District's projected fund balance by including encumbered funds is incorrect.

The Commissioner concurred with the ALJ's findings and conclusions with respect to the disputed issues with the exception that the Commissioner concluded that the Department correctly included the District's encumbered funds in projecting the District's fund balance consistent with the Department's accounting manual and instructions to the school districts with respect to the processing of year-end purchase orders, *N.J.A.C.* 6A:23-2.2 and *N.J.A.C.* 6A:10-1.2.

October 20, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4096-03

AGENCY DKT. NO. 202-6/03

BOARD OF EDUCATION OF
THE TOWNSHIP OF NEPTUNE,

Petitioner,

v.

STATE OF NEW JERSEY,
DEPARTMENT OF EDUCATION,

Respondent.

Richard E. Shapiro, Esq., for petitioner

Ray Lamboy, Deputy Attorney General, for respondent (Peter Harvey, Attorney General of New Jersey, attorney)

Record Closed: September 24, 2003 Decided: September 26, 2003

BEFORE **JOSEPH F. MARTONE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

By letter of its counsel dated August 28, 2003, the Board of Education of the Township of Neptune, one of 28 urban special needs *"Abbott"* school districts, notified the OAL of its intention to pursue its pending appeal from the Department of Education's (DOE's) August 27, 2003 Notice of Preliminary Maintenance Budget Figure for 2003-2004 and Estimate of

Discretionary Additional *Abbott v. Burke* State Aid Award.

By way of background, on March 24, 2003, the DOE moved before the Supreme Court for an order modifying the decision in *Abbott v. Burke,* 153 *N.J.* 480 (1998) *(Abbott V). See also Abbott v. Burke,* 172 *N.J.* 294 (2002) (*Abbott IX*). The DOE requested that the discretionary Additional *Abbott v. Burke* State Aid (supplemental aid) that it would be required to provide to *Abbott* districts in 2003-2004 be limited to an amount sufficient to support those programs, positions and services in the districts' approved budgets for 2002-2003. On April 8, 2003, the Education Law Center (ELC) cross-moved for an order setting an expedited schedule for the DOE's decisions on districts' budgets and requiring the DOE to conduct a formal evaluation of the implementation of Whole School Reform (WSR), and other relief.

On April 29, 2003, the Supreme Court ordered the DOE and the ELC to participate in mediation before the Hon. Philip S. Carchman, J.A.D., to attempt to resolve issues raised by their motions. Mediation resolved all issues except the 2003-2004 budget process, and the DOE's motion for an order extending by an additional year the one-year relaxation of remedies granted in *Abbott IX* which remained outstanding. However, the parties agreed to an expedited schedule for budget approvals and appeals beginning with the DOE's reviews and approvals of districts' budgets by May 30, 2003. Districts' appeals from the DOE's reviews were to be transmitted to the Office of Administrative Law (OAL), where administrative law judges (ALJs) were to issue initial decisions (IDs) within 50 days of the appeal. The Commissioner was to issue final decisions within 25 days of the IDs. On May 20, 2003, the Supreme Court issued an order incorporating the parties' mediation agreement and providing that the schedule would remain in effect until further order of the Court.

On May 30, 2003, the DOE issued decisions on the *Abbott* districts' budgets. In this case, by letter of that date, the DOE's Assistant Commissioner, Division of Abbott Implementation notified the district that the DOE had completed its initial review of the district's 2003-2004 expenditure budget dated May 5, 2003, that the expenditure budget was approved except as noted in the letter. On June 5, 2003, the district's verified petition of appeal was filed with the Department. *N.J.S.A.* 18A:6-9. The DOE transmitted the contested case to the OAL, where it was filed on June 9, 2003, for hearing as a contested case. On June 20, 2003, the Department's

answer was filed in the OAL.

On June 24, 2003, the Supreme Court issued an Order approving the mediated agreement and scheduling argument on the DOE's motion for an order extending the relaxation of remedies granted in *Abbott IX.* On July 23, 2003, the Supreme Court granted the DOE's motion and relaxed *Abbott v. Burke,* 153 *N.J.* 480 (1998) *(Abbott V)* remedies as applied to the 2003-2004 budget process. In its Order, the Court gave the DOE the authority to treat the 2003-2004 school fiscal year as a maintenance year for purposes of calculating Additional *Abbott v. Burke State* Aid for the *Abbott* districts. During 2003-2004, K-12 programs provided for in the 2002-2003 school year were to be continued, subject to conditions set forth in the Order. The Court's July 23, 2003 Order also defined the term "maintenance budget" as follows:

> A maintenance budget shall mean that a district will be funded at a level such that the district can implement current approved programs, services, and positions and therefore includes documented increases in non-discretionary expenditures. Examples of non-discretionary expenditures are increases in contracted salaries, health benefits, and special education tuition. Maintenance does not include the restoration of programs, positions, or services that were reduced in 2002-2003, or new programs, positions, or services, except in respect of Paragraph 2c. of the Court's Order of June 24, 2003 (pertaining to those elementary schools without a whole school reform developer in place in 2002-2003 and permitting whole school reform contracts in certain circumstances), irrespective of the timing for the promulgation of regulations governing that provision.

With respect to appeals of the DOE's determinations, the Court's Order provided:

> *Abbott* districts may appeal any reductions to their maintenance budgets by the DOE's application of the effective and efficient standard, which appeals shall be heard by the [OAL]. In those appeals, the DOE shall bear the burden of moving forward to establish the basis for any proposed reductions to the district's maintenance budget based on the effective and efficient standard set forth in the DOE's emergency regulations. If that initial burden is met, the district shall bear the burden of demonstrating that any budgetary reductions are not justified under that standard.

Finally, by its Order, the Supreme Court set a schedule for new DOE decisions on supplemental funding and the administrative appeal and hearing process. The Court fixed a

schedule requiring the OAL to issue initial decisions on district appeals from the DOE's preliminary maintenance budget figures for the 2003-2004 school year within 30 days of the dates of those decisions as set forth in Paragraph 4 of the Order. It ordered the DOE to promulgate emergency regulations governing the process.

The DOE, relying on the Fiscal Year 2004 Appropriations Act and the Supreme Court's July 23, 2003 Order, promulgated emergency regulations amending *N.J.A.C.* 6A:10, including *N.J.A.C.* 6A:10-1.2, -3.1, -4.2, and -4.7. The regulations are effective August 22, 2003, and expire June 30, 2004. Among these emergency regulations, *N.J.A.C.* 6A:10-1.2 states:

> "Maintenance budget" means, for the 2003-2004 school year, a budget funded at a level such that the district can implement 2002-2003 approved and provided programs, services, and positions and includes documented increases in non-discretionary expenditures and adjustments for actual 2002-2003 expenditures. Examples of non-discretionary expenditures are increases in contracted salaries, health benefits, and special education tuition. Maintenance does not include the restoration of programs, positions, or services that were provided in previous years or new programs, positions, or services unless necessary to meet paragraph 2c of the Supreme Court's order of June 24, 2003 in *Abbott v. Burke.* Maintenance also does not include non-recurring 2002-2003 expenditures.

On August 27, 2003, the DOE issued to Neptune its Notice of Preliminary Maintenance Budget Figure for 2003-2004 and Estimate of Discretionary Additional *Abbott v. Burke* State Aid Award. On August 28, 2003, the Board of Education of the Township of Neptune notified the OAL of its intention to pursue its pending appeal.

A telephone prehearing conference was held on September 3, 2003, and during that conference the school district argued that the emergency regulation promulgated by the DOE defining "maintenance budget" is inconsistent with the Supreme Court's Order of July 23, 2003, and should be disregarded. I asked the parties to submit legal argument on the issue whether the OAL has the authority to disregard the provisions of a duly adopted regulation. David G. Sciarra, Esq., also submitted legal argument on this issue on behalf of *Amicus Curiae, Abbott* Plaintiffs. By an Order entered in this matter on September 10, 2003, I adopted a prior ruling by ALJ

Tassini in *Board of Education of the City of Asbury Park v. New Jersey Department of Education,* OAL Dkt. No. EDU 4095-03, that the school district's challenge to the validity and applicability of *N.J.A.C.* 6A:10-1.2's "maintenance budget" may not be heard in the OAL and the regulation must be applied in the OAL. In addition, I concluded that the language used in the DOE regulation is consistent with the definition of "maintenance budget" established by the Supreme Court.

A hearing in this matter was scheduled for September 4, 9, 10 and 15, 2003. Through the efforts of the parties, the issues were substantially narrowed in scope, and all but one hearing date was adjourned. A hearing was held on September 15, 2003. At the conclusion of the hearing, the record remained open to permit the submission of written closing arguments. When these were received, the record was closed on September 24, 2003.

FACTUAL DISCUSSION

The first witness to testify at the hearing of this matter was Dr. Michael Lake, Superintendent of Schools for petitioner. Dr. Lake testified that for the 2002-2003 school year, the Department of Education declined to fund a number of paraprofessional positions, school security and security personnel, and the cost of programs for the technology department, including an additional position. These items were previously reduced from the budget and were required to be eliminated.

Dr. Lake explained that the school district felt so strongly that these positions and programs were essential for the benefit and proper education of its students that a campaign was mounted and taxpayers were urged to approve the proposed school district budget which included these additional items (P-1). As a result, the budget was approved by a narrow margin and this additional funding was included in the school district's budget for the 2003-2004 school year. However, the DOE has taken the position that these additional funding amounts are to be included in surplus and are available to reduce State aid.

David A. Mooij, the School Business Administrator and Board Secretary, also testified concerning this funding. The Board of Education is required to develop a budget and to establish

local taxes for the 2003-2004 school year. In order to include any additional items in the school district budget it was believed necessary to raise the local tax levy, and the Board decided to go ahead with this plan. The intent was to include in the school budget funding for unfunded and non-approved programs, including services and personnel, in order to return the school district to the same level as in the 2001-2002 school district budget. A publicity campaign was undertaken in order to obtain taxpayers' support for this proposal (P-1). The voters eventually approved the school district's budget by 13 votes. He identified the Board of Education proposed budget resolution (P-2) and the certificate and report of school taxes, which established the tax levy for the 2003-2004 school year (P-3).

Mr. Mooij testified that there was no direction by the DOE as to how the additional tax levy may be used, and the school district put the two million dollars into play in this budget. However, the DOE has now reduced additional *Abbott* Aid by the two million dollars raised by the school district and intended to be utilized for these programs. Thus, the school district is not being permitted to use these funds in order to fund non-approved programs. The net effect is to reduce the burden of the DOE, contrary to the intent of the voters.

Mr. Mooij also testified concerning the issue of preschool expansion aid. By memorandum dated February 26, 2003, Richard Rosenberg of the Division of School Finance indicated that the 2003-2004 initial award of preschool expansion aid was the amount of $204,210 (P-5). However, the $204,210 amount is not in State aid (P-4). If this amount is not funded, the school district will have to make it up out of its fund balance.

Peter J. Leonard, Assistant Business Administrator and Assistant Board Secretary for the school district, and a Certified Public Accountant, also testified in this matter. He testified that he could not tie in the numbers contained in the DOE's August 23, 2003, final estimate worksheet (P-4) with many of the numbers in the school district's budget. In addition, with respect to the DOE Notice from Gordon MacInnes, Assistant Commissioner, dated August 27, 2003, specifying *Abbott* funding, he does not know where the projected surplus (fund) balance came from or how the two percent surplus was calculated.

Mr. Leonard testified that the amount not being provided by the State for *Abbott* funding

is $555,925. His estimate of the two percent required surplus is based on a total budget of $56,022,058.90 and two percent would be approximately 1.1 or 1.2 million dollars. His calculation shows the school district's surplus to be under two percent (P-7).

John White, DOE Budget Manager, testified that he has been employed by the Department of Education for four years. He testified that he was previously employed at the Office of Legislative Services for 27 years as an in-house school aid expert. He was assigned to the Neptune Township school district budget in the Fall of 2002. He was involved with the calculation of the Neptune Township school district budget for 2003-2004, including the *Abbott v. Burke* State Aid.

Mr. White identified the DOE's estimate of projected fund balances (P-6 and R-3). This was prepared using projected figures with unaudited numbers. However, the numbers used were not the same as those contained in the report of the school district's board secretary (P-7). He testified that the DOE used the 2002 audit as the starting point. He also emphasized that the amounts contained in the letter of August 27, 2003 (P-6) are not the final maintenance budget figures. In order to determine the final maintenance budget figures the DOE requires the true audited numbers, and these will not be available until November 2003 when the school district's Comprehensive Annual Financial Report (CAFR) is issued.

Mr. White testified that in calculating the surplus, all available revenues were included and surplus was calculated based on unspent funds from the prior year. The calculations in the Department's spreadsheet (P-4) only include actual expenditures based on the best available figures. He explained that these figures do not take into account unspent funds, or amounts which have been encumbered, but have not yet been expended. This is based on the best available figures, but these figures will be changed by the November 2003 final audit. He emphasized that encumbered amounts are included in calculating the total amount of surplus.

Mr. White acknowledged that the $8,843,176 amount set forth in Line 00284, is incorrect (P-4). He stated that this occurred because the school district failed to provide the revised actual budget. He also indicated that the error was on the revenue side and that this has no effect on the final aid amounts.

With respect to the local tax levy, Mr. White testified that the position of the DOE is that all spending in an *Abbott* district is *Abbott*-funded. An *Abbott* school district cannot set aside any portion of the local tax levy for unapproved programs and cannot fund unapproved programs.

On cross-examination, Mr. White testified that once the audited figures are made available, that there would probably be an additional amount of *Abbott* funding based on encumbered amounts that are found to have been actually expended. He admitted that he did not independently verify the open encumbrances set forth in the board secretary's report and did not include them in the August 27, 2003 letter. He also testified that with respect to tuition and maintenance reserves, an *Abbott* school district can come to the Department and get the actual amounts needed, so no amounts need be reserved. Finally, he testified that the school district will receive the preschool expansion aid, less an adjustment for what was actually spent.

LEGAL DISCUSSION

In its *Abbott* decisions, the Supreme Court has made it clear that all budget disputes related to the implementation of the Court's *Abbott* remedies should be first adjudicated by the OAL. Under those decisions, it is the responsibility of the OAL, in the first instance, to assess in these disputes whether the DOE has properly implemented the *Abbott* educational remedies and mandates.

An important function of the OAL is to conduct a thorough hearing and establish a complete record by allowing the parties to present all of their evidence relevant to the contested case, including evidence related to constitutional claims and defenses. The OAL's authority to hear and initially determine all factual and legal issues in *Abbott* cases has its genesis in the *Abbott I* decision, *Abbott v. Burke,* 100 *N.J.* 269 (1985), where it was stated,

> We anticipate that the OAL will conduct a thorough hearing, where the parties shall present all their evidence relevant to the constitutional claims and defenses. This will serve to consolidate all fact-findings in a single proceeding. We intend that the proceedings will promote development of a complete and informed record, which will reflect determinations of appropriate

> administrative issues as well as the resolution of factual matters material to the ultimate constitutional issues.
>
> [100 *N.J.* at 303.]

The Supreme Court's July 23, 2003 Order states that the Department bears the burden of moving forward to establish the basis for any proposed reductions to the district's maintenance budget based on the effective and efficient standard set forth in the DOE's emergency regulations. See, *N.J.A.C.* 6A:10-4.7(a)(3). In this matter, since the DOE made no reductions to Neptune's budget based on the effective and efficient standard (P-4), the burden of proof remains on Neptune. See, my discussion of this issue in *Bd. of Educ. of Tp. of Neptune v. Dep't. of Educ.*, OAL Dkt. EDU 727-03, EDU 728-03 (June 25, 2003).

Neptune' s Preliminary Maintenance Budget

On August 27, 2003, the Department issued notices of preliminary maintenance budget figures for 2003-2004 and estimates of discretionary additional *Abbott v. Burke* aid (supplemental aid) to the *Abbott* districts, including Neptune. According to DOE's Notice to Neptune, its preliminary maintenance budget figure was $61,934,548. (P-6). Department Budget Examiner John White testified that a uniform method was used to calculate the *Abbott* districts' preliminary maintenance budget figures and supplemental aid, as itemized and broken down on the Department's worksheet for Neptune. (P-4). Counsel for Neptune stipulated to the methodology used to calculate Neptune's maintenance budget figure.

Neptune's challenge to the maintenance budget figure is primarily a legal challenge in that it contends the DOE's regulatory definition of a maintenance budget is inconsistent with the Supreme Court's July 23, 2003 Order and should be disregarded. I have previously ruled in this matter that the DOE's definition of a maintenance budget is consistent with the Supreme Court's Order.

The DOE's August 27, 2003 notice to Neptune also provided the district with an estimate of discretionary aid of $5,236,824, based in part on a projected fund balance for Neptune of $2,274,763 as of June 30, 2003. (P-6). Budget Manager John White testified that the DOE calculated this balance by adding Neptune's audited unreserved fund balance at June 30, 2002

based on last year's CAFR and Neptune's ***unspent appropriations*** as of June 30, 2003 (R-3). The DOE reduced the balance by the two-percent required surplus pursuant to the Appropriations Act, and by an outstanding 2002-2003 account receivable in State supplemental aid of $594,001, leaving Neptune with an excess surplus or excess fund balance of $322,762. (P-6). Mr. White testified that the DOE did not adjust Neptune's fund balance for encumbrances because they could not be accurately determined when the balance was calculated. He explained that the DOE takes the position that Neptune's documented encumbrances and actual costs for goods and services that were received for 2002-2003 will be accurately determined, independently verified and ultimately factored into Neptune's fund balance when the Comprehensive Annual Financial Report is issued in November 2003.

Neptune Assistant Business Administrator Peter Leonard testified to his calculations of Neptune's projected fund balance as of June 30, 2003. (P-7). Mr. Leonard testified that Neptune's Final (Unaudited) Fund Balance for June 30, 2003 was only $1,024,895, leaving Neptune with no surplus over two percent and the DOE owing it the $594,001 account receivable. (P-7).

The major difference between the DOE's projected fund balance and Neptune's projected fund balance is that Neptune subtracted 2002-2003 encumbrances and reserve items from its projected fund balance, and the DOE did not.

The DOE takes the position that both the DOE's projected fund balance of $2,274,763 and Neptune's projected fund balance of $1,024,895 are based on the unaudited June 30, 2003 Board Secretary's Report. (P-6 and P-7). Both balances are based on estimated projections and estimated expenditures that did not undergo a detailed audit examination by an independent certified public accountant. The only common figure in the DOE's balance calculation (R-3) and Neptune's balance calculation (P-7) is Neptune's ***audited*** unreserved fund balance at June 30, 2002 of $1,081,826 determined in the prior year's CAFR. The DOE takes the position that this demonstrates why the CAFR is so important.

The DOE points out that, pursuant to *N.J.S.A.* 18A:4-14, the State Board of Education has prescribed a uniform system of bookkeeping consistent with generally accepted accounting

principles (GAAP) established by the Governmental Accounting Standards Board for use in all school districts. Each school district must ensure that its uniform system is fully consistent with GAAP. *N.J.A.C.* 6A:23-2.1(b). The financial reporting requirements of GAAP require the issuance of a Comprehensive Annual Financial Report by every school district. The CAFR is a school district's official annual report, prepared in part by independent auditors, due this year by November 5, 2003. The DOE accepts the costs and calculations in the CAFR because they have been independently audited and verified as accurate.

The DOE asserts that the 2003-2004 preliminary maintenance budget figure for Neptune is just that, preliminary and subject to the CAFR, which will reveal Neptune's actual audited expenditures for the 2002-2003 school year. Similarly, the DOE contends that its estimate of discretionary *Abbott v. Burke* State Aid is only an estimate and is also subject to the CAFR, which will reveal Neptune's true audited fund balance and available revenue, if any, as of June 30, 2003. The DOE takes the position that it would be fiscally irresponsible for it to award supplemental State aid based on Neptune's best-guess projections, unaudited financial statements, and undocumented encumbrances, especially in light of the fact that Neptune's CAFR will be available in less than two months. The DOE thus asks that I reject Neptune's unaudited balance calculation and that I rule that the DOE should calculate Neptune's true balance based on the 2002-2003 CAFR when it is issued.

However, in making the fund balance or surplus calculation, the DOE has disregarded the mandate of *N.J.A.C.* 6A:23-2.2(c)3 requiring that each local district board of education use the accrual basis of accounting in measuring its financial position and operating results. As I understand it, there are two basic accounting methods, the cash method and the accrual method. If the cash method of accounting is used, the business or governmental entity records revenues only when they are received as cash, and expenses only when they are actually paid out. However, this method can distort income and expenses, and does not give a true picture of the financial state of the entity. With the accrual method, the entity records income when the legal obligation to receive the income "accrues" regardless when it gets paid, and records expenses when it is legally obligated to pay them, even though they may not be paid until a later date. The accrual method recognizes economic events regardless of when cash transactions happen and gives a more accurate picture of the entity's financial position.

The purpose of the encumbrance system utilized by school districts is to comply with the accrual method of accounting by recording expenses when the school district is legally obligated to pay them, even though they may not yet be paid, that is, the cash transaction may not yet have occurred. Thus, these encumbered amounts are not merely "estimates" of the amounts the school district might be obligated to pay in the future, but are required to represent actual legal obligations of the school district. I **FIND** that these encumbered amounts are not "best-guess projections, unaudited financial statements, and undocumented encumbrances" as asserted by the DOE, but have been identified by the school district as amounts which it is legally obligated to pay.

In addition, the Annual Appropriations Act of Fiscal Year 2004, P.L. 2003 c. 122, authorizes the Commissioner to ". . . consider all of the district's available resources and any appropriate reallocations, including, but not limited to, a reallocation of the district's ***undesignated*** general fund balances in excess of two percent." My interpretation of the words "undesignated general fund balances" is that they refer to general fund balances that are not set apart for some specific purpose. That is clearly not the case with respect to encumbered funds since they have been set aside for a specific purpose. Therefore, I **FIND** that amounts that are set apart for the purpose of paying the legal obligations of the school district cannot be considered as "undesignated" fund balances. Under these circumstances, and based upon the provisions of the Appropriations Act and of *N.J.A.C.* 6A:23-2.2(c)3, I **FIND** that the DOE's method of calculating Neptune's projected fund balance of $2,274,763 by including encumbered funds therein is incorrect.

With respect to tuition and maintenance reserves, the argument can be made that the amounts set by the school district are clearly designated for particular purposes. However, there is no evidence in the record that these amounts have been the subject of encumbrances, or that they are anything more than estimates of future obligations. The DOE's position is that an *Abbott* school district can come to the DOE and obtain the actual amounts needed when they become due. Therefore, under these circumstances, I **FIND** that the DOE was correct in excluding tuition and maintenance reserves in its calculation of Neptune's projected fund balance. This finding may have differed if there had been a documentation establishing these

reserves as legal obligations of the school district.

The final and most troubling issue relating to the calculation of the projected fund balance involves the action of the DOE in adding to Neptune's projected fund balance a receivable in the amount of $594,001.00. This receivable represents the last payment of Additional *Abbott v. Burke* State Aid for the 2002-2003 school year ending June 30, 2003. The school district argues that it has lost the benefits of the final State aid payment for its needs that had not been met by State funding in the 2002-2003 school year. The school district's argument appears to have merit on its face, and it appears unfair and troubling for the DOE to take a credit for an amount it should have paid to the school district, but did not. However, the reality is that if this receivable is actually paid to the school district, this payment will simply have the effect of increasing the school district's projected fund balance. This is so because the 2002-2003 school year is completed and the school district will not be permitted to incur any new or additional expenses for that year. Therefore, I **FIND** that the action of the DOE in adding to the Neptune projected fund balance a receivable in the amount of $594,001.00 representing the last payment of Additional *Abbott v. Burke* State Aid for the 2002-2003 school year is correct.

Based on the foregoing, I **FIND** that the correct amount of Neptune's projected fund balance is $1,388,864. Since this exceeds the 2% required surplus by $30,864, I **CONCLUDE** that the additional amount available to be added to the fund balance net of the receivable of $594,001.00 in New Line 121 – in the revised budget is $30,864.00.

School district proposed use of taxpayer-approved tax revenues for non-approved purposes

During the hearing, Neptune's witnesses testified that Neptune voters approved a local $2 million tax levy to pay for non-approved positions, services and programs, but the DOE subsequently reduced Neptune's supplemental aid by a corresponding amount. The DOE points out that in the Annual Appropriations Act of Fiscal Year 2004, the Legislature required the Commissioner to "consider all of the [*Abbott*] district's available resources and any appropriate reallocations" in adjusting the district's discretionary aid. The DOE argues that local tax revenue is an available resource to Neptune, and such a reduction is mandated by law because the Legislature expressly required the Commissioner to consider all of Neptune's available resources

and make appropriate reallocations before awarding it discretionary aid.

In response, Neptune contends that the DOE's authority to consider all available resources is limited by the Appropriations Act to the time after the receipt and review of the CAFR. It also argues that the DOE is seizing "unavailable" funds because these funds have been voter-approved for specific purposes and are being utilized for these purposes. Finally, Neptune argues that the underlying premise in *Abbott v. Burke,* 153 *N.J.* 480 (1998) (*Abbott V*), is that if the DOE did not approve programs, services and positions, the school district has the ability to seek funding for those non-approved items from the local taxpayers. It contends that in the absence of clear legal authority local taxpayers should not be divested of their right to fund non-approved educational programs, services and positions.

I have not been able to find any language in *Abbott V* which supports Neptune's position that it has the ability to seek funding from local taxpayers for non-approved items. In fact, the opposite appears to be the case since the Supreme Court states:

> If a school demonstrates the need for programs beyond those recommended by the Commissioner . . . , then the Commissioner shall approve such requests and, when necessary, shall seek appropriations to ensure the funding and resources necessary for their implementation.
>
> [*Id.* 153 *N.J.* at 518.]

The DOE argues that pursuant to the Annual Appropriations Acts of Fiscal Year 2003, the Legislature required the Commissioner of Education to consider "all of the [Abbott] district's available resources and any appropriate reallocations" in determining the district's discretionary aid. It asserts that in the Annual Appropriations Act of Fiscal Year 2004, the Legislature again required the Commissioner to "consider all of the [Abbott] district's available resources and any appropriate reallocations" in adjusting the district's discretionary aid.

The exact language of the Appropriations Act, P.L. 2003 c. 122, is as follows:

> In making any adjustment to the discretionary award, the commissioner shall consider all of the district's available resources

> and any appropriate reallocations, including, but not limited to, a reallocation of the district's undesignated general fund balances in excess of two percent.

Based on the foregoing language, it is clear that an *Abbott* district must consider all of its available resources before submitting an application for discretionary aid. *N.J.A.C.* 6A:10-3.1(b). The DOE is required to review an *Abbott* district's budget to determine that all available resources and reallocations have been incorporated therein. P.L. 2003 c. 122; *N.J.A.C.* 6A:10-3.1(c). I **FIND** that Neptune cannot set aside tax revenue for non-approved programs while requesting that the State provide supplemental aid for approved programs as if the tax revenue was not an available resource to it. I agree with the DOE that such a scheme would effectively result in a windfall for Neptune. An *Abbott* district that seeks the benefit of supplemental State aid must also bear the burden of considering all of its available resources before receiving that aid, pursuant to statute and regulation.

Accordingly, I **FIND** that Neptune's additional $2 million tax levy is an "available resource" to Neptune and that the DOE properly reallocated and reduced Neptune's discretionary aid by the amount of this tax revenue.

Preschool Expansion Aid

In his post-hearing submission, attorney for petitioner states that petitioner will not pursue the preschool expansion aid issue at the present time. I am uncertain, based on this statement, whether petitioner is withdrawing the claim it pursued at the hearing or has simply chosen not to pursue argument on the issue. Since the issue of preschool expansion aid was dealt with at the hearing, I feel constrained to address the issue in this initial decision.

By a memorandum dated February 26, 2003 (P-5), Richard Rosenberg of the DOE's Division of School Finance, advised Neptune that its approved early childhood plan for 2003-2004 was $6,057,095, and its initial award for preschool expansion aid was $204,210. During the hearing, Neptune's Business Administrator David Mooij testified that this preschool expansion aid was not included anywhere in the DOE's calculations. However, Budget Examiner John White testified that the correct amount is included on the worksheet (P-4) under the item

heading "EC [early childhood] Plan 03-04 $5,967,430". Mr. White also testified that the early childhood plan ultimately determines the amount of preschool expansion aid. (P-4).

The DOE asserts that the Appropriations Act for Fiscal Year 2003 provides that *Abbott* preschool expansion aid "shall be based on documented expansion of the preschool program" and that the Act authorizes the Commissioner to require *Abbott* districts to provide supporting documentation to verify that the actual expansion in the preschool program had occurred in 2002-2003. It further asserts that the Act additionally authorizes the Commissioner to make appropriate adjustments to this aid based on actual need. It contends that the Appropriations Act for Fiscal Year 2004 continues this statutory scheme, and that preschool expansion aid is funded based on actual expansion, actual costs and actual need.

The specific language of the 2003-2004 Appropriations Act, P.L. 2003 c. 122, is as follows:

> The amount appropriated hereinabove as Abbott Preschool Expansion Aid is for the purpose of funding the increase in the approved budgeted costs from 2001-2002 to 2003-2004 for the projected expansion of preschool programs in "Abbott districts." Payments of Abbott Preschool Expansion Aid shall be based on documented expansion of the preschool program. Upon the Commissioner of Education's request, "Abbott districts" will be required to provide such supporting documentation as deemed necessary to verify that the actual expansion in the preschool program has occurred in the 2003-2004 fiscal year. Such documentation may include expenditure, enrollment and attendance data that may be subject to an audit. Appropriate adjustments to a district's Abbott Preschool Expansion Aid amount may be made by the commissioner based on actual need.

I agree with the DOE that Neptune's initial 2003-2004 preschool expansion aid award of $204,210 in February 2003 was initial only, based on an approved 2003-2004 early childhood plan of $6,057,095 and an expectation of a certain level of enrollment and corresponding costs. It is also clear that such award is subject to change based on any change to the early childhood plan. (P-5). Neptune's approved early childhood plan for 2003-2004 was subsequently amended and reduced after the date of the Rosenburg memorandum, February 26, 2003.

As the Rosenberg memorandum shows, the initial preschool expansion aid award of

$204,210 was calculated by subtracting the 2001-2002 approved, early childhood plan of $5,852,885 (the baseline plan) from the 2003-2004 approved early childhood plan of $6,057,095. (P-5). Any subsequent reduction to the 2003-2004 approved plan would necessarily result in a corresponding reduction to preschool expansion aid. In fact, Neptune's preschool expansion aid was amended and reduced after the Rosenberg memorandum was issued in February 2003. As pointed out by attorney for respondent, in *Bd. of Educ. of Tp. of Neptune v. New Jersey Dep't. of Educ.*, OAL Dkt. EDU 2202-03 (July 2, 2003) it is stated:

> It has been stipulated and agreed by and between the parties that the Department has approved Neptune's Early Childhood Plan for the 2003-2004 school year in the amount of $5,967,430.

This stipulated amount is reflected on the Department's worksheet. (P-4) Based upon the foregoing discussion, I **FIND** that the initial award of $204,210 is based on a previously approved early childhood plan funded at a higher level than the subsequent approved plan. I **FIND** that Neptune is not entitled to the initial preschool expansion aid award of $204,210, because that award was based on an early childhood plan that was subsequently amended and reduced, as stipulated by Neptune.

DECISION AND ORDER

For the reasons stated above, it is hereby **ORDERED** that the DOE's method of calculating Neptune's projected fund balance by including encumbered funds therein is incorrect and is hereby **REVERSED**. It is further **ORDERED** that the DOE was correct in excluding tuition and maintenance reserves in its calculation of Neptune's projected fund balance and in adding thereto a receivable in the amount of $594,001.00 representing the last payment of Additional *Abbott v. Burke* State Aid for the 2002-2003 school year, and these actions are hereby **AFFIRMED**. It is further **ORDERED**, based on the foregoing, that the correct amount of Neptune's projected fund balance is $1,388,864 and that since this exceeds the 2% required surplus by $30,864.00, the additional amount of $30,864.00 is available and is to be added to the fund balance net of the receivable of $594,001.00 in New Line 121 in the revised budget.

It is further **ORDERED** that the $2 million tax levy approved by the voters of Neptune

is an "available resource" to Neptune, and the action of the DOE reallocating and reducing Neptune's discretionary aid by the amount of this tax revenue is correct and is hereby **AFFIRMED**.

It is further **ORDERED** that Neptune is not entitled to the initial preschool expansion aid award of $204,210, because that award was based on an early childhood plan that was subsequently amended and reduced, as previously stipulated by Neptune, and the action of the DOE in this regard is hereby **AFFIRMED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within the time allowed under the existing orders of the New Jersey Supreme Court and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Notwithstanding the provisions of any rule to the contrary, exceptions to Initial Decisions of the Office of Administrative Law in *Abbott* District budget appeal matters shall be filed within five (5) days of the date of mailing of the Initial Decision, and reply exceptions shall be filed within two (2) days of receipt of exceptions. File written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 26, 2003
DATE

JOSEPH F. MARTONE, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

9-26-03
DATE

E-mailed Initial Decision to the parties on:

9-26-03

mph

APPENDIX

WITNESSES:

For petitioner:

Dr. Michael Lake

David A. Mooij

Peter J. Leonard

For respondent:

John White

EXHIBITS:

For petitioner:

P-1 Neptune Township Board of Education 2003-2004 Budget Proposal

P-2 Board of Education Budge Resolution, dated March 28, 2003

P-3 Board of Education Tax Levy for 2003-2004 School Year

P-4 Department of Education Budget Worksheet of August 23, 2003

P-5 Richard Rosenberg memo, dated February 26, 2003

P-6 Department of Education Notice of Preliminary Maintenance Budget, etc., dated August 27, 2003

P-7 June 30, 2003 Board of Education Secretary Report

For respondent:

R-3 Department of Education Calculation of Excess Surplus

OAL DKT. NO. EDU 4096-03
AGENCY DKT. NO. 202-6/03

BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

The record of this local "Abbott" District's appeal of the Department of Education's (Department) decision on its supplemental funding request for the 2003-2004 school year, and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions and replies thereto were filed by both the Board of Education of the Neptune School District (District) and the Department in accordance with the schedule established in response to the Court's order for expedition and were considered by the Commissioner in reaching this decision.

Initially, upon careful and independent review of the record, the Commissioner concurs with the Administrative Law Judge's (ALJ) September 10, 2003 Order Relative to "Maintenance Budget,"[1] that the OAL does not have jurisdiction to determine directly or indirectly the validity of *N.J.A.C.* 6A:10-1.2, as such determination is solely within the jurisdictional purview of the Appellate Division or the Supreme Court. R. 2:2-3(a); s*ee, also,*

[1] The District did not file a request to the Commissioner for interlocutory review of this Order, but its exceptions to the Initial Decision urge the Commissioner to "reject the ALJ's determination of the 'maintenance budget' issue." (District's Exceptions at 5)

Pascucci v. Vagott, 71 *N.J.* 40, 51-52 (1976); *Wendling v. N.J. Racing Com'n*, 279 *N.J. Super.* 477, 485 (App. Div. 1995). Moreover, even if it were to be assumed, *arguendo*, that the OAL has jurisdiction to determine "a choice of law" as argued by the District, the Commissioner finds that the Department's definition of "maintenance budget," as detailed in *N.J.A.C.* 6A:10-1.2, does not differ in any appreciable way from the Supreme Court's definition of that term contained in its Budget Order of July 23, 2003. Consequently, the Department's application of such regulatory definition in its review and approval of the District's 2003-2004 budget is wholly appropriate.[2]

Upon a thorough and independent review, the Commissioner concurs with the ALJ's determinations that: 1) the Department correctly excluded tuition and maintenance reserves in its calculation of the District's projected fund balance; 2) the District's additional $2 million tax levy is an "available resource" to the District and the Department properly allocated and reduced the District's discretionary aid by the amount of this tax revenue; 3) the District is not entitled to the initial preschool expansion aid award of $204,210[3]; and 4) the action of the Department in adding to the District's fund balance a receivable in the amount of $594,001, representing the last payment of Additional *Abbott v. Burke* State Aid for the 2002-2003 school year is correct. With respect to these issues, therefore, the Commissioner accepts the ALJ's factual findings and determines that his analysis and legal conclusions are consistent

[2] Consequently, pursuant to *N.J.A.C.* 1:1-14.10(j), the Commissioner adopts the ALJ's interim Order of September 10, 2003.

[3] The ALJ points out that the District indicated in its post-hearing brief that it will not pursue its preschool expansion aid claim at the present time. (Initial Decision at 15) However, stating that he is uncertain whether the District's intention is to withdraw its claim or whether it has chosen not to present arguments on this issue, the ALJ made findings on this issue and concluded that the District was not entitled to the $204,210 preschool expansion aid "because that award was based on an early childhood plan that was subsequently amended and reduced, as stipulated by Neptune." (*Id.* at 17) The sole mention of this claim in the District's exceptions to the Initial Decision appears in the District's conclusion:

> (3) require the DOE to provide the District with the pre-school expansion aid***. (District's Exceptions at 13)

with the Supreme Court's Order of July 23, 2003, as well as the Department's regulatory amendments adopted on August 22, 2003.

However, the Commissioner does not concur with the ALJ's finding that the Department erred in calculating the District's projected general fund balance by including encumbered funds in the amount of $2,274,763 because "amounts that are set apart for the purpose of paying the legal obligations of the school district cannot be considered as 'undesignated' fund balances." (Initial Decision at 12) The Commissioner believes that the ALJ's analysis reflects a fundamental misunderstanding of the differentiation between the terms "encumbrances" and "accounts payable," and how these terms are used in conjunction with an accrual or modified accrual basis of accounting. As correctly explained by the Department in its exceptions:

> An encumbrance is an accounting tool that permits a school district to set aside funds for purchase orders that were issued during the 2002-2003 school year for goods or services that were *not* received as of June 30, 2003. In the Department's manual, *Financial Accounting for New Jersey Public School Districts* (web site omitted), school districts were directed to account for unpaid purchase orders in which goods or services were received by June 30th as accounts payable liabilities, and account for purchase orders to be honored in the subsequent fiscal year by reserving them as encumbrances on their June 30th general fund balance sheets. *** If a school district complied with the manual, then the encumbrances on its June 30th balance sheet reflect liabilities for goods and services that were not received by June 30th. Encumbrances should not be deducted from a district's fund balance as of June 30, 2003, because the underlying goods and services were not actually received in the 2002-2003 school year. *See N.J.A.C.* 6A:10-1.2 (a maintenance budget is funded at a level so a district can implement 2002-2003 approved and "provided" programs, services, and positions, with adjustments for "actual" 2002-2003 expenditures).
>
> The Department's inclusion of encumbered funds in Neptune's fund balance calculation does not conflict with the accrual method

of accounting. Pursuant to *N.J.A.C.* 6A:23-2.2, school districts are required to use an accrual or modified accrual basis of accounting.

Accrual is a method of accounting

> that records the financial effects on a district board of education of transactions...that have cash consequences for the district in the periods in which those transactions...occur, rather than only in the periods in which cash is received or paid by the district. [*N.J.A.C.* 6A:23-1.2.]

An accrual reflects the fact that an obligation has been incurred or a revenue has been earned. Under the modified accrual method, an obligation is incurred when a school district has received a good or service and thus is obligated to pay for it, regardless of when the payment is made. For example, if the district received textbooks on June 2, 2003, but did not receive the invoice nor make the payment for the textbooks, the district has still incurred the legal obligation to make payment. Encumbrances are not "accrued" because the underlying obligations have not occurred yet. Those obligations will occur when the goods or services are provided. (Department's Exceptions at 3-5)

The Commissioner finds that the above explanation is consistent with the record in the matter entitled *Board of Education of the City of Burlington v. New Jersey State Department of Education*, Commissioner Decision No. 581-03, decided October 20, 2003. Therein, Keith Costello, Budget Manager/Examiner for the Department of Education, Office of Abbott Implementation, testified that, by memo dated September 16, 2003 to all school districts, Assistant Commissioner Richard Rosenberg addressed the procedures to be followed for open purchase orders and encumbrances on the school district's books as of June 30. The September 16, 2003 memo states, in pertinent part:

> Open purchase orders at June 30, 200X should be classified into the following two categories for review and reclassification:

1. Category one represents purchase orders for which the goods have been received or the services have been rendered at June 30th that have not been paid. These purchase orders must be expensed in the current audit period, the related encumbrances reversed, and a liability (accounts payable) established. If the invoice has not been received the amount must be estimated. In accordance with GAAP, an expenditure is recorded when goods are received or services are rendered.

2. Category two represents purchase orders which will be honored in the subsequent year. These purchase orders will be rolled over into the next fiscal year and will be shown in the June 30th general fund balance sheet as a reserve for encumbrances. Per NCGA Statement 1, paragraph 91 "encumbrances outstanding at year-end represent the estimated amount of the expenditures ultimately to result *if unperformed contracts in process at year-end are completed. Encumbrances outstanding at year-end do not constitute expenditures or liabilities."* (emphasis in text) (Exhibit R-1, in evidence) (*Board of Education of the City of Burlington v. New Jersey State Department of Education*, slip opinion at 17)

Accordingly, category one purchase orders and the related encumbrances are to be considered 2002-2003 fiscal year expenditures in applying *N.J.A.C.* 6A:10-1.2, but category two purchase orders are considered expenditures in the 2003-2004 fiscal year and, thus, are not to be included in development of a "maintenance budget" for the 2003-2004 school year pursuant to *N.J.A.C.* 6A:10-1.2.

The District insists that the Commissioner should accept the ALJ's conclusions with respect to encumbrances because: 1) "the ALJ had the opportunity to evaluate all of the testimony and documentary information before him at the hearing in reaching his conclusion that the DOE erred in increasing the District's fund balance by improperly excluding valid encumbrances" (District's Reply Exceptions at 3); 2) "the ALJ heard the District's testimony on how the list of encumbrances was developed and what the encumbrances represented" (*Ibid.*); and 3) the Department bases its exceptions to the ALJ's conclusions "on a document that was *not*

introduced into evidence and on factual assertions that are not part of the record." (emphasis in text) (*Id.* at 2) Notwithstanding these assertions by the District, the Commissioner finds that the resolution of whether it was appropriate for the Department to include encumbered funds in the fund balance calculation does not turn on credibility determinations or documents "not introduced into evidence," but, instead, on whether the encumbered goods and/or services were received by June 30, 2003. Assuming the District properly complied with the procedures set forth in the Department's accounting manual and Assistant Commissioner Richard Rosenberg's letter of September 16, 2003, as set forth above, encumbrances for goods and services received by June 30, 2003 were to be reversed and a liability (accounts payable) established. The District's encumbrances outstanding at year-end, therefore, represent the estimated amount of the expenditures ultimately to result if unperformed contracts in process at year-end are completed, and, thus, encumbrances outstanding at year-end do not constitute expenditures or liabilities. Although there is no dispute that expenditures for goods and/or services received by June 30, 2003 should be deducted from the District's fund balance, based on the proofs brought to this record, the Commissioner is unable to determine which, if any, of the District's encumbrances have become accounts payable by virtue of the receipt of the encumbered goods or services on or before June 30, 2003 so as to be considered 2002-2003 expenditures.

The Commissioner, therefore, concludes that it was entirely appropriate and consistent with the Department's accounting manual, *Financial Accounting for New Jersey Public School Districts*, the instructions with respect to the processing of year-end purchase orders provided to school districts in Assistant Commissioner Richard Rosenberg's letter of September 16, 2003, *N.J.A.C.* 6A:23-2.2 and *N.J.A.C.* 6A:10-1.2 to include the encumbered funds in the fund balance calculation. Any adjustments to be made will be based on updated

information with respect to the June 30, 2003 encumbrances and accounts payable for the 2002-2003 school budget year in the course of the Comprehensive Annual Financial Report (CAFR) review scheduled to begin in November 2003.

Finally, in its exceptions, the Department seeks what it terms a "correction of a factual error" regarding the District's request for State supplemental aid, stating:

> [D]uring the hearing, Neptune Business Administrator David Mooij pointed out that line item 00284 on the Department's worksheet (Ex. P-4) incorrectly indicates that the district requested $8,843,176 in Additional *Abbott v. Burke* State Aid. In fact, Neptune requested $7,651,967 in additional aid, a difference of $1,191,209. (Ex. P-2) In order to properly account for this factual error, Neptune's estimated discretionary aid must be reduced by an additional $1,191,209, to $4,045,615. (Department's Exceptions at 2)

In response, the District vigorously objects to this "correction," averring that this "alleged" error was fully discussed at hearing and that "the DOE budget manager testified 'that the error was on the revenue side and that this has no effect on the final aid amounts.'" (District's Reply at 2) The District further claims that this is a disingenuous attempt by the Department to further reduce the District's discretionary aid.

In reviewing the Initial Decision, with respect to the Department's budget manager's testimony, the ALJ states that:

> Mr. White acknowledged that the $8,843,176 amount set forth in Line 00284, is incorrect (P-4). He stated that this occurred because the school district failed to provide the revised actual budget. He also indicated that the error was on the revenue side and that this has no effect on the final aid amounts. (Initial Decision at 7)

Given the lack of specificity or any analysis of the effect of this "alleged" error in the Initial Decision, the absence of a transcript of the proceedings, and the silence of the record on this issue, the Commissioner cannot, based on the record before him, resolve this dispute.

Ordinarily, this matter would be remanded for an evidentiary hearing to fully develop the record so that a determination could be made, but, in light of the Supreme Court Order to expedite proceedings in this matter, the Commissioner concludes that the most effective approach to resolve this matter is to direct that the effect on discretionary aid, if any, of the "alleged" error be reviewed as a part of the November CAFR. In the event that a dispute remains after the CAFR, either party may subsequently seek relief by filing a Petition of Appeal to the Commissioner.

Accordingly, the Initial Decision is adopted with modification, as set forth herein.[4]

IT IS SO ORDERED.[5]

COMMISSIONER OF EDUCATION

Date of Decision: 10/20/03

Date of Mailing: N/A

[4] The Commissioner so determines, based upon the proofs brought to *this* record, while acknowledging that the presentation of such evidence may have been disadvantaged by both a Court Order to expedite proceedings and the unavailability of the Comprehensive Annual Financial Report (CAFR) until November 2003, which will reveal the District's true audited fund balance and available revenue, if any, as of June 30, 2003. In any event, beyond his determination herein, the Commissioner underscores the availability of a mechanism for Abbott districts to address needs, arising during the year due to unanticipated expenditures or unforeseen circumstances, for additional resources to implement Department-approved programs and services. *N.J.A.C.* 6A:10-3.1(g).

[5] Pursuant to *P.L.* 2003, *c.* 122, "*Abbott*" determinations are final agency actions appealable directly to the Appellate Division of the New Jersey Superior Court.

BOARD OF EDUCATION OF THE CITY OF PASSAIC, PASSAIC COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning "Abbott" District appealed the Department's determination of its 2003-04 preliminary "maintenance budget," alleging that the Department's review was not in accordance with the July 23, 2003 order of the Supreme Court. The District challenged the inefficiencies identified by the respondent in noninstructional expenditures, including a grant writer's position, the business cost center and purchased professional services for special education. The District also challenged the Department's determination of certain maintenance calculations.

The ALJ found that the OAL does not have jurisdiction to determine the validity of *N.J.A.C.* 6A:10-1.2. The ALJ also concluded that the Department properly determined inefficiencies with the grant writer's position and the business cost center, noting that the latter reduction must take into account any superceding constraints of contractual and tenure rights. Finally, the ALJ found that respondent's maintenance calculations which incorporate Consumer Price Index (CPI) adjustments of 2.11 % and an anticipated cost increase of 7 % for utilities should be upheld.

The Commissioner concurred with the ALJ's findings and conclusions and adopted the Initial Decision.

October 20, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5499-03
AGENCY DKT. NO. 203-6/03

BOARD OF EDUCATION OF THE CITY OF PASSAIC, PASSAIC COUNTY,
Petitioner,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION,
Respondent.

Deryls Maria Gutierrez, Esq., appearing for Petitioner

Allison Colsey Eck, Deputy Attorney General, appearing for Respondent
(Peter C. Harvey, Attorney General of New Jersey, attorney)

Record Closed: September 24, 2003 Decided: September 26, 2003

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

STATEMENT OF THE CASE

Petitioner, Board of Education of the City of Passaic or District, an "Abbott" special needs school district, is appealing Respondent's Department of Education (DOE or Department) review of the District's 2003-2004 expenditure budget bearing the

date of May 5, 2003. *N.J.S.A.* 18A:7F-3 "*Abbott District;*" see also *N.J.A.C.* 6A:10-1.1 *et seq.* Subsequent to filing of the initial appeal, there were several orders of the Supreme Court, as set forth more fully below: ultimately the issues on appeal were those arising out of the amended DOE budget letters issued on August 27, 2003. (J-1)

Although Petitioner set forth ten specific items to be resolved through litigation, as a result of the settlement conference held on August 29 and subsequent negotiation, all but three of the items were settled or withdrawn. (Appendix I). The issues to be determined herein are, first, to determine which definition of the term "maintenance budget" should be applied; however, the threshold question of whether the Office of Administrative Law has jurisdiction to make such a determination must first be resolved. The second issue which must be addressed is whether DOE has made a *prima facie* case of three specifically identified inefficiencies in the non-instructional programs including the business center, the grant writer position and purchased professional services for special education. Finally, if DOE has made a *prima facie* showing identifying the inefficiencies, Petitioner must demonstrate any budgetary reductions are not justified under the effective and efficient standard. (July 23 Order at 5.]

PROCEDURAL HISTORY

On March 24, 2003, the Commissioner of Education (Commissioner) moved before the Supreme Court for relief from some of the mandates of *Abbott v. Burke*, 153 *N.J.* 480 (1999) (*Abbott V*). Specifically, the Commissioner requested that discretionary Additional *Abbott v. Burke* State Aid (supplemental aid) be limited in 2003-2004 to providing support for those programs, positions and services in the Abbott districts' approved budgets for 2002-2003.

On April 8, 2003, the Education Law Center responded to that motion and made a cross motion for relief, requesting an expedited schedule for the review and approval of Abbott district budgets and the appeals arising therefrom. On April 29, 2003, the

Court ordered the parties into mediation before the Honorable Philip S. Carchman, J.A.D.

During the mediation, the parties resolved all of the issues except that of the 2003-2004 budget process. The parties, however, did agree to an expedited schedule for budget approvals and appeals which commenced with the DOE review and approval of district budgets by May 30, 2003. In that expedited schedule, the OAL would render an Initial Decision within 50 days of the appeal, and the Commissioner would render final decisions within 25 days of the Initial Decision. On May 20, 2003, the Court entered an order incorporating that agreement. The Order provided that the schedule would "remain in effect until the further Order of the Court."

On May 30, 2003, the DOE rendered decisions on all of the Abbott budgets using the maintenance standard that it had requested that the Court approve. Twenty-three districts (including Passaic) filed appeals from the decisions and those appeals were transmitted to the OAL. All 23 appeals challenged the standard employed by DOE in approving the budgets for 2003-2004.

On June 24, 2003, the Supreme Court issued an Order in *Abbott v. Burke* incorporating the terms of the mediation agreement and scheduling oral argument for July 10, 2003 on the remaining issue of the 2003-2004 budget process.

On July 23, 2003, the Supreme Court issued an Order (July 23 Order) in favor of the Commissioner, granting the application for relaxation of the *Abbott V* remedies as applied to the 2003-2004 budget process:

> The DOE shall have the authority to treat the 2003-2004 school year as a maintenance year for purposes of calculating Additional Abbott v. Burke State Aid for the Abbott districts. During 2003-2004, K-12 programs provided for in the 2002-2003 school year will be continued, subject to conditions set forth in this Order.

[July 23 Order at 4].

The Court went on to establish a schedule for the provision of new DOE decisions on supplemental funding and the administrative hearing process to follow on "the DOE's application of the effective and efficient standard." *Id.* at 7. The Court also directed the promulgation of emergency regulations on the standard. *Id.* at 5-6.

On August 22, 2003, consistent with the authority granted in the FY2003 Appropriations Act, the Commissioner promulgated emergency regulations as directed by the July 23 Order.[1] The DOE defined "maintenance budget" as the standard for reviewing the Abbott Districts' 2003-2004 applications for additional supplemental funding as follows:

> for the 2003-2004 school year, a budget funded at a level such that a district can implement 2002-2003 approved and provided programs, services and positions and includes documented increases in non-discretionary expenditures and adjustments for actual 2002-2003 expenditures. Examples of non-discretionary expenditures are increases in contracted salaries, health benefits and special education tuition. Maintenance does not include the restoration of programs, positions or services that were provided in previous years or new programs, positions or services unless necessary to meet paragraph 2c of the Supreme Court's Order of June 24,2003 *Abbott v. Burke*. Maintenance also does not include non-recurring 2002-2003 expenditures.
>
> [*N.J.A.C.* 6A:10-1.2].

[1] The FY2003 Appropriations Act, L. 2003, c. 122, provides in pertinent part:

> The Commissioner of Education shall not authorize the disbursement of funds to any "Abbott district" until the Commissioner is satisfied that all educational expenditures in the district will be spent effectively and efficiently in order to enable those students to achieve the core curriculum content standards. The Commissioner shall be authorized to take any necessary action to fulfill this responsibility, including but not limited to, the adoption of regulations related to the receipt and/or expenditure of State aid by the "Abbott districts" and the programs, services and positions supported thereby. Notwithstanding and provision of P.L. 1968, C. 410 (C.52:14B-1 *et seq.*), any such regulations adopted by the Commissioner shall be deemed adopted immediately upon filing with the OAL.

On August 27, 2003, the DOE issued decisions establishing a preliminary maintenance budget figure and the amount of additional supplemental funding needed to support that budget for each of the 23 "appealing" Abbott districts, including Passaic. Pursuant to the regulatory definition of a maintenance budget in *N.J.A.C.* 6A:10-1.2, the DOE used the 2002-2003 school year as a baseline to determine Passaic's preliminary maintenance budget figure for 2003-2004.

The preliminary maintenance budget figure reflects instructional and non-instructional programs that were approved and provided for in the 2002-2003 school year, including increases for non-discretionary costs, as well as adjustments based on Passaic's actual 2002-2003 expenditures.[2]

During a telephone prehearing conference in one of the other "Abbott" cases, Petitioner asserted DOE's regulatory definition of a maintenance budget was inconsistent with the Supreme Court's July 23, 2003 Order.

Subsequently, Passaic notified me that it joined in that contention. I requested and received legal argument from both sides on the issue

LEGAL ANALYSIS AND CONCLUSION

I. *Definition of Maintenance Budget*

This matter was scheduled for hearing to commence on August 29, 2003 and to continue on September 8, 12 and 15, 2003. Because DOE issued new budget review letters late in the day on August 27, 2003, these parties requested the August 29 hearing date be converted to a settlement conference. I granted this request and, during a status conference call on Thursday, September 4, 2003, the parties indicated that three inefficiencies, out of ten set forth in the August 27, 2003 letter, remained in

[2] "Actual 2002-2003 expenditure" is defined by regulation as a cash or accrued expense in the 2002-2003 school year for goods and/or services received in the 2002-2003 school year. *N.J.A.C.* 6A:10-1.2.

contention. (See Appendix I). The representatives requested a determination of whether the definition of maintenance budget promulgated in the emergency regulations is inconsistent with the Supreme Court's Order of July 23, 2003 and, therefore, should be disregarded.

I have reviewed the submissions of both parties as well as the orders issued in *Board of Education of the City of Asbury Park v. New Jersey Department of Education,* OAL DKT NO. EDU 4095-03, Order Relative to maintenance Budget," September 4, 2003 and *Board of Education of the Township of Neptune v. New Jersey Department of Education,* OAL Dkt. No. EDU 4096-03, "Order Relative to "Maintenance Budget," September 10, 2003. I agree with the conclusions of my colleagues who have determined in the first instance that since Petitioner's contention is essentially a challenge in the validity of the regulation, OAL lacks jurisdiction to determine issue and, in the second instance, concluding the definition of "maintenance budget" in the regulation does not differ in any significant way from the definition in the Supreme Court's definition.[3]

I **CONCLUDE** that the legal principles enunciated in *Asbury Park* and in *Neptune* are fully applicable to this matter and incorporate them herein as if set forth in full. Both are attached as Appendix II and III. Based upon those legal principles, I **CONCLUDE** the appropriate definition of "maintenance budget" is that which is set forth at *N.J.A.C.* 6A:10-1.2.

II. *Effectiveness and efficiency of non-instructional expenditures*

The emergency regulation governing application for additional supplemental funding for the 2003-2004 school year requires Respondent to review the non-instructional

[3] See *Board of Education of the Township of Neptune v. New Jersey Department of Education,* OAL Dkt. No. EDU 4096-03, Order Relative to "Maintenance Budget," September 10, 2003 (recognizing Petitioner's assertion that he issue is not a facial challenge to the regulation, but presents a choice of law questions, *i.e.,* whether to apply the Supreme Court's definition of "Maintenance Budget: or the different regulatory definition adopted by DOE; concluding that the language in each definition is consistent with the language in the other). (Attached hereto as Appendix I & II respectively).

expenditures in the 2002-2003 budget, on which the 2003-2004 school year is based, to ensure that they are effective and efficient. The regulation then sets forth the mechanisms by which the determination of effectiveness and efficiency of non-instructional expenditures shall be measured. These mechanisms include a comparative analysis of non-instructional expenditures to those of other school districts and/or historical data in the district, an analysis of staffing needs, and a review of non-instructional programs which may be funded through other sources or, in the alternative, that funding is not available because the expenditure is not essential to the provision of a thorough and efficient education. For those inefficiencies which are sustained by the Commissioner, a reduction in Petitioner's budget shall be made. *N.J.A.C.* 6A:10-3.1.

In this case, when Respondent's letter dated August 27, 2003 was issued, Petitioner identified ten "inefficiencies" which the District intended to appeal. The first scheduled date of hearing, September 29, was converted to a settlement conference[4] and, by the day of hearing, the ten issues had been reduced to three.[5] There were, however, six last minute "maintenance issues" raised for the very first time at a late afternoon conference with the attorneys on the Friday before the hearing.

The first inefficiency identified by Respondent is the grant writer's position. While the DOE representative was explicit and strenuous in his support of maintaining this position, he testified that, after completing the analysis of this position, currently funded at 67% from the General Revenue fund and 33% from Special Revenue fund, he came to the conclusion the position could be funded through sources other than through Petitioner's budget and made a $30,000 reduction in the District's budget for this position. He made this determination by comparing Passaic with other districts as well as examining alternative funding sources. For example, some grants permit a district to charge for indirect costs which could be used to capture a portion of the grant

[4] The cooperation between the District and DOE representatives in attempting a resolution in this matter has been exemplary. The parties spent many hours here at OAL negotiating their differences. I commend them for the time and effort they expended.

[5] Attached as Appendix I is Petitioner's letter indicating the ten issues and which had been withdrawn and which remained to be heard on the date of hearing.

writer's salary. Moreover, he recommended that the District investigate the viability of using so called "carry-over" grant funds to fund a portion of the grant writer's salary. The witness further testified that he, as the Coordinator of the Northern Region and Budget Manager for Passaic, has seen "carry-over" grant money revert to the grantor because Passaic failed to monitor the grants to prevent this from happening. This testimony was unrebutted.

The language of the regulation requires Respondent to identify expenditures which may be funded through other funding sources. Based on DOE'S analysis, I **FIND** Respondent has identified this expenditure as an inefficiency. I further **FIND,** based on the witness' testimony of the comparison to other districts as well as his analysis of alternative funding sources, Respondent has made a *prima facie* case for the reduction of the budget item relating to the grant writer's position.

Petitioner's witness, the grant writer, replied that the amount of grant money which the writer has brought in over the period of her tenure more than justifies her salary. In addition, the District asserts that many Abbott districts have grant writing positions whose entire salary is paid by the District. While the record is clear that the position is essential to the District, such conclusory statements are not sufficient to support elimination of recommended reduction. The grant writer herself testified that if more of her salary was attributed to "carry over" funds, she would have to allocate a greater percentage of her time to grant management, which has to do with implementing the programs for which the grant is provided, rather than grant development, which is concerned with the researching of ideas and the writing of grant proposals. Given the unrebutted testimony regarding the reversion of carry over funds to the grantors, I **FIND** there is clearly a need for better grant management in the District.

With respect to the suggestion that a portion of the grant writer's salary be funded through indirect costs, the grant writer testified that this could not be done because Passaic did not have an indirect cost rate, which is required in order to apply

for salary funding through indirect costs, which are certain administrative costs involved in the programs for which the funds are granted.

Moreover, according to the Business Administrator, indirect costs are only applicable to Title I grants. There was, however, no explanation of what Title I grants are and how much of the total grant funding is attributable to Title I nor was there an explanation of why Passaic has not applied for the rate. Finally, Petitioner has not demonstrated other funding sources are not available.

Based on the totality of the testimony, I **FIND** that Petitioner did not sustain the shifted burden of demonstrating that this budgetary reduction is not justified under the effective and efficient standard. I **CONCLUDE**, therefore, that DOE properly determined that there is an inefficiency in this position and that the reduction in the budget of $30,000 was proper and is affirmed.

Turning now to the issue of the efficiency and effectiveness of the Business Cost Center, DOE determined that $150,000 in the business cost center should be reduced as inefficient. DOE's representative, the Budget Manager for the District who is also the Coordinator of the Northern Region, evaluated this cost center by reviewing the number of business office personnel in other Abbott districts. (R-1). Although this Cost Center includes business office personnel as well as other administrative personnel, Respondent's focus was on the business office. In its relevant submissions to DOE, Passaic represented that it had 31 positions in this cost center.

Respondent's witness testified that in coming to this determination, he took the following factors into consideration:

a) the large number of non-degree (uncertified) individuals earning extremely high salaries, in excess of $50,000, in comparison to other districts;
b) the Business Administrator is the highest paid in the State of New Jersey; and

c) the Assistant Business Administrator is paid a "significant" salary.

Respondent's representative noted other *Abbott* school districts operate without an Assistant Business Administrator; in addition, Passaic is presently operating without two FTE's.[6] A proposed budget manager has not been hired and one vacancy exists in the position of assistant payroll coordinator.

Based on the testimony that the Business Administrator is the highest paid in the State and the Assistant Business Administrator receives a significant salary, as well as the fact that the two vacancies exist and there has been no testimony that keeping these positions vacant has had a deleterious effect on the operation of the business office, I **FIND,** to the extent of the salaries and benefits related to the two vacancies, Petitioner has failed to rebut Respondent's *prima facie* showing of inefficiency in the business office. The record is devoid of any testimony or documentation of specific need for an Assistant School Business Administrator.

In addition to keeping the two positions vacant, Respondent testified since the salaries of the Business Administrator and his assistant, as well as those of other high level administrative personnel not covered by a collective bargaining agreement are among the highest in the State, he suggested that an efficiency in the business office might be accomplished by a salary freeze. The record is clear that the witness was aware that at least one of the employees in this category is tenured, and, therefore, enjoys the protection of the tenure statute.[7]

Because Respondent identified the salaries of these administrators as a possible source of inefficiency, Petitioner must demonstrate reductions based on these salaries are not justified, which Petitioner has failed to do. Although these are individuals not covered by collective bargaining agreements, there are issues of contractual rights, and, perhaps, protection of the tenure law. There is nothing in the record to

[6] Full Time Employee
[7] *N.J.S.A.* 18A:6-10

demonstrate which of these administrators may be protected by the tenure statute or may have contractual rights which would be affected by a wage freeze. I **FIND**, therefore, to the extent that these top administrators are protected by contractual rights and/or the tenure statute, the payment of a salary increase is non-discretionary; I further **FIND**, however, Petitioner has failed to demonstrate any budgetary reduction in the business office account is not justified. Accordingly, I **CONCLUDE** the determination an inefficiency exists in the business office was appropriate; I further **CONCLUDE** an appropriate deduction from Petitioner's budget in accord with the superceding constraints of contractual rights and the tenure statute is appropriate.

The third inefficiency identified by Respondent is in the area of purchased professional services in Special Education. The record is clear Passaic has historically had difficulty in budgeting in this area and there is significant variation in the spending per special education student in Passaic in comparison with that of other Abbott Districts. In comparison to the other districts, Passaic's per pupil amount is considerably higher than the average and significantly higher than the next closest school district by more than $700 per pupil, according to DOE's testimony. Moreover, the average cost for purchased professional services in Passaic is $1484, the highest of all the Abbott districts, in which the average is $210. These numbers were not disputed.

Accordingly, one of the economies suggested by Respondent was for the District to consider employing "in house" providers of related or purchased services rather than paying consultant a "per hour" fee for services. The testimony of Petitioner's two witnesses on this point, however, was consistent and persuasively credible. Both testified that the District has been unable to hire staff consultants, such as speech therapists; therefore, there is a need to purchase the services on a "per hour basis". The requirements are driven by the IEP[8] in each individual student's case and they fluctuate throughout the year. In addition, although Respondent asserted purchasing

[8] Individual Education Plan

the required services on a "per hour basis" *could* result in higher costs, this testimony was couched in general, non-specific terms.

Based on the testimony of Petitioner's witnesses regarding the difficulty they have encountered in employing such consultants "in house" well as Respondent's recognition increased spending in new IEP's depends on the composition of the district and the requirements of each district's special education population, I **FIND** Petitioner has successfully rebutted the *prima facie* case on this issue. I **CONCLUDE,** therefore, that a reduction in Petitioner's budget based on this inefficiency is inappropriate.

III. *Determination of Certain Maintenance Calculations*

Literally on the eve of hearing, the District raised the issue of whether six maintenance calculations had been properly determined. The parties reached an agreement with respect to four of those calculations. (See Appendix IV). Only the propriety of the calculations of the CPI and the utilities adjustments remain to be determined.

The Supreme Court's July 23, 2003 Order and the Department's regulations require the Department to provide increases for non-discretionary costs in the 2003-2004 maintenance budget; neither the Court nor the Department require adjustments for discretionary costs. Although not required to provide an adjustment for discretionary increases, the Department decided to provide an across the board cost of living increase to all of the non-salary cost centers not otherwise specifically provided for in the list of non-discretionary increases. The Department also provided an increase for utility costs, which could be considered both discretionary and non-discretionary. Utilities are non-discretionary since electricity and heat need to be provided, but utility costs are also discretionary since the school district can seek to control the usage and costs through other providers and engaging in conservation measures.

Petitioner challenges both of these calculations.

A. Consumer Price Index – 2.11% Non-Salaried Increase

Respondent's witness testified the CPI[9] adjustment was a catch-all adjustment which was intended to provide the districts with a little extra funding to cover unforeseen increases in their budget. The CPI calculation in the maintenance budget is an average of the CPI rate for the New York/Northern New Jersey area and the Philadelphia/Southern New Jersey, in accordance with the statutory provision set forth in *N.J.S.A.* 18A:7F-3 which states:

> CPI means the average annual increase, expressed as a decimal, in the CPI for the New York City and Philadelphia areas during the fiscal year preceding the prebudget year as reported by the United States Department of Labor.

Although the Northern New Jersey CPI may be higher, the Department relied upon the CPI rate calculated pursuant to statute for all of the state aid figures in the state, and used the CPI figure provided by the Department of Finance when it calculated the CPI adjustment to the maintenance calculation. Although I agree with Petitioner's assertion that this calculation does not take into consideration the rising cost of non-salaried items that a school district must necessarily purchase in order to provide a thorough and efficient education to its pupils, especially when that district is located in an area with a higher CPI, I **FIND** that there is a reasonable basis for Respondent's calculation; furthermore, the methodology, *i.e.,* the averaging of New York and Philadelphia areas, is required by statute. I am, therefore, constrained to **CONCLUDE** Respondent's determination concerning the rate of 2.11% must be upheld since it was calculated pursuant to Department procedures for all school districts and in accordance with statutory requirements.

In addition to the rate of the CPI adjustment, Passaic also challenges the total number of accounts to be included in the calculation of the CPI adjustment. Respondent's witness testified he looked at the total expenditure in the 2002-2003 year

[9] Consumer Price Index

for the non-salary accounts. He then deducted the amounts included in separate cost driver adjustments, specifically, salaries, health benefits, charter school tuition, special education, transportation for special education, social security FICA and utilities, as well as the amount for compensated absences, which was an area of inefficiency that the parties are attempting to eliminate. After he made these deductions from the sum of non-salary accounts, the witness testified he arrived at a figure of approximately ten million dollars. He then multiplied that amount by the 2.11% average to determine that the district should receive a CPI adjustment in the amount of $215,877.

Passaic did not provide any evidence to challenge the Department's total expenditures sum nor did they challenge the number of the accounts that were deducted. Mr. Lee, Petitioner's representative, and Mr. Turek, Respondent's representative, could not explain the difference between the Department's and Passaic's numbers for the sum on non-salary accounts. Each witness testified to the method he employed; however, Passaic did not provide any evidence which demonstrates that the Department's determination is unreasonable, arbitrary or capricious. Accordingly, I **FIND** DOE's calculation to be reasonable; I further **FIND** the Department's calculation of the total number of non-salary accounts, exclusive of the items otherwise provided for, and the $215,877 provided as the CPI adjustment are reasonable. I **CONCLUDE** these determinations should be upheld.

B. Utilities

Respondent recognized districts could be faced with significant utility increases. Accordingly, the Department decided to include a cost driver for utilities to provide funding for anticipated cost increases. Respondent's witness testified that he reviewed the rates of increase for a number of utility providers and determined that a seven percent increase appeared to be an average increase based upon the information he had available.

Passaic claims that its rates for utilities will increase by close to 30% for the 2003-2004 school year. Petitioner's witness testified that he called four other utility companies, all of whom declined to bid, because PSE&G rates were competitive; Petitioner's witness also testified to a conversation he had with a PSE&G representative, who, according to the witness, told him the increase in rates in the coming year would be approximately 30%. This testimony is unsupported hearsay; thus, I accord it no weight.

Moreover, Passaic's reliance on the PSE&G bulletin (P-15) is misplaced. In the first instance, that bulletin also is clearly hearsay which was uncorroborated and unsubstantiated during the hearing. Secondly, the bulletin, which is ambiguous, at best, does not state that energy bills will increase by 30%. The narrative on the two pages describes the elimination of the 14% rate freeze and the increased costs of providing service to customers, and nothing in the language states that rates will increase 30%. The only reference to anticipated increases is set forth in a side box of information on the second page which states that "PSE&G's *residential* customer bills will increase an average 15.1 percent beginning this month." (Emphasis added).

DOE's representative testified if the cost of utilities increases throughout the year, the District has the right to apply to DOE for additional funding. Although Petitioner contends this method of delaying the District's entitlement to an increase can be interpreted as nothing more than an attempt to prolong the budget appeal process, it is because of the nature of the particular circumstances surrounding energy issues, such as the recent expiration of the rate freeze and the announced increase, as well as the changing patterns of usage in the districts, that such a budget process is required. If Passaic incurs an unexpected cost increase in utilities mid-year, it can apply for additional supplemental *Abbott v. Burke* State Aid. *N.J.A.C.* 6A:10-3.1(g). I **FIND** the determination of Respondent regarding the calculation of utility increase, which is an increase granted in the discretion of DOE, *i.e.,* it is outside the parameters of the *Abbott* order, to be reasonable. I **CONCLUDE**, therefore, that Respondent's calculation should be upheld.

ORDER

Consonant with the preceding findings of fact and conclusions, I hereby **ORDER:**

Respondent's determination with respect to the grant writer position be and hereby is **AFFIRMED**;

Respondent's determination with respect to the business office be and hereby is **MODIFIED** in accordance with the conclusions set forth herein;

Respondent's determination with respect to purchased professional services for special education be and hereby is **REVERSED**; and

Respondent's determination with respect to calculation of the CPI utility adjustments be and hereby are **AFFIRMED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within the time allowed under the existing orders of the New Jersey Supreme Court and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Notwithstanding the provisions of any rule to the contrary, exceptions to Initial Decisions of the Office of Administrative Law in *Abbott* District budget appeal matters shall be filed within five (5) days of the date of mailing of the Initial Decision, and reply exceptions shall be filed within two (2) days of receipt of exceptions. File written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 26, 2003
DATE

Maria M. La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

September 26, 2003
DATE

E-mailed Initial Decision to the parties on:

September 26, 2003
DATE

jb

APPENDIX V

Witnesses

James Turek

Henry Lee

Ellen Ziff

Frank D'Ambra

Angela Gomez

Exhibits

Joint:

J-1 DOE Letter, August 27, 2003

J-2 DOE Maintenance Items, August 23, 2003

Petitioner:

P-1 Excerpt from Annual District Budget Statement Supporting Documentation (pg. F 2)

P-2 Grants Development to Date (2 pgs)

P-3 Director of Grant Management List

P-4 Districts with Grants Offices Funded Through District Funding

P-5 Final Report - Passaic Public School System Management Study, June 13, 1997

P-6 Fiscal Function, September 11, 2003

P-7 Business Office Staffing Summary

P-8 Total Administrative Cost – Indicator 8

P-9 Salaries & Benefits for Administration – Indicator 9

P-10 Contractual Salaries & FICA

P-11 Health Benefits Calculation

P-12 US Dept. of Labor CPI

P-13 CPI Adjustment by District

P-14 Statement of Energy Costs

P-15 PSE&G New Rates effective August 1, 2003

P-16 Calculation of Electric Energy Costs for LPLS Users

P-17 Calculation of Electric Energy Costs for GLP Users

P-18 Positions Transferred from General Funds Early Childhood Education

Respondent:

R-1 Business Office FTE Analysis

R-2 Rosenfarb Waters Report (pg. 16 only)

R-3 Special Education Related Costs

R-4 Student/Administrator Ration – Indicator 18

BOARD OF EDUCATION OF THE CITY OF PASSAIC, PASSAIC COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	
	:	

The record of this local "Abbott" District's appeal of the Department's decision on its supplemental funding request for the 2003-04 school year, and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties' exceptions and replies were duly submitted in accordance with the schedule established in response to the Court's order for expedition and were considered by the Commissioner in reaching this decision.

Upon careful and independent review of the record, the Commissioner initially concurs with the Administrative Law Judge (ALJ) that the OAL does not have jurisdiction to determine directly or indirectly the validity of *N.J.A.C.* 6A:10-1.2, as such determination is solely within the jurisdictional purview of the Appellate Division or the Supreme Court. R. 2:2-3(a); *see, also, Pascucci v. Vagott*, 71 *N.J.* 40, 51-52 (1976); *Wendling v. N.J. Racing Com'n*, 279 *N.J. Super.* 477, 485 (App. Div. 1995). Even if it were to be assumed, *arguendo*, that the OAL has jurisdiction to consider petitioner's argument regarding the validity and applicability of the regulation at issue, the Commissioner agrees with the ALJ that the Department's definition of

"maintenance budget," as detailed in *N.J.A.C.* 6A:10-1.2, does not differ in any appreciable way from the Supreme Court's definition of that term contained in its Budget Order of July 23, 2003.

Further, with respect to the identified inefficiencies in petitioner's non-instructional expenditures, including the grant writer position, the business cost center and purchased professional services for special education, based on the record before him and the credibility assessments of the ALJ, *N.J.S.A.* 52:14B-10(c), the Commissioner accepts the ALJ's factual findings and determines that her analysis and legal conclusions are consistent with the Supreme Court's Order of July 23, 2003, as well as the Department's regulatory amendments adopted on August 22, 2003.[1] The Commissioner additionally concurs with the ALJ that respondent's maintenance calculations incorporating Consumer Price Index (CPI) adjustments of 2.11 % and an anticipated cost increase of 7 % for utilities should be upheld.

Accordingly, the Initial Decision is adopted for the reasons expressed therein.[2]

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 10/20/03

Date of Mailing: N/A

[1] The Commissioner notes that the individuals involved in this business cost center are *not* covered by a collective bargaining agreement. (Initial Decision at 10) To the extent there is a contractual obligation to pay these individual administrators' salaries, the Commissioner clarifies that the Department is not necessarily obligated to provide funding for the increase where it has been determined to be inefficient, as it has herein. (*Ibid.*)

[2] The Commissioner so determines, based upon the proofs brought to *this* record, while acknowledging that the presentation of such evidence may have been disadvantaged by both a Court Order to expedite proceedings and the unavailability of the Comprehensive Annual Financial Report (CAFR) until November 2003. In any event, beyond his determination herein, the Commissioner underscores the availability of a mechanism for Abbott districts to address needs, arising during the year due to unanticipated expenditures or unforeseen circumstances, for additional resources to implement Department-approved programs and services. *N.J.A.C.* 6A:10-3.1(g).

[3] Pursuant to *P.L.* 2003, *c.* 22, "*Abbott*" determinations are final agency actions appealable directly to the Appellate Division of the New Jersey Superior Court.

591-03

BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning "Abbott" District appealed the Department's determination of its 2003-04 preliminary "maintenance budget," alleging that the Department's review was not in accordance with the July 23, 2003 order of the Supreme Court.

The ALJ found that the duly promulgated rule implementing the Court's order for "maintenance" controlled in this proceeding, and that the Office of Administrative Law lacked jurisdiction to determine its validity.

The Commissioner concurred with the ALJ's findings and conclusions, adopted the Initial Decision for the reasons expressed therein and dismissed the District's petition.

October 20, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 5493-03

AGENCY DKT. NO. 205-6/03

BOARD OF EDUCATION OF
THE CITY OF ELIZABETH,

Petitioner,

v.

NEW JERSEY DEPARTMENT
OF EDUCATION,

Respondent.

Richard E. Shapiro, Esq., appearing for petitioner

Kathleen Asher, Deputy Attorney General, appearing for respondent
(Peter C. Harvey, Attorney General of New Jersey, attorney)

Record Closed: September 22, 2003 Decided: September 26, 2003

BEFORE **MARGARET M. HAYDEN**, ALJ:

STATE OF THE CASE
AND PROCEDURAL HISTORY

Petitioner Board of Education of the City of Elizabeth (district), the operator of an urban special needs *Abbott* school district, appealed from the Department of

Education's (DOE) initial review of the district's 2003-2004 expenditure budget. *N.J.S.A.* 18A:7F-3.

On March 24, 2003, the DOE moved before the New Jersey Supreme Court for an order modifying the decision in *Abbott v. Burke*, 153 *N.J.* 480 (1998) (*Abbott V*) to limit the budgetary expenditures for the 2003-2004 years to those approved for 2002-2003. A subsequent Court-ordered mediation resolved most issues between the parties but the issue of the maintenance budget remained. On May 30, 2003, the DOE issued decisions on the *Abbott* districts' budgets.

In this case the DOE Assistant Commissioner, Division of Abbott Implementation, by letter dated May 30, 2003, notified the district that the DOE had completed its initial review of the district's 2003-2004 expenditure budget. On June 3, 2003, the district filed a verified petition of appeal with the department challenging parts of the budget. The DOE transmitted the matter on June 9, 2003 for a hearing as a contested case to the Office of Administrative Law. On June 12, 2003, the DOE filed its answer.

On July 10, 2003, the New Jersey Supreme Court heard oral argument on the budget process. The Supreme Court's July 23, 2003 Order (the Order) gave DOE the authority to treat the 2003-2004 fiscal school year as a maintenance year for calculating additional Abbott aid. The Order set a deadline for DOE to provide notice to each district of the preliminary maintenance budget figures and set a schedule for new DOE decisions on supplemental funding and for the administrative appeal and hearing process. The Court also ordered DOE to promulgate emergency regulations for evaluating the efficiency of non-instructural programs.

The DOE promulgated emergency regulations, effective August 22, 2003, including amending *N.J.S.A.* 6A:10 to include a definition of the term "maintenance budget". *N.J.A.C.*6A:10-1.2 states in pertinent part: "'Maintenance budget' means, for the 2003-2004 school year, a budget funded at a level such that a district can

implement 2002-2003 approved and provided programs, services and positions . . . . Maintenance does not include the restoration of programs, positions or services that were provided in previous years . . . ."

On August 27, 2003, the DOE sent to the district superintendent preliminary maintenance budget figures, setting the school district's budget at $288,116,672, inclusive of the district's general fund budget and restricted revenue accounts. The DOE's review determined that the district's need for discretionary Additional Abbott v. Burke State Aid was $7,413,285. The DOE noted that the preliminary maintenance budget and the estimated supplemental aid was subject to further adjustments after submission by the district of the 2002-2003 CAFR.

In early September 2003, the district and the DOE engaged in informal discussion over the course of several days. As a result counsel for the district notified the undersigned by letter dated September 16, 2003, that the district "does not contest any of the specific maintenance budget calculations of the department in its August 27, 2003 letter." The district further advised that there was no need for a factual hearing. As the only remaining issue was the definition of "maintenance budget," the undersigned directed the parties to file briefs on the subject on or before September 22, 2003. On September 19, 2003, DOE filed its brief. On September 22, 2003, the district filed its brief and the record closed. In its brief the district stated that it was negotiating with the DOE for stipulations but none have been received.

LEGAL ANALYSIS AND CONCLUSION

The issue here is the applicable definition of the term "maintenance budget" in these administrative proceedings. The school district argued that the Order clearly and unambiguously provided that a maintenance budget is the amount approved for 2002-2003 school fiscal year, whether or not the funds were actually spent for the approved purposes. In ordering that DOE treat the 2002-2003 school fiscal year as a maintenance year, the Court stated, "During 2003-2004, K-12 programs provided for in

the 2002-2003 school year will be continued, subject to the conditions set forth in this Order." Order, para 1. Next the Court explicitly defined maintenance budget as a budget in which "a district would be funded at a level such that the district can implement current approved programs, services and positions and therefore includes documented increases in non-discretionary expenditures." Order, para. 2. The district argued that, contrary to the DOE's emergency regulation definition, the Supreme Court's use of the terms "provided for" and "current approved" plainly denote that the maintenance budget means the approved, not the actual, expenditures.

Additionally, the district argued that the Supreme Court ordered the DOE to promulgate an emergency regulation concerning the standard for evaluating non-instructional programs, but neither required or authorized the DOE to promulgate a regulation relating to the definition of maintenance budget. Hence, *N.J.A.C.* 6A:10-1.2, the DOE's emergency regulation defining maintenance budget as "a budget funded at a level such that the district can implement 2002-2003 approved and provided programs, services and positions . . ." is not keeping with the Court's own Order. The district further argued that the term "provided for" has a completely different meaning than "provided": "provided for" being synonymous with "approved" and "provided" being "actually supplied." The district also argued that the definition in DOE's emergency regulation was contrary to the definition DOE had offered previously to the Supreme Court. "Maintenance means that a district will be funded at the level that will enable it to continue implementing the current approved programs, services and positions . . . ." (Report of the Abbott mediation (Order of April 28, 2003) attachment 4).

The DOE argued that the *N.J.S.A.* 6A:10-1.2 maintenance budget definition is consistent with the Supreme Court Order. Further, DOE submitted that the school district's objection to the definition is essentially a facial challenge to the regulation. As such, the challenge must be brought in the Appellate Division under *R.* 2:2-3(a)(2), as the OAL has no jurisdiction to determine the validity of rules. It is undisputed that no challenge to the regulation has been filed in the Appellate Division. Consequently, the current regulation is the applicable standard in all cases pending at the OAL.

The school district disagreed with the need to challenge the validity of the rule in the Appellate Division. Rather the district argued that *Abbott V* directed that all disputes concerning the *Abbott* issues must be heard at the OAL, then go to the Commissioner, with the final agency determination appealable to the Appellate Division. *Abbott V* at 526-27. Moreover, the ALJ is merely faced with a choice of law and must choose the wording of the Supreme Court over the regulation.

An administrative regulation carries a presumption of validity so that any party attacking it bears the burden of proving it is arbitrary, capricious and unreasonable or otherwise unlawful. *New Jersey Guild of Hearing Aid Dispensers v. Long*, 75 *N.J.* 544, 561-62 (1978). If an administrative regulation is within the fair contemplation of the enabling statute and is neither arbitrary nor capricious, a court will not invalidate the regulation. *Marsh v. Dept. of Environmental Protection*, 152 *N.J.* 147, 149 (1997). In creating the OAL, the Legislature provided an administrative forum for hearings on contested case of administrative agencies and for issuance of initial decisions by an administrative law judges containing recommended findings of fact and conclusions of law. *N.J.S.A.* 52:14B-2(b)-10(c). The OAL is part of the executive branch and has no jurisdiction to determine the validity of a rule. *N.J.S.A.* 52:14F-1; *Wendling v. New Jersey Racing Comm'n,* 279 *N.J. Super.* 477, 475 (App. Div. 1995). In fact, a previous challenge to the rules implementing *Abbott* funding was brought in the Appellate Division. *In re 1999-2000 Abbott Implementing Regulations*, *N.J.A.C.* 6:19A-1.1 *et seq.,* 348 *N.J. Super.* 382 (App. Div. 2002).

The crux of the school district's contention is that the regulation adds an impermissible limitation to the maintenance budget definition in the Order, which on its face is arbitrary and unreasonable. *R.* 2:2-3(a)(2) provides that an appeal challenging the validity of any state administrative agency regulation must be brought in the Superior Court Appellate Division. See also *Pascucci v. Vagott,* 71 *N.J.* 40 (1976). It is undisputed that no such appeal has been brought. Therefore, I **CONCLUDE** that the district's challenge to the validity and applicability to the *N.J.A.C.* 6A:10-1.2 definition of

"maintenance budget" is a facial challenge to the regulation, which cannot be heard at the OAL. Unless determined otherwise by the Appellate Division, the disputed definition is part of a valid regulation that must be applied at the OAL. The district's argument that this is a choice of law case and that the OAL may choose to follow the Order rather than the valid regulation gives the OAL more power than the legislature and the Supreme Court has. Plainly the *Abbott* districts would not have previously challenged the 1999-2000 regulation in the Appellate Division if the OAL were the correct forum to make the facial attack. Hence, I **CONCLUDE** that the regulation's maintenance budget definition must be applied here.

ORDER

Consistent with the above, it is hereby **ORDERED** that the *N.J.A.C.* 6A:10-1.2 definition of maintenance budget is applicable here.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within the time allowed under the existing orders of the New Jersey Supreme Court and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Notwithstanding the provisions of any rule to the contrary, exceptions to Initial Decisions of the Office of Administrative Law in *Abbott* District budget appeal matters shall be filed within five (5) days of the date of mailing of the Initial Decision, and reply exceptions shall be filed within two (2) days of receipt of exceptions. File written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Sept 26, 2003
DATE

MARGARET M. HAYDEN, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

Sept. 26, 2003
DATE

E-mailed Initial Decision to the parties on:

Sept. 26, 2003
DATE

jb

OAL DKT. NO. EDU 5493-03
AGENCY DKT. NO. 205-6/03

BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

The record of this local "Abbott" District's appeal of the Department's decision on its supplemental funding request for the 2003-2004 school year, and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The District's exceptions and the Department's reply thereto were duly submitted in accordance with the schedule established in response to the Court's order for expedition and were considered by the Commissioner in reaching this decision.

Upon careful and independent review of the record and the District's exceptions, the Commissioner concurs with the Administrative Law Judge (ALJ), that the District's challenge to the definition of "maintenance budget" in *N.J.A.C.* 6A:10-1.2 is a facial challenge to the regulation and that the OAL does not have jurisdiction to determine directly or indirectly the validity of *N.J.A.C.* 6A:10-1.2, as such determination is solely within the jurisdictional purview of the Appellate Division or the Supreme Court. R. 2:2-3(a); *see, also, Pascucci v.* Vagott, 71 *N.J.* 40, 51-52 (1976); *Wendling v. N.J. Racing Com'n.*, 279 *N.J. Super.* 477, 485

(App. Div. 1995). Moreover, even if it were to be assumed, *arguendo*, that the OAL has jurisdiction to determine "a choice of law" as argued by the District, the Commissioner finds that the Department's definition of "maintenance budget," as detailed in *N.J.A.C.* 6A:10-1.2, does not differ in any appreciable way from the Supreme Court's definition of that term contained in its Budget Order of July 23, 2003. Consequently, the Department's application of such regulatory definition in its review and approval of the District's 2003-2004 budget is wholly appropriate.[1]

Accordingly, the Initial Decision is adopted for the reasons expressed therein. The District's petition is, therefore, dismissed.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 10/20/03

Date of Mailing: N/A

[1] In that counsel for petitioner notified Judge Hayden by letter of September 16, 2003 that the District "does not contest any of the specific maintenance budget calculations of the Department of Education in the August 27, 2003 letter," the validity of the definition of the "maintenance budget" set forth in *N.J.A.C.* 6A:10-1.2 is the only remaining issue in this matter.

[2] Pursuant to *P.L.* 2003, *c.* 122, "*Abbott*" determinations are final agency actions appealable directly to the Appellate Division of the New Jersey Superior Court.

592-03

BOARD OF EDUCATION OF THE CITY OF PLAINFIELD, UNION COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning "Abbott" District appealed the Department's determination of its 2003-04 preliminary "maintenance budget," alleging that the Department's review was not in accordance with the July 23, 2003 order of the Supreme Court.

The ALJ found that the duly promulgated rule implementing the Court's order for "maintenance" controlled in this proceeding, and that the Office of Administrative Law lacked jurisdiction to determine its validity. The ALJ also concluded that: 1) the Department correctly adjusted the maintenance calculation for Funds 11 and 15 and the excess fund balance, and that any adjustments for new information will be audited and adjusted with the 2002-03 CAFR and 2) the Department's methodology for calculating the maintenance budget for the Early Childhood Plan is reasonable. The ALJ further ordered that, as set forth in Joint Exhibit No. 1, the parties will review the PSEA revenue adjustment to determine if this amount was counted twice, the Department will calculate the District's CPI adjustment based on the June 30, 2003 Board Secretaries Report at 2.1% and the maintenance budget worksheet will be revised accordingly, and that, in all other respects, the Department's determination was affirmed with respect to Plainfield's 2003-04 budget, as set forth in the determination letter of August 27, 2003.

The Commissioner concurred with the ALJ's findings and conclusions and adopted the Initial Decision for the reasons expressed therein.

October 20, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5502-03
AGENCY DKT. NO. 206-6/03

BOARD OF EDUCATION OF THE
CITY OF PLAINFIELD, UNION COUNTY,
Petitioner,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION,
Respondent.

Richard E. Shapiro, Esq., for petitioner

Diana Rosenheim, Deputy Attorney General, for respondent
(Peter C. Harvey, Attorney General of New Jersey, attorney)

Record Closed: September 25, 2003 Decided: September 26, 2003

BEFORE **ELINOR R. REINER**, ALJ:

Statement of the Case

The Board of Education of the City of Plainfield, operator of an urban special needs "Abbott District" school system appeals from the Department of Education's (DOE's) May 30, 2003 review of the District's 2003-2004 expenditure budget. More particularly, the District appeals from DOE's preliminary maintenance budget figure for

the 2003-2004 school year consisting of the 2002-2003 approved budget and an estimate of the supplemental funding that will be needed to support the 2003-2004 approved budget, as set forth in DOE's letter of August 27, 2003 by Assistant Commissioner Gordon MacInnes (J-2 and J-3).

After numerous conferences with counsel, this matter was scheduled for hearing on September 24, 2003 at the Office of Administrative Law. Witnesses who testified and exhibits considered in deciding this case are listed in the attached appendix.

Issues

Prior to the hearing, it became clear that there were essentially three issues in dispute. First, the District contends that *N.J.A.C.* 6A:10-1.2's "maintenance budget" definition conflicts with the Supreme Court's July 23, 2003 Order and should not govern this case. Second, the District argues that the DOE's calculation for funds 11, 15 and, therefore, the excess surplus fund balance does not appropriately take into account the District's actual expenditures and encumbrances as of June 30, 2003. Third, the District asserts that the DOE's "maintenance budget" worksheet improperly compared the difference between the budgeted early childhood plan for 2003-2004 and the budgeted early childhood plan for 2002-2003 rather than the actual (revised) plan of the District for 2002-2003, which was based on the District's actual enrollment in 2002-2003.

Stipulated Facts

At the hearing it became clear that the facts were essentially undisputed. The parties signed a stipulation of facts (J-1), incorporated by reference, which sets forth the relevant facts essential to a determination, as well as those issues, which have been resolved by the parties.

Testimony

In addition to the stipulated facts, the DOE relied on the testimony of Keith Costello, budget manager for the DOE, responsible for aiding the District in formulating a "maintenance budget," consistent with DOE guidelines. His testimony related solely to whether the DOE properly compared the budgeted early childhood plan for 2002-2003 to the budgeted early childhood plan for 2003-2004. Although he agreed that this comparison resulted in a decrease in the amount of money received by Plainfield for 2003-2004, he indicated that since the actual amount for 2003-2004 could not be known, the budgeted amounts for the two years were compared. This was the approach utilized in each "Abbott District." He contended that most "maintenance numbers" are based on 2002-2003 budgeted amounts.

On cross-examination, Costello agreed that the District received aid based on the actual enrollments for 2002-2003. In fact, the District received approximately $2 million less than its budgeted amount. He agreed that a budgeted plan is based on the projection of the number of children and the actual plan based on actual enrollments, which was less in this case. He further agreed that the DOE looked at the actual numbers in determining the budget for funds 11 and 15 and knew the District's actual numbers for early childhood for 2002-2003. [1]

Discussion

First to be addressed is the District's contention that *N.J.A.C.* 6A:10-1.2's "maintenance budget" definition conflicts with the Supreme Court's July 23, 2003 Order and should not govern this matter. In reaching a determination on this issue, I am persuaded by the decision of Administrative Law Judge John R. Tassini, dated September 4, 2003 in which Judge Tassini considered an "Abbott district's" challenge to

[1] Although Costello claimed that he received conflicting information as to the actual amount of money received by the District in early childhood for 2002-2003, the District agreed to stipulate to the DOE's actual numbers for 2002-2003.

the validity and applicability of *N.J.A.C.* 6A:10-1.2's "maintenance budget" definition. *See, Board of Educ. of the City of Asbury Park v. New Jersey Department of Education*, OAL Dkt. No. EDU 4095-03, Decision by Hon. John R. Tassini, ALJ on Order Relative to "Maintenance Budget" (Sept. 4, 2003). Judge Tassini determined that any challenge to a duly adopted regulation, such as *N.J.A.C.* 6A:10-1.2 must be brought in the Superior Court, Appellate Division, pursuant to *R.* 2:2-3(a)(2) and no jurisdiction exists at OAL to address that issues. He thus concluded that the regulation must be applied in the OAL.

I am further persuaded by the order of Administrative Law Judge Joseph F. Martone dated September 10, 2003, in which he agreed with Judge Tassini's determination. *See, Board of Educ. of the Township of Neptune v. State of New Jersey, Department of Education*, OAL Dkt. No. EDU 4096-03, Decision by Hon. Joseph F. Martone, ALJ on Order Relative to "Maintenance Budget" (September 10, 2003). Of import, Judge Martone also found that the language contained in the Supreme Court's Budget Order of July 23, 2003 was consistent with *N.J.A.C.* 6A:10-1.2's "maintenance budget" definition. He concluded that the Supreme Court's Order provided a reasonable basis for *N.J.A.C.* 6A:10-1.2's "maintenance budget" definition and refused to disregard the "maintenance budget" definition contained in that regulation in deciding a matter involving a particular Abbott school district.

Since I am in agreement with the conclusions reached by Judges Tassini and Martone, regarding the proper definition of "maintenance budget," I incorporate them here. Inasmuch as I agree with my colleagues, I see no reason to reiterate the arguments of counsel or further discuss their conclusions. I, therefore, **CONCLUDE** that the definition of "maintenance budget" as set forth in *N.J.A.C.* 6A:10-1.2 is applicable to this matter.

The next issue to be addressed is the District's contention that the DOE must consider the actual figures in the June 30, 2003 Board Secretary's Report rather than the figures supplied by the District by August 26, 2003. The District does not dispute that the Board Secretary's Report was supplied to the DOE on or about September 18,

2003, but argues that in any event the DOE must use that updated information rather than wait for the Comprehensive Annual Financial Review (CAFR) to make the necessary adjustments. The District contends that if the June 30, 2003 Board Secretary's Report had been available to the DOE prior to August 27, 2003, the DOE would have utilized the figures contained in that report. The District asserts that resolution of this issue should not be based on an assessment of "fault" because the District turned in the report late, but rather on what the District's 2003-2004 maintenance budget properly should be so that the children impacted by the budget are not harmed. The District argues that the DOE has the legal obligation "through the administrative process to accept supplemental documentation" and to cure any deficiencies in the District's budget resulting from the DOE's consideration of outdated and inaccurate information. Thus, the adjustments should be made based on what it has now given to the DOE and should not await the CAFR for the 2002-2003 school year, required to be submitted to the DOE by the District mid-November 2003. The District asserts that the Supreme Court's Order of July 23, 2003 requires that the District's budget issues be resolved now, not after receipt of the CAFR, which properly allows the District to plan for the school year. Moreover, there is no indication as to when the DOE will make any adjustments based on the CAFR, nor is it clear that the District would receive actual cash funding if there is an upward adjustment in favor of the District rather than an account receivable in the 2004-2005 school year. The District further points out that the DOE improperly reduced the excess fund balance over 2% on the basis of predictions in advance of the CAFR.

DOE argues that pursuant to *N.J.A.C.* 6A:24-9.6(c), the District bears the burden of proof in this case and must comply with the requirements of the DOE's duly adopted regulations in order to establish any entitlement to additional aid. The DOE argues that it used the numbers for funds 11 and 15 that were provided to it from the District by August 26, 2003. These were the most up-to-date numbers that the District had provided to the DOE prior to the issuance of the August 27, 2003 budget letter. It contends that further adjustments for actual spending and final 2002-2003 amounts should await receipt of the CAFR. More particularly, the DOE argues that pursuant to *N.J.S.A.* 18A:17-10 the Board Secretary is required to file the Board Secretary's Report

with the Commissioner on or before August 1 of each year. Pursuant to *N.J.S.A.* 18A:23-1, the school district is to have an annual audit completed not later than four months after the end of the school fiscal year. *N.J.A.C.* 6A:23-1.2 defines the CAFR to be the official annual report of a governmental unit that includes all funds and accounts groups summarizing the activities and operations performed by all units. According to the DOE, if the District's new information is, after audit, included in the CAFR, then the adjustment will be made to the District's aid award pursuant to the Appropriations Act (New Jersey Fiscal FY 04 Appropriations Act, P.L. 2003 c. 122).

I have considered the arguments of counsel and must agree with DOE's contentions. It is clear that pursuant to *N.J.S.A.* 18A:17-10 the Board Secretary is required to file the Board Secretary's Report with the Commissioner on or before August 1 of each year. In this case, the District simply did not do so. Moreover, the Supreme Court's July 23, 2003 Order set forth particular time frames for the DOE to provide notice to each district of its preliminary maintenance budget figures for the 2003-2004 school year, consisting of the 2002-2003 approved budget and an estimate of the supplemental funding that would be needed to support the currently approved budget. In actuality, these scheduling orders gave the DOE until August 27, 2003 to issue its budget decision letter to the District.

It must be pointed out here that not only did the District fail to get the Board Secretary Report to the DOE as required on August 1, 2003 but it did not get its updated figures to the DOE prior to the DOE's August 27, 2003 letter. In fact, the Board Secretary Report was not given to the DOE until September 18, 2003.

In light of this, I **CONCLUDE** that the District failed to comply with the requisite statutory requirements, as well as the scheduling requirements, essentially established by the New Jersey Supreme Court. As such, it is not only reasonable but appropriate that the District's *Abbott v. Burke* State Aid Award be adjusted based on the annual audit filed pursuant to *N.J.S.A.* 18A:23-1, if the District's new information is, after the requisite audit, included in the CAFR. I, therefore, **CONCLUDE** that the DOE correctly adjusted the maintenance calculation for Funds 11, 15 and the excess fund balance

and that any further adjustments for new information will be audited and adjusted with the 2002-2003 CAFR.

A third legal issue concerns the District's contention that in the case of early childhood, the DOE improperly used the approved 2002-2003 EC plan rather than the actual revised 2002-2003 plan after the elimination of preschool expansion aid. The District points out that since the elimination of preschool expansion aid required a reduction in the scope of the approved plan for the 2002-2003 school year, the District's revised approved EC plan had to be adjusted downward to account for the revised scope of the plan. Thus, the accurate calculation of the differences between 2002-2003 and 2003-2004 should take into account the revised, approved plan because that is all the District was able to provide in 2002-2003. The District argues that simply because the DOE consistently used this methodology, does not make it correct. The District contends that since the budgeted 2003-2004 EC plan is, until otherwise revised, the actual EC plan for 2003-2004, DOE's comparison of the 2003-2004 EC plan with the 2002-2003 EC plan should have similarly accounted for the actual revised 2002-2003 EC plan.

The DOE argues that it properly adjusted the maintenance calculation for the difference in the EC plan by comparing EC Plan Year Budget to EC Plan Year Budget. The DOE argues that it did this consistently throughout all the districts resulting in more favorable outcomes for the districts than unfavorable outcomes. The DOE contends that the negative result here should not invalidate the consistent and reasonable approach that the DOE took in dealing with this adjustment. It further asserts that even if the DOE had compared the EC Plan Budget for 2002-2003 to 2002-2003 EC Plan actual expenditures, the District would have incurred the same decrease and thus no adjustment is necessary based on the available numbers.

I have considered the arguments of counsel and must agree with the position espoused by the DOE.[2] Although I agree with the District that the consistent use of the DOE's methodology does not in itself make it correct, I do not agree that simply because it does not work to the District's advantage makes it incorrect. The methodology utilized by the DOE has been applied to all "Abbott Districts" uniformly and has served to increase maintenance budgets in over half of the Districts. The District has not established that the use of this methodology is *per se* improper, illegal, inconsistent with the New Jersey Supreme Court's Order of July 23, 2003 or violative of any of its constitutional rights. The DOE is obligated only to utilize an approach that is reasonable and uniformly applied. Here they have done so. If the methodology is to be changed in each area in which an Abbott District is not advantaged, there will be no uniformity or equity to the provision of Abbott funds. Thus, I reject the District's argument and **CONCLUDE** that the DOE's methodology is reasonable and will not be second-guessed.

Order

I **ORDER** that as set forth in J-1 (#1) the parties will review the PSEA revenue adjustment to determine if this amount was counted twice. Further, pursuant to J-1 (#2), The DOE will calculate the District's CPI adjustment based on the District's June 30, 2003 Board Securities Report at 2.1%. The maintenance budget worksheet will be revised accordingly. I further **ORDER**, for the reasons set forth above, that in all other respects, the determination by the DOE with respect to Plainfield's 2003-2004 budget, as set forth in Assistant Commissioner MacInnes' letter of August 27, 2003, be affirmed and that the appeal be **DENIED.**

[2] Although the DOE argues that the calculation on the maintenance budget worksheet, J-3, would be unchanged no matter how the actual plan decrease was handled, I make no finding on that assertion, inasmuch as no testimony has been adduced in regard to that calculation nor is the undersigned clear that this would be the result.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within the time allowed under the existing orders of the New Jersey Supreme Court and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Notwithstanding the provisions of any rule to the contrary, exceptions to Initial Decisions of the Office of Administrative Law in *Abbott* District budget appeal matters shall be filed within five (5) days of the date of mailing of the Initial Decision, and reply exceptions shall be filed within two (2) days of receipt of exceptions. File written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 26, 2003
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

September 26, 2003
DATE

E-mailed Initial Decision to the parties on:

September 26, 2003
DATE

al

APPENDIX

List of Witnesses

For Respondent:

Keith Costello

List of Exhibits

J-1 Stipulation of Facts, dated September 24, 2003 (three pages)

J-2 Letter to Dr. Linnea Weiland, Acting Superintendent, from Gordon MacInnes, Assistant Commissioner, dated August 27, 2003 (two pages)

J-3 Maintenance Budget Worksheet for Plainfield, dated August 19, 2003 (two pages)

J-1 1 rev'd 9/0

Stipulated Facts

1. If the total general fund revenue of $106,916,490. includes the PSEA revenue adjustment of 389,157. then the PSEA revenue adjustment will be zero.

2. The CPI adjustment will be calculated based on the District's June 30, 2003 Bd. Sec. report. at 2.1.%.

3. The ~~the~~ District agrees with the utilization rate increase determined by the Dept on the maintenance budget worksheet

4. The Department's calculation for funds 11 + 15 on the maintenance budget worksheet is based on information provided to the Dept by the District on August 26, 2003. This information was based on preliminary June 30, 03 figures provided by the District

Excess Surplus Fund Balance - To be adjus
accordingly, based on the ab
adjusted figures.

5. The Department's maintenance budget wor
compared the difference between the budg
Early childhood Plan for 2003-04 a
the budgeted Early childhood Plan for 2002-03
to determine the amount to be added
subtracted from the ~~or~~ base 2002
program budget. This resulted in a
deduction of $1,585,682.00 to the
District in ~~the~~ determining the amount f
2003-2004 maintenance budget.

The Department did not utilize the
actual (revised) plan of the District
2002-2003. This was based on the
enrollment in 2002-2003. If these
numbers were utilized the difference bet
the 2002-

the Dept's approach resulted in an increase in its maintenance budget for 2003-2004.

Dated: 9/24/03

Counsel for Plainfield School District

9-24-03

Dianna Rosenbaum, DAG

OAL DKT. NO. EDU 5502-03
AGENCY DKT. NO. 206-6/03

BOARD OF EDUCATION OF THE CITY OF PLAINFIELD, UNION COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

The record of this local "Abbott" District's appeal of the Department of Education's (Department) decision on its supplemental funding request for the 2003-04 school year, and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The Board of Education of the Plainfield School District's (District) exceptions and the Department's reply thereto were duly submitted in accordance with the schedule established in response to the Court's order for expedition and were considered by the Commissioner in reaching this decision.

Initially, the Commissioner concurs with the Administrative Law Judge (ALJ), that the OAL does not have jurisdiction to determine directly or indirectly the validity of *N.J.A.C.* 6A:10-1.2, as such determination is solely within the jurisdictional purview of the Appellate Division or the Supreme Court. R. 2:2-3(a); *see, also, Pascucci v.* Vagott, 71 *N.J.* 40, 51-52 (1976); *Wendling v. N.J. Racing Com'n*, 279 *N.J. Super.* 477, 485 (App. Div. 1995). However, to the extent that he may appropriately do so in an administrative proceeding, the

Commissioner opines that the regulation at issue is fully consistent with the language and intent of the Court. Thus, like the ALJ, the Commissioner finds the regulatory definition controlling herein, with no conflict between it and the underlying Court order. Accordingly, the Department's application of such regulatory definition in its review and approval of the District's 2003-04 budget is appropriate.

Upon careful and independent review of the record, and based upon the credibility assessments of the ALJ, *N.J.S.A.* 52:14B-10(c), the Commissioner accepts the ALJ's factual findings and determines that her analysis and legal conclusions are consistent with the Supreme Court's Order of July 23, 2003, as well as the Department's regulatory amendments adopted on August 22, 2003.

Accordingly, the Initial Decision is adopted for the reasons expressed therein.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 10/20/03

Date of Mailing: N/A

* Pursuant to *P.L.* 2003, *c.* 122, "*Abbott*" determinations are final agency actions appealable directly to the Appellate Division of the New Jersey Superior Court.

593-03

BOARD OF EDUCATION OF THE TOWN OF PHILLIPSBURG, WARREN COUNTY,

PETITIONER,

V.

NEW JERSEY STATE DEPARTMENT OF EDUCATION,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning "Abbott" District appealed the Department's determination of its 2003-04 preliminary "maintenance budget," alleging that the Department's review was not in accordance with the July 23, 2003 order of the Supreme Court. The District challenged the inefficiencies identified by the respondent.

The ALJ determined that the OAL does not have jurisdiction to determine the validity of *N.J.A.C.* 6A:10-1.2. The ALJ also concluded that the Department properly determined inefficiencies in the following areas: contracted salaries, health benefits, special education tuition, 8 new high school teachers, non-recurring expenses, miscellaneous unbudgeted revenue, courtesy busing, 3 full-time supervisory positions, one full-time central office position, one full-time assistant principal, one full-time central office technology position, and 5 of the 7 identified full-time custodial and security staff. The ALJ restored the following: 2 in-class support teachers, 3 preschool-handicapped teachers, part-time instructional aides, one full-time athletic trainer, legal fees, 2 custodial/security services positions, armory rental costs, supplies and materials and a part-time substitute caller.

The Commissioner concurred with the ALJ's findings and conclusions and adopted the Initial Decision.

October 20, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5501-03
AGENCY DKT. NO. 207-6/03

BOARD OF EDUCATION OF OF PHILLIPSBURG SCHOOL DISTRICT,
Petitioner,
v.
NEW JERSEY DEPARTMENT OF EDUCATION,
Respondent.

Richard E. Shapiro, Esq., for petitioner

Allison Colsey Eck, Deputy Attorney General, for respondent
(Peter C. Harvey, Attorney General of New Jersey, attorney)

Record Closed: September 22, 2003 Decided: September 26, 2003

BEFORE **KEN R. SPRINGER**, ALJ:

Statement of the Case

This is an appeal by the Phillipsburg Board of Education ("Phillipsburg" or "Board") from its amount of Additional Abbott v. Burke State Aid ("supplemental aid") for the 2003-2004 fiscal year ("FY '04"). In accordance with the recent ruling by the New Jersey Supreme Court issued on July 23, 2003, the amount of supplemental aid granted for 2003-2004 is to be determined under a "maintenance budget" standard.

Adoption of this standard allows a school district to continue implementing the approved programs, services and positions from the 2002-2003 fiscal year ("FY '03"), subject to an adjustment for "non-discretionary expenditures," such as increases in contracted salaries, health benefits and special education tuition. Additionally, the Supreme Court directed the New Jersey Department of Education ("DOE") to "promulgate an emergency regulation establishing the standard for evaluating the effectiveness and efficiency of the district's non-instructional program." In compliance with this directive, the DOE adopted emergency regulations on August 22, 2003 clarifying the meaning of "maintenance budget" and establishing standards for determining whether administrative and central office expenditures are "ineffective and inefficient." Applying its newly adopted standard, the Department has identified various administrative costs said to be "ineffective or inefficient" and has reduced Phillipsburg's FY '04 supplemental aid by such amounts.

Phillipsburg argues that the definition of "maintenance budget" set forth in the Department's new regulations contravenes the New Jersey Supreme Court's ruling and deprives it of maintenance funds to which it is entitled. Moreover, Phillipsburg contends that the budgetary reductions are improper under the effective and efficient standard. Additionally, Phillipsburg contends that the DOE failed to apply its regulations uniformly and consistently among the thirty Abbott districts.

Under the Supreme Court order, "the DOE shall bear the burden of moving forward to establish the basis for any proposed reductions to the district's maintenance budget based on the effective and efficient standard set forth in the DOE's emergency regulation. If that initial burden is met, the district shall bear the burden of demonstrating that any budgetary reductions are not justified under that standard."

Procedural History

By letter dated May 30, 2003, the Department notified the Board of the results of its initial review of Phillipsburg's budget submission. On June 5, 2003, the Board filed a verified petition of appeal with the Commissioner of Education ("Commissioner").

Thereafter, the Department filed an answer on June 13, 2003. Meanwhile, on June 9, 2003, the Commissioner had already forwarded the matter to the Office of Administrative Law ("OAL") for hearing as a contested case.

Initially, the OAL held hearings on July 7, and 8, 2003. After the New Jersey Supreme Court issued its most recent ruling, the OAL held additional hearings on September 9, 10, 12 and 22, 2003. Witnesses and exhibits are listed in the appendix.

Findings of Fact

General Background Information

Most of the general background facts are undisputed. Located in Warren County, New Jersey across the Delaware River from Pennsylvania, the Town of Phillipsburg has a population of 15,000 to 16,000. Phillipsburg School District, one of thirty so-called "Abbott" Districts, has a total enrollment of roughly 3,500 students.[1] It is a K-to-12 district serving the children of town residents. Phillipsburg operates four elementary school buildings (two for grades 1 and 2 and two for grades 3, 4 and 5), a middle school building (grades 6, 7 and 8) and a high school building (grades 9, 10, 11, and 12). Kindergarten classes are conducted at an armory and at one of the elementary schools. Phillipsburg also leases facilities for use of its preschool program.

Phillipsburg is the receiving district for high school students from the neighboring municipalities of Alpha, Bloomsbury, Greenwich, Lopatcong and Pohatcong. None of these comparatively wealthier sending districts qualify as "Abbott" Districts. In contrast, Phillipsburg has "a lot of needy children," many of whom come from single parent households. Over half of the children at the elementary and middle school level receive subsidized meals under the federal free or reduced lunch program. Economic

[1] "Abbott district" means one of the 28 urban districts in district factor groups A and B specifically identified in the appendix to *Abbott v. Burke*, 119 *N.J.*287, 394 (1990) ("*Abbott* II") or any other district classified as a special needs district by legislation. *N.J.S.A.* 18A:7F-3. Phillipsburg falls within district factor group B. http://www.state.nj.us/njded/finance/sf/dfgdesc.shtml

conditions in the community have deteriorated following the closing of the Ingersol Rand plant and other nearby factories. A majority of its students are Caucasian. African-American students comprise nine to ten percent of the enrollment and Hispanic students one to two percent.

Pursuant to the direction of the New Jersey Supreme Court in *Abbot v. Burke*, 153 *N.J.* 480 (1998) ("Abbott V"), every Abbott school must adopt one of several whole-school reform models designed to raise educational standards for disadvantaged children. Unique among Abbott Districts, Phillipsburg received state approval to select an alternate model whose use in the District predated whole school reform. At the elementary level, Phillipsburg employs the "standard bearer model" developed by Phil Schlechtey of the Center for Leadership and School Reform in Louisville, Kentucky. Essentially, this model requires educators to align curriculum, instructional activities and assessment so that children are tested on what they are taught. At the high-school level, Phillipsburg applies the "Coalition of Essential Schools model," derived from the research of Ted Sizer of Brown University, which focuses on the work product of the child as the measure of success.

What originally drew the Department's attention to Phillipsburg is that its budget for FY '04 is 14% higher than base year '03, far outstripping the annual rise in the cost of living. At a time when the Department sought to hold educational spending level in Abbott districts, Phillipsburg's request for state aid rose from $4.2 million in 2002-2003 to $11.3 in 2003-2004, an increase of 275%.

When reviewing Phillipsburg's budget requests, James Turek, DOE's budget manager assigned to review the Phillipsburg budget, concentrated on economic "inefficiencies" and did not conduct his own evaluation of programmatic "effectiveness."[2] Turek is a certified public accountant with special expertise in school finance and has eleven years of experience examining school budgets. Having been assigned to work with Phillipsburg for several years, Turek is thoroughly familiar with local conditions. He

[2] Eleanor Jaick, a Department official with expertise in program development, performed a programmatic review of the District, but she did not testify at the hearing.

defines "efficiency" in terms of "achieving positive results and spending low amounts of money." Thus, he looks for ways to save money without compromising academic achievement in a school district. Generally, Turek commenced his review by comparing budgeted amounts in FY '04 with FY '03, looking for increases. Then he referred to DOE's comparative spending guide for 2003, which ranks all Abbott districts in terms of spending for a particular function or service. Overall, Turek found that Phillipsburg was consistently among the top spenders in nearly every category.

Next, Turek utilized a report prepared for DOE by the independent forensic accounting firm of RosenfarbWinters as an additional measure of excessive spending. RosenfarbWinters took audited financial expenditures for FYs '01 and '02, adjusted for inflation, and converted the data to cost per pupil for various categories contained in the uniform chart of accounts.[3] As a proxy of academic success, RosenfarbWinters used test scores on a statewide reading test administered in fourth grade. Plotting non-instructional expenses against reading scores, RosenfarbWinters selected four districts falling within the middle range of all Abbott districts as "benchmarks. Lastly, Turek applied his own professional judgment and experience in identifying which cost centers were overly expensive. For the most part, Turek did not single out individual employees as performing poorly, but rather compared total costs for delivery of particular packages of goods or services.

Disputed Cost Items

For convenience, each disputed cost item will be discussed under an appropriate heading. Items No. 1(A) through 1(F) involve "non-discretionary" cost increases necessary to maintain programs and services existing in 2002-2003. Item 2 deals with non-recurring expenses. Item No. 3 relates to determination of miscellaneous unbudgeted revenue. Items No. 4 to 15 pertain to non-instructional expenses that the Department has identified as "inefficient or ineffective," and, therefore, ineligible for state funding.

[3] RosenfarbWinters derived its data from the Comprehensive Audited Financial Reports ("CAFRs") that school districts are required to file annually. Actual expenditures for FY '03 are not yet available since the CAFRs are not due until November 5, 2003.

Calculation of Non-Discretionary Expenses

Abbott districts are entitled under the latest New Jersey Supreme Court order to "documented increases in non-discretionary expenditures" including, *e.g.*, increases in contracted salaries, health benefits and special education tuition. A common theme running throughout discussion of this issue is the difference in methodology used by the parties to calculate this amount. DOE started with projected total spending in FY '03 taken from a report prepared by accounting firm of KPMG.[4] After adjusting for the effect of staff turnover, Turek applied a factor designed to represent a reasonable increase in non-discretionary expenses, such as the consumer price index or movement on a negotiated salary guide. Phillipsburg started with the number of employees on the district roster as of June 30, 2003 (or the number of students enrolled in the district as of September 2003) and multiplied that amount by contracted increases. Basically, DOE bases its calculation on *spending* in FY '03, whereas Phillipsburg bases its calculation on contracted increases *per employee or student*. Both methods have their relative strengths and weaknesses. DOE's reliance on actual spending does not fully mirror that some employees may start or leave midyear, although the DOE contends that such minor variances should not materially affect the total amount that Phillipsburg spent in the 2002-2003 school year. Phillipsburg's reliance on the number of persons on its payroll at the end of a particular school year fails to consider that these same persons may not be employed during the next school year.

[4] Because final audited financial data for FY '03 will not be available until November 5, 2003, DOE retained KPMG to project Phillipsburg's spending in FY '03 based on "agreed-on procedures." DOE has stipulated that it is willing to adjust the numbers up or down when the final audited figures are filed.

1(A) Increases in Contracted Salaries

Negotiations for teacher salary increases were ongoing during FY '03 and were not concluded until shortly before the closing of the record in this case. Therefore, the salary increases are not really "non-discretionary," in the sense that, until recently, they were still within Phillipsburg's ability to control. Aware of the High Court's directive for continuation of a maintenance standard, Phillipsburg nevertheless saw fit to award its teachers a generous salary increase well above the statewide average.[5] Since Phillipsburg was not raising its local tax share, the Board had little incentive to hold the line. On September 13, 2003, Phillipsburg entered into a memorandum of agreement granting teachers a 7% increase for FY '04.[6] In exchange, Phillipsburg obtained the teachers' consent to lengthen the school day by 60 minutes at the elementary and middle schools and by 10 minutes at the high school. Significantly, Phillipsburg made no attempt to justify its high salary increase by claiming that its teaching staff historically earned less than teachers in comparable school districts.

Following the DOE's methodology, Turek increased the total spending in FY '03 by the amount necessary for step increases on existing salary guides and arrived at a total salary increase of $774,931.[7] While the DOE acknowledged a willingness to approve a reasonable salary increase for teachers once contract negotiations were complete, it is unprepared to fund such a large salary jump in an austerity year. On the other hand, Poch applied the 7% increase to the salaries of teachers on the payroll and came to a total salary increase of $1,776,990, or about $1 million more than DOE's estimate.

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[5] A news release from the New Jersey School Boards Association, dated September 4, 2003, reports that the average salary increase for teachers' contracts covering the 2003-2004 school year is 4.63%

[6] In addition, the Board made other substantial concessions, including deleting the deductible on the district's prescription drug plan, increasing coaches' salaries and agreeing to submit future disputes to binding arbitration.

[7] Turek's approach also took into consideration a 4% contractual increase for other school-based personnel and 4.25% contractual increase for custodians and maintenance workers. Their contracts did not expire in FY '03, so the amounts were already fixed.

I **FIND** that the Department's methodology provides a reasonable gauge of the total increase that Phillipsburg will spend for salaries in FY '04. No system is perfect and each necessarily depends on a snapshot of available data at a particular point in time. Regardless of the merits of Phillipburg's preferred methodology, the DOE has chosen a rational approach that must be upheld. Phillipsburg acted imprudently by expanding the workload in a maintenance year and demanding state subsidy of a large salary increase to pay for what is clearly a new service. Understandably, the DOE is reluctant to intervene in the collective bargaining process or to establish an inflexible cap on salary increases. Surely, teachers are entitled to receive a reasonable cost-of-living adjustment. Absent special circumstances, however, the Commissioner should not approve funding for a salary increase greatly in excess of the average increase resulting from competitive market forces.

1(B) Increased Cost of Health Benefits

Disagreement on the health benefit issue again turns on the parties' differing methodologies for calculating increased costs. Both sides accepted the FY '04 rate increases for Phillipsburg's major medical, dental and prescription drug programs, amounting to roughly 11%, 9% and 17% respectively. Once more, Turek multiplied the composite rate times actual *spending* in FY '03 and determined a total cost increase of $596,672. Poch used the same rates, but took the *number of employees* on its payroll on June 20, 2003, and projected a total cost increase of $740,126.

I **FIND** that that DOE applied an appropriate methodology, based on actual spending in FY '03, and granted Phillipsburg a reasonable increase for higher health benefit costs in FY '04.

1(C) Increase in Special Education Tuition

Phillipsburg incurs tuition costs for placement of students with severe disabilities in various types of out-of-district settings, including other public school districts, state

facilities, day training centers and private schools.[8] Expected percentage increases in tuition rates are largely known, stemming from fees charged by the schools in question. However, the need for outside placement changes from year to year, depending on a set of complex factors, including the severity of the handicapping condition, the kinds of classes and related services available in-district, the progress made by individual children, graduation of those eligible for service, and families moving into and out of the district.

In light of the potential for wide fluctuations, the DOE did not merely take last year's actual spending to calculate the anticipated increase the current fiscal year. Instead, Turek reviewed the number of individual educational programs from 1998-1999 through 2002-2003 and created a five-year historical trend for each Abbott school district. The underlying source for such data is the annual Application for State School Aid ("ASSA"), containing audited enrollment figures as of October 15th of each year[9].

On the five year historical trend, Phillipsburg had a projected decrease in special education tuition of -.267%. By comparison, East Orange had a projected increase of 11.79% and City of Newark of 8.87%. Rather than subject Phillipsburg to a loss of special education tuition, Turek extrapolated a likely out-of-district enrollment of 51 children and granted a special education tuition increase of $205,000. Should actual enrollment happen to turn out differently, Turek is willing to adjust the aid figure once actual enrollment and audited spending amounts are known.[10]

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[8] Under federal and state law, public school districts in New Jersey are obligated to provide eligible handicapped children with a free and appropriate public education, which sometimes requires placement in a more restrictive environment than the local public school. *Lascari v. Board of Educ. of Ramapo-Indian Hills Reg. Sch. Dist.*, 116 *N.J.* 30 (1989).

[9] *See N.J.S.A.* 18A:7F-33.

[10] Assistant Education Commissioner Gordon MacInnes' letter of August 27, 2003 promises "that the preliminary maintenance budget and estimated need for discretionary Additional Abbott v. Burke State aid will be subject to further adjustment after submission by your district of the 2002-2003 CAFR."

Since official enrollment figures for the current year will not be compiled until October 15, 2003, Phillipsburg does not yet have reliable enrollment date for FY '03.[11] Using less accurate information available as of September 2003, however, Poch calculated that Phillipsburg's special education tuition increase for the current year should be $399,226 or $194,226 more than DOE's allowance. Apart from its questionable accuracy, Phillipsburg's reliance on opening-day enrollment figures conflicts with DOE's established procedures for predicting Abbott district's future needs. Although this year the state's determination of the preliminary maintenance budget happened to be delayed, ordinarily the DOE would expect to release its preliminary aid figures in ample time for Abbott districts to plan for the upcoming school year. Of necessity, the preliminary figures would have to be based on reasonable projection techniques, since actual numbers would not be available until after the start of classes.

Equally important, Phillipsburg failed to present a satisfactory explanation for any sudden and unexpected increase in tuition costs. Adequate inquiry into such changed circumstances would best be accomplished by a thorough programmatic review conducted by the Division of Special Education rather than a financial audit by persons less acquainted with special education considerations. Completion of such programmatic review will take additional time and cannot be accomplished within the short timeframe for determination of the district's immediate budgetary needs.

I **FIND** that DOE used the best available data to foresee likely tuition increases in the school year about to begin. When audited figures become known in November, Phillipsburg will have an opportunity to reconcile any differences. If Phillipsburg remains dissatisfied with the amount of tuition costs reimbursed by state aid, it can always file a mid-year emergency application for additional resources.[12]

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[11] In its report, RosenfarbWinters did not use Average Daily Enrollment ("ADE"), as opposed to ASSA numbers, because "budgeted ADE numbers may be inaccurate." (at 20).

[12] An Abbott district may file a separate application for supplemental funding during a school year if it has a " need for additional resources to implement Department-approved program, services and other services due to unanticipated expenditures or unforeseen circumstances." *N.J.A.C.* 6A:10-3.1(g).

1(D) 2 "In-Class Support" Teachers Costing $94,049

Responsive to the strong statutory preference for educating handicapped children together with their non-handicapped peers in the mainstream, Phillipsburg has several third and fourth grade classes with a mixed enrollment of classified and non-classified students.[13] Such "in-class support" settings require two teachers, an elementary-school teacher who teaches the regular curriculum to everyone and a teacher of the handicapped who provides extra support to handicapped students. Last year, Phillipsburg provided in-class support services to five classes at Andover Morris Elementary School with a total enrollment of 47 students. Enrollment has increased to 56 this year. Accordingly, Phillipsburg is extending in-class support services to two additional classrooms in FY '03 and has requested two additional special-education teachers to provide these services. John Consentino, Phillipsburg's director of special services, testified that Phillipsburg would be unable to furnish the services mandated by the children's individual educational programs without the two new teachers.

At first blush, this cost center would appear to be governed by the same principles as the preceding one, in which Phillipsburg had relied on unaudited enrollment data from September 2003. Turek, however, adopted a much more conciliatory approach and appeared to agree with Consentino that the increase was probably necessary. Turek's only hesitation in approving this expense was that he had not been provided with sufficient information that existing classes had reached maximum capacity.

Consentino explained that the Division of Special Education will rarely grant a waiver to increase class size. Lacking expertise in the field of special education, Turek mistakenly thought that one teacher with dual certification might be able to perform the services of both teachers. That proposal, however, would defeat the purpose of adding a second teacher to provide additional support and assistance to children in need of more individualized attention.

I **FIND** that Phillipsburg must employ two additional special education teachers to comply with federal mainstreaming requirements and provide learning-disabled students with the assistance necessary to succeed in a regular classroom environment.

1(E) 3 Preschool-Handicapped Teachers Totaling $160,749

While this item was analyzed as a "non-discretionary increase," it is not a new or more costly service in the district. During 2002-2003, Phillipsburg already provided in-class support services to handicapped children enrolled in mainstream preschool classes. Phillipsburg actually had four special-education teachers providing in-school support to handicapped preschool-aged children last year, but one of the teachers has been transferred to a third-grade class for 2003-2004. Therefore, Phillipsburg is seeking Abbott funding to maintain three teaching positions that had already existed in the base budget year.

Phillipsburg's inclusive preschool classes have a maximum class size of 15 children, no more than 6 of whom can be handicapped.[14] Staffing consists of three adults: a preschool teacher; a special-education teacher; and an aide. Prior to FY '04, the Division of Early Childhood Education funded all three positions out of Early Childhood Program Aid. Beginning in 2003-2004, the Division of Early Childhood Education will no longer pay for the special education teacher, which position must now be funded out of the general account. Turek's objection to this expense relates not so much to the efficacy of the program as to the change in funding source. Nevertheless, he expressed lingering doubts regarding whether such intensity of service is really desirable or necessary.

I **FIND** that this program was included in last year's spending and, regardless of funding source, is more fittingly part of the maintenance budget than a new expense. In-class support is a school-based instructional service that directly benefits the

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[13] 20 *U.S.C.A.* §1412(5)(B). *Oberti v. Board of Educ. of Clementon Sch. Dist.,* 995 *F.* 2d 1204 (3rd Cir. 1993).

[14] Mainstream preschool programs must have "a certified teacher and an assistant for each class" and "a maximum class size of 15 students." *N.J.A.C.* 6A:10-2.1.

youngest and most vulnerable members of our society. Phillipsburg is entitled to receive Abbott funding in order to continue this valuable program.

1(F) 8 New High School Teachers Totaling $334,026

Not only did these positions not exist in FY '03, but also the September 2003 high-school enrollment was unknown at the time that the DOE determined Phillipsburg's preliminary maintenance budget. Comparing official high school enrollment on October 15, 2002 with unofficial figures on September 8, 2003, Phillipsburg calculated an increase of 164 students. Without explaining the intervening steps, Phillipsburg equated this increased secondary enrollment to a need for two social studies teachers, an English teacher, a home economics teacher, a French teacher, a special education teacher, a health and physical education teacher and a mathematics teacher.

As discussed in the general background section, Phillipsburg is the receiving high-school district for several surrounding communities, many of which are relatively prosperous and do not qualify as Abbott districts. Since public records show that the growth rate for enrollment at Phillipsburg's elementary and middle schools is less than 1%, it is reasonable to infer that the bulk of the increased enrollment at the high school comes from the sending districts. Turek was dismayed at the prospect that Abbott funds might be "diverted" to pay the fair share of sending districts that can afford to pay their own way. Phillipsburg received $7.9 million from the sending districts for FY '04, an increase of $600,000 to $700,000 over the prior year.

In advocating the need for additional high school teachers, Phillipsburg witness George Chando referred to a "prescribed" classroom size of 24 students at the high school level, but did not cite any authority for this limit. Turek clarified that 24 students per high-school class was intended by DOE as a target goal and that DOE has no immediate plans to sanction any Abbott district for failing to reach that goal.[16] Class sizes in non-Abbott high schools in New Jersey range from a low of 15 to a high of 35.

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[16] *N.J.A.C.*6A:24-4.1(j) requires that, by September 2002, Abbott districts have a plan in place to continue to reduce class size by 1:24 for grades 9 through 12.

I **FIND** that the increase in high school enrollment is largely attributable to population trends in the sending districts and that Phillipsburg has the option of increasing its tuition fees to defray any increased costs. In the worst-case scenario, a modest increase in high-school class size will not substantially impede the ability of Phillipsburg students to master the core curriculum content.

2. Non-Recurring Expenses Totaling $142,825

One-time costs incurred in the base year must be deducted from the maintenance budget because they will not recur in the current year. Phillipsburg stipulates that the acquisition costs for the site of its proposed new high-school building is a non-recurring cost because the School Construction Corporation ("SCC") has purchased the property and assumed financial responsibility. Henceforth, Phillipsburg will no longer be required to make principal and interest payments on the lease-purchase agreement. However, Poch testified that, on September 15, 2003, Phillipsburg had to make a last payment to the bank of $120,000 in principal and $11,667 in interest. Another interest payment of $11,158 is due by March 15, 2004.

Phillipsburg concedes that the SCC will ultimately refund its full principal and interest payments. Before that can happen, however, the Board must successfully bring a "defeasance" action in court. Phillipsburg encountered delay in instituting the defeasance proceeding because its bond counsel has been ill or otherwise unavailable for the past four months. In essence, Phillipsburg is asking the DOE to "front" the money, which Phillipsburg knows will soon be reimbursed to it.

Turek countered that DOE has been encouraging Phillipsburg to commence a defeasance action "since March or April 2003," but that Phillipsburg has ignored its entreaties. DOE is unwilling to fund amounts now payable by the SCC.

I **FIND** that the continuing obligation for Phillipsburg to pay these costs in FY '04 is due to its own inaction and failure to protect its rights. DOE should not use Abbott

funding to pay for a cost that was avoidable and for which Phillipsburg will be receiving full reimbursement.

3. Miscellaneous Unbudgeted Revenue Totaling $350,000

Miscellaneous revenue includes income from various sources, such as interest earnings, athletic gate receipts, and income from rental of district-owned facilities. While Phillipsburg budgeted miscellaneous revenues of $175,000 for FY '04, DOE wants to double that amount to $350,000.

Poch introduced a worksheet showing that Phillipsburg had received total miscellaneous revenue of more than $300,000 each year since FY '00. In FY '02 alone, miscellaneous revenue totaled $529,257. Despite that rosy record, Poch anticipates that this number will drop to $175,000 next year because one of the major sources of miscellaneous revenue last year will not be repeated in 2003-2004. Furthermore, Poch noted that interest rates have fallen dramatically. Taken in conjunction with Phillipsburg's declining free balance, Poch predicted that future interest earnings would be less than past performance.

Data from the KPMG report confirms that Phillipsburg had miscellaneous revenues well in excess of $300,00 each year for the past four years. Moreover, the KPMG report discloses that Phillipsburg engaged in a pattern of underestimating its miscellaneous receipts by half in the years for which audited data is available. Turek disagreed with Poch that interest earnings will continue to erode, since the effect of lower interest rates has already been felt in FY '03. Additionally, Phillipsburg has some ability to increase future returns by raising the cost of tickets to athletic events and by charging more for rental of its facilities.

I **FIND** that DOE's calculation, based on historical performance and the district's demonstrated tendency to understate its revenues by half, is an acceptable approach to projecting miscellaneous revenue in FY '04.

4. Courtesy Busing Totaling $50,000

State statutes and regulations require public school districts to furnish transportation for elementary-school students residing more than two miles from their school of attendance and for high-school students residing more than two and-a-half miles from their school of attendance.[17] Above the amount necessary to comply with the law, Phillipsburg seeks additional money to provide transportation for students alleged to reside along hazardous routes. Although the Department approved about half of this request, it deducted $50,000 from Phillipsburg's appropriation.

School business administrator William Poch described several heavily traveled thoroughfares running through the District, such as Route 22 and Belvidere Road, and other streets that are "narrow" or "do not have sidewalks." Crossing guards supplied by the town are stationed at some of the more dangerous intersections during hours when children walk to and from school.[18] Despite his personal views on safety conditions, Poch acknowledged that the Board had never adopted a formal policy designating certain routes as hazardous.[19] Moreover, Phillipsburg did not produce any government reports showing a high number of accidents at any particular location or present any testimony by law enforcement officials trained in traffic safety. In response to questioning, Poch admitted that the Board has never explored other available options, such as asking the town to pay for courtesy busing, requesting additional crossing

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[17] *N.J.S.A.* 18A:39-1; *N.J.A.C.* 6A:27-1.2.

[18] Traffic safety hazards are the responsibility of municipal or county government and not the school district. *Melick v. Lopatcong Twp. Bd. of Educ.*, OAL DKT. NO. EDU 2280-85 (Oct. 28, 1985), *adopted* Comm'r (Dec. 4, 1985). The Commissioner has ruled that a school board lacks the "authority to enforce traffic laws, to provide sidewalks, traffic lights, crossing guards, police patrols, overpasses, etc. to meet the requirements of safe travel for school children." *Schrenk v. Ridgewood Bd. of Educ.*, 1961 *S.L.D.* 185, 187.

[19] *N.J.S.A.* 18A:39-1.1 expressly requires that school districts providing courtesy busing must adopt a policy listing hazardous routes requiring courtesy busing of students and setting forth "the criteria used in designating the hazardous routes."

guards, or charging subscription fees to parents who can afford to pay.[20] As Turek pointed out, nearly half of the families in the district are not financially disadvantaged and could contribute toward courtesy busing if they want the extra service.

I FIND that $50,000 for remote busing could be eliminated from Phillipsburg's budget without negative impact on the quality of education in the district. Phillipsburg has voluntarily chosen to provide free transportation to children who live within reasonable walking distance of school. Proofs are inadequate to establish that these routes pose an unacceptable threat to children's safety. Furthermore, the Board has not exhausted other methods of shifting these costs to families who directly benefit from the service or to town authorities who are responsible for local safety conditions.

5. Part-Time Instructional Aides Totaling $60,000

Phillipsburg has employed instructional aides or "tutors" to assist classroom teachers at the primary-grade level since long before the advent of whole school reform. Last year, Phillipsburg employed twelve full-time equivalent ("FTE") aides in its elementary classrooms, including three FTE's that the Department proposes not to fund. Typically, an aide works only part-time, so that six or more people fill three full-time positions Most of these aides are assigned to grades 1 and 2 and only a few to grades 3 and 4. Pat Cawley, Phillipsburg's director of elementary education, explained that aides work intensively with at-risk students entitled to remedial educational services.[21] Much of the aides' time is devoted to reinforcing the lessons in an instructional setting. The District uses a "balanced literacy program," in which students are exposed to a variety of instructional approaches, including phonics, guided reading and written exercises. Groups of three or four children gather at workstations to practice their reading, writing and mathematics skills. Since a classroom teacher

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[20] The Town of Phillipsburg or the Board itself may provide busing to non-remote children and pass all or some of the cost along to parents or guardians, provided that it does not impose such charges on households who qualify for the free and reduced lunch program. *N.J.S.*A. 18A:39-1.2, -1-3; *See also*, *N.J.A.C.* 6A:27-1.3.

[21] Initially, Phillipsburg's classroom aides had been partially supported by Title I funds, but eventually the local district assumed the full costs.

cannot be everywhere at once, the teacher relies on the instructional aide to circulate among these smaller groups.

Use of paraprofessionals to assist teachers is a time-honored practice in the field of education.[22] Aides do not possess teaching certificates and can only work under the direction of a certified professional.[23] Cawley, who personally evaluated classroom aides in his previous position of elementary school principal, noted that elementary school aides had become "part of the fabric" of the District's homegrown model for whole school reform. Teachers and aides "co-plan together" and "meet at various times to coordinate their efforts."

Indeed, the Department's representative recognizes that classroom aides in Phillipsburg perform "a wide gambit" of activities, including assisting students with their studies and helping control misbehaving students. Turek targeted this area for a cut not for any perceived lack of educational usefulness, but largely because state code only requires classroom aides in kindergarten and preschool. Conceding that Phillipsburg has not proposed any increase in the number of elementary school aides from the prior year, Turek nevertheless suggested that the money "could be put to a better use." Not having academic credentials, however, Turek was unable to contradict Cawley's assertion that classroom aides make a valuable contribution to the success of Phillipsburg's academic program. Cawley noted that fourth graders' test scores on state-mandated achievement tests have improved, which he attributes to greater academic preparation in the lower grades.

I **FIND** that Phillipsburg has made effective use of school-based aides to assist small groups of at-risk students in developing basic academic skills. Unrefuted proofs

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[22] As the name implies, an aide's main function is to aid professionals by relieving them of easy or repetitive tasks that do not require extensive training or expertise. *Roach v. Sch. Dist. of South Orange-Maplewood,* 96 *N.J.A.R.*2d (EDU) 370, 1995 *W.L.* 869230 (N.J. Admin.)

[23] *N.J.A.C.* 6:11-4.6 authorizes the County Superintendent of Schools to approve the appointment of school or classroom aides who assist in the supervision of pupil activities "under the direction of a principal, teacher, or other designated certified professional personnel."

show that primary grade students have benefited from the extra attention and that their basic skills have measurably improved. Over the years, these aides have been integrated into the design of Phillipsburg's whole school reform and it would be difficult to eliminate them now without adversely affecting the comprehensive model. None of the evidence indicates that the aides are wasteful or nonproductive in achieving academic gains.

6. 1 Full-Time Athletic Trainer Costing $40,000

Turek targeted this cost center for reduction of one athletic trainer because he "had the suspicion that Phillipsburg was spending at the upper range of the scale." Unlike some larger school districts that employ only one athletic trainer, Phillipsburg budgeted for two trainers, one male and one female, so that female students would be serviced by a female trainer. If the district eliminated the female trainer, who has less seniority, the remaining male trainer would treat at least 150 female students. Indicator 13 of the 2003 comparative spending guide confirmed that Phillipsburg ranks as third highest in spending among the Abbott districts for *all* extracurricular activities, including sports as well as other pursuits. Statistics gathered internally by the DOE suggest that Phillipsburg had budgeted $76 per pupil for athletic costs in FY '04, compared to an average of $22 per pupil for twenty-seven other Abbott districts. On cross-examination, however, Turek conceded that the statistical analysis "appeared to have some flaws in it" and that the Department "could probably get better data."[24] In the absence of a female trainer, Turek suggested that a school nurse, the school physician, or female coaches might assume her duties. Turek consulted with coaches "outside the district," but did not speak to Phillipsburg's athletic trainers to find out exactly what they do.

Athletic trainers in Phillipsburg perform personal services requiring physical contact with students, such as wrapping ankles. William Poch, the school business administrator, explained that Phillipsburg wanted to retain a female athletic trainer to treat sports injuries incurred by female athletes. Parents in the district have expressed

[24] Several school districts are portrayed in the DOE's data as having spent nothing for their entire athletic program in FY '03, which appears highly unlikely.

concern about having male staff touching the bodies of adolescent girls. Approximately three hundred-fifty to four hundred girls presently participate in interscholastic athletic programs in Phillipsburg, a marked increase over female participation in past years. During the last five years, Phillipsburg has added a girls' lacrosse team and girls' soccer team to its sports program. Often the boys' team will play at one site at the same time that the girls' team is playing at a different site, making it impossible for the same person to cover both events.

I **FIND** that Turek relied on an admittedly unreliable statistical analysis and that he failed to give adequate consideration to local sensibilities. Phillipsburg's hiring of same-sex trainers was a reasonable accommodation to parental concerns for the welfare of their children. Because scheduling conflicts prevent the male athletic trainer from regularly attending girls' sporting events, someone else would have to cover these events anyway. DOE has not shown that it would be more cost-effective to hire a more qualified nurse or doctor to perform services that could be handled by an athletic trainer or that female coaches are properly trained to serve as a substitute.

7. Legal Fees Totaling $100,000

Phillipsburg spent $241,259 for legal services in FY '03. DOE proposed to reduce state aid relating to legal expenses by $100,000 for FY '04. Adjusting the difference of $141,259 by an inflation factor of 2.11%, DOE approved legal fees of $144,240. In conducting his review, Turek did not prepare a detailed analysis of what was driving legal costs in the district. Instead, he compared Phillipsburg's legal expenses to the RosenfarbWinter's benchmark standard of $115,791. Nevertheless, Turek criticized certain legal expenditures as being extravagant or unnecessary. Specifically, Turek faulted Phillipsburg for increasing legal fees by entering into a one-year contract with its teachers, thereby necessitating that the contract be renegotiated in the upcoming year. Similarly, he questioned whether it was necessary for Phillipsburg to retain outside counsel to pursue its Abbott appeal and sue to switch to a different interscholastic athletic league.

Phillipsburg countered with evidence that its legal expenses were reasonable and justified by the needs of the district. Some of Phillipsburg's legal expenses were appropriately incurred in connection with disciplinary action taken to suspend disruptive students and in the defense of a slip-and-fall case. Originally, the Board had entered into a one-year labor contract due to the uncertainty surrounding state funding, but Phillipsburg has recently concluded negotiations resulting in a new three-year contract. Phillipsburg hired outside counsel to handle the Abbott appeal because its regular board counsel lacked special expertise in this field. Changing to a different athletic league is designed to reduce significantly the travel time of students participating in interscholastic sports.

I **FIND** that the amount incurred by Phillipsburg for legal expenses last year was reasonable and should not be reduced by $100,000 below the maintenance budget. Legal costs are one of the most difficult types of expenses to compare meaningfully, since the amount varies greatly with type of litigation and, to the extent that a district is forced to defend itself, may be beyond its ability to control. Fees for labor counsel and for legal advice about switching athletic leagues are related to legitimate district business and cannot be regarded as extravagant or unnecessary. Certainly the Board should be able to obtain adequate legal representation in order to challenge the amount of state aid allocated to it under the Abbott formula. Nothing suggests that the hourly rates charged or the amount of time spent by the attorneys were excessive.

8. 3 Full-Time Supervisory Positions Totaling $200,000

Compared to other Abbott districts, Phillipsburg devotes a larger portion of its limited revenues to administration and supervision of teachers. On the 2003 comparative spending guide, Indicators 18 and 19, which reflect administrative deployment, illustrate that Phillipsburg ranks 28 out of 30 Abbott districts, with a student-administrator ratio of 79.1 to 1 and a faculty-administrator ratio of 8.9 to 1. Garfield City, a comparable school district in size and population, manages to perform the same function with a more efficient student-administrator ratio of 168.5 to 1 and an administrator–faculty ratio of 14.9 to 1. RosenfarbWinters' study of Phillipsburg's

budget confirms abnormally high spending in this cost center. Scrutinizing total salary expense for non-instructional services (which lumps together school administrators and supervisors with other non-instructional services), RosenfarbWinters quantified Phillipsburg's inefficient spending in this general category to be in excess of $1.45 million.

Testimony of Phillipburg's own witnesses lends support to the finding that the district has too many supervisors. Until recently, Phillipsburg functioned without a supervisor of curriculum and instruction, let alone two such positions. Pat Cawley, director of elementary education, recalled that these two new positions were added in 2001 because Phillipsburg's curricula were not aligned to the state's core curriculum content standards and the task was too large for one person alone. One of the new supervisors updated the curricula for science, social studies and world language, while the other updated the curricula for language arts, reading and math. Significantly, Phillipsburg concedes that the task is now complete, so it would appear that one or both positions are no longer necessary. With their main job done, the two supervisors are largely reduced to responding to future core curriculum changes, introducing new teaching materials to teachers, attending meetings and assisting other administrators. Written descriptions of the tasks assigned to these two supervisors disclose numerous overlapping duties and responsibilities.

Unlike many other Abbott districts, Phillipsburg's supervisors do "little or no teaching" and "have no regular classes." Phillipsburg employs nine supervisors, who serve as department heads. Their time is exclusively spent on administrative tasks, such as developing new courses, making in-service presentations, supervising other teachers, and conducting performance evaluations. The closest any of these supervisors get to the classroom is when they occasionally demonstrate a model lesson to inexperienced or ineffectual teachers. In addition to the nine subject-matter supervisors, Phillipsburg also has building principals and various assistant principals (four at the high school and one at the middle school) who serve the duplicative function of evaluating teacher performance. Review of Phillipsburg's organizational hierarchy reveals that the administrative structure is highly redundant. For example, in

special education, this relatively small district maintains three separate layers of supervision: a director of special services; a supervisor of special education; and a supervisor of child study teams.

Without presuming to tell Phillipsburg which particular supervisory positions are dispensable, Turek expressed his view that Phillipsburg could eliminate three intermediate-level supervisors at a salary savings of $200,000. State law requires school districts to employ a chief school administrator and building principal (and most, if not all, districts have an assistant superintendent), but, once you get below cabinet level, other supervisory duties "are ripe for reallocation." It is important to emphasize that Turek did not attempt to assess the job performance of individual supervisors. Far from accusing Phillipsburg's supervisors of incompetence, Turek believed that their talents were underutilized and that a fewer number of administrators could accomplish more work. According to Turek, Phillipsburg's high administrative costs "created a drag on this cost center in comparison to other Abbott districts."

I **FIND** that Phillipsburg is top heavy in administration and could realize a savings of $200,000 in this cost center without any adverse impact on learning. Contrary to the format in other districts, supervisors in Phillipsburg do not carry a teaching load and have no direct interaction with students. Phillipsburg consistently rates near the bottom of the list on all objective measures of administrative efficiency, including ratio of administrators to faculty or students and total administrative costs.

9. 1 Full-Time Central Office Position Totaling $50,000

Again, Turek proposed that one central office position could be safely abolished due to Phillipsburg's excessive administrative ratios on Indicators 18 and 19 and the RosenfarbWinters study of inefficient non-instructional costs.[25] About three and-a-half years ago, Superintendent Pethick undertook an administrative reshuffling, which

[25] RosenfarbWinters commented that, while Abbott districts have greater needs than the wealthiest districts, "special needs do not drive all costs." In some areas, one would expect same or similar cost structures. For example, central office costs "should not vary significantly between school districts." (cf. p. 17).

changed several job titles but did not cause a net loss in the total number of administrators.[26] As part of the reorganization, an existing administrator was promoted to the title of director of elementary education and the high school principal was transferred to the title of director of secondary education. While Phillipsburg sought to justify the reorganization in terms of greater efficiency, Business Administrator Poch was unable to produce any cost-benefit analysis and admitted that the salary cost was pretty much "a wash." Aside from meaningless generalities, the district offered no explanation as to why its administrative expenses exceed other Abbott districts or why the duties of one of the three directors could not be redistributed among the five other central office administrators.

I **FIND** that the central office staff could be streamlined by abolishing one director's position, at a savings of $100,000, without harming the delivery of a thorough and efficient education. Simply put, Phillipsburg has too many administrators for a district of its size.

10. 1 Full-Time Assistant Principal Totaling $84,000

Phillipsburg employs four assistant principals at the high school. In comparison, Garfield City, with comparable enrollment, has only two assistant principal at the high school. As noted, Phillipsburg ranks low on Indicators 18 and 19 for administrative efficiency and was designated a high spender in the RosenfarbWinters study. Turek believes that Phillipsburg originally shared his perception because in April 2003 the Board selected one of the four vice-principal slots for elimination.

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[26] Before the reorganization, Phillipsburg had a superintendent, two assistant superintendents, a business administrator/ school board secretary, a director of reading and a special projects coordinator. After the reorganization, Phillipsburg had a superintendent, one assistant superintendent, a business administrator/school board secretary, a director of elementary education, a director of secondary education and a director of whole school reform.

George Chando, the district's director of secondary education, described the duties of a vice principal as including staff evaluation, student discipline, attendance matters, parent contact and supervision of student activities. While Chando said that services at the high school would be "strained" by the loss of one assistant principal, he never claimed that the remaining supervisors would be unable to assume the additional responsibilities.

I **FIND** that the administrative structure of four vice-principals at the high school is inefficient and that one of the positions could be eliminated without significant impact on student academic achievement.

11. 1 Full-Time Central Office Technology Position Totaling $50,000

Although the DOE agrees that Phillipsburg is entitled to a director of technology to oversee the district's computer system, it questions whether he also needs an assistant to help him perform his duties. Here too, Phillipsburg spends considerably more than other Abbott districts to deliver similar services. Indicator 7 shows that Phillipsburg budgeted $2,219 per pupil for support-service salaries and benefits for FY '03, compared to the Abbott state median of $1,322, and ranks 25th highest in per-pupil expense for this cost center. Likewise, Indicator 8 shows that Phillipsburg budgeted $1,480 per pupil for total administrative costs, compared to the median of $1,309, and ranks 24th highest in per-pupil expense. Attempting to explain such poor showing, Turek noted that some of the smaller districts with declining enrollment, like Phillipsburg, would like to provide the same breadth of support services as larger districts, although their smaller size cannot justify the higher per-pupil expenditure.

Larry McKenna, Phillipsburg's director of technology, testified that he is in charge of three computer technicians, who monitor and repair computer hardware. Last year, McKenna also supervised an unspecified number of technology coordinators, who worked directly with teachers "to integrate current technologies into their curriculum."

Management of Phillipsburg's student database, including attendance records and scheduling, has been outsourced to a private company in Pennsylvania.

Nonetheless, McKenna claims that he must have an assistant, possessing data processing and web-design skills, to fulfill his own managerial responsibilities. Pressed to elaborate on his assistant's duties, McKenna mentioned that his assistant makes educational materials available on the district's website, publishes data for Title I monitoring, and performs the "time-consuming" process of transferring student information at the end of the year. It turns out, however, that the task of transferring student information occurs over the summer, so that McKenna (who is a twelve-month employee), or someone under his direction, should be able to accomplish the chore without interfering with other duties during the regular school year.

I **FIND** that Phillipsburg is inefficient in the area of support services and does not require an extra person, at a cost of $50,000, to assist the director in managing its computer services. No evidence establishes that Phillipsburg has been unable to repair or maintain its computer system. Inadequate consideration has been given to using secretaries or clerical staff to assist with whatever data collection and analysis is not done by the outside company. Phillipsburg has failed to prove that the lack of a director's assistant will significantly impair the ability of its student body to master the core curriculum content.

12. 7 Full-Time Custodial & Security Staff Totaling $270,000

While this cost center also incorporates maintenance workers and security guards, Turek focused on inefficiencies in custodial staffing. Indicator 11, which captures costs for operation and maintenance of physical plant, shows that Phillipsburg has a per-pupil cost of $864, well above the Abbott state median of $688, and ranks 23 among the 30 districts. Several New Jersey school districts, notably Keansburg Boro and the Paterson City, have realized considerable economies by opening their cleaning operations to competitive bidding. Consequently, Turek recommended that Phillipsburg could achieve substantial savings either by reducing its janitorial staff or by privatizing

its custodial operations. In lieu of privatization, Turek suggested that Phillipsburg might reduce costs by minimizing overtime and cutting back on absenteeism. Assuming an average annual salary of $38,500, Turek estimated that Phillipsburg could save about $270,000 by eliminating seven custodians.[27] Phillipsburg itself abolished two custodial positions at the end of the 2003-03 academic year, which DOE regards as tacit recognition that its custodial department was overstaffed.

National figures from a cost study cited by DOE indicate that the median amount of square footage maintained per full-time custodial worker is 24,167.[28] Although the study has definite limitations, it offers a reasonable approximation of an acceptable workload for one custodian.[29] Applied to the total area of 420,960 square feet in Phillipsburg's physical plant, the study suggests that Phillipsburg only needs 18 full-time custodians to clean its buildings.

Phillipsburg seeks to retain its full complement of 35 custodial positions existing as of June 2003 and to add an additional custodial position. At the commencement of the 2003-2004 academic year, Phillipsburg had five vacant custodial positions and would have to remove another two custodians to attain DOE's goal of reducing seven positions. William Poch, school business administrator, maintained that DOE overstates the savings obtainable through the reduction of seven custodians, because seniority rules require that the district lay off lowest-paid workers first. He calculates actual savings from a reduction of seven custodial positions to be $215,131.

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[27] It is not exactly clear how Turek arrived at this number, but apparently it represents the savings that he hoped Phillipsburg could achieve if they privatized custodial services.

[28] *32nd Annual Maintenance and Operations Cost Study*, published in AMERICAN SCHOOL & UNIVERSITY MAGAZINE 32 (April 2003).

[29] The article cautions that, "When using these figures as a benchmark, keep in mind that all costs are greatly affected by a number of factors, including the age and overall condition of buildings, climate, the labor market in your area, as well as other aspects over which school administrations have limited control." (at 32-34).

Evidence shows that Phillipsburg's school buildings are relatively old, with the oldest dating back to 1927 and others built during the 1930's. Presumably, older buildings would require more maintenance and upkeep than newer structures. Conspicuously absent from the testimony, however, is any showing that the facilities in Phillipsburg are especially dilapidated or in need of repair. Instead, Tom Scerbo, Phillipsburg's director of facilities, testified that the thirty or so trailers serving as temporary classroom space are "a nightmare to clean" because of difficulty in moving furniture in such confined quarters. Scerbo anticipated that the proposed reduction of custodians would mean that his staff would no longer be able to continue wiping desktops, emptying wastebaskets and cleaning bathrooms on a daily basis. He predicted that less frequent cleaning might lead to a greater incidence of illness among students and teachers.

With respect to privatization, Poch stated that it would be extremely difficult to accomplish in FY '04 because the district's current contract with its custodial staff will not expire until June 2004.[30] Checking with colleagues in other New Jersey school districts, Poch learned of serious tradeoffs resulting from privatization, such as less dedication to the job, higher rates of absenteeism and loss of control over work product.[31] Hunterdon Central Regional High School District, which returned to a district-operated custodial staff after experimenting with privatization, reported that their experience had been "very negative."[32]

I **FIND** that the truth lies somewhere between the two extremes advocated by the litigants. Phillipsburg has not adequately explained why its custodial services are so labor intensive. DOE, on the other hand, has not presented a persuasive case for

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[30] *But see Impey v. Board of Education*, 142 *N.J.* 388 (1995), holding that a school board may legally terminate employment of tenured teachers and subcontract their former duties to an outside agency.

[31] For a frank discussion of the drawbacks of privatization, see "*Privatization of Custodial Services – Lessons Learned*" on the website of the Paterson Public School District. http://inet.paterson.k12.nj.us/~maintenance/ARTICLE2.html

replacing the district's entire custodial staff. Any decision by the local board to privatize custodial services should be reached only after careful consideration of all alternatives and not in the heated context of Abbott litigation. A suitable middle ground is for Phillipsburg not to fill the five custodial positions that existed throughout most of FY '03 but are presently vacant. Elimination of five custodians at the district's lowest average salary of $30,700 should produce a savings in the neighborhood of $153,500.

13 . Rental Costs for Armory Totaling $49,855

Phillipsburg houses three of its kindergarten classes in a portion of an armory, which it leases from the Department of Military & Veteran's Affairs. Phillipsburg's School-Based Youth Services ("SBYS") occupy the rest of the building, and its costs are subsidized by federal grants. The present arrangement is only temporary. Plans are afoot for Phillipsburg to vacate the armory and consolidate its far-flung kindergarten operations at a single location by September 2005. In the meantime, Pat Cawley, Phillipsburg's director of elementary education, has examined the available alternatives and concluded that it is "not feasible" to find sufficient classroom space for the 57 kindergarten students elsewhere in the district.

Turek contemplated that Phillipsburg could save rent of $49,855 if it broke up existing kindergarten classes and rearranged elementary class configurations to free up additional classroom space in other elementary schools. This idea is an offshoot of Turek's proposal to increase kindergarten class size up to the state maximum of 21 students.[33]

I **FIND** that it would be unrealistic to attempt to redistribute three large kindergarten classes to other school facilities, especially since the temporary housing

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[32] Besides the direct disadvantages to the district, there are accompanying social costs, including loss of local jobs in an economically depressed area and potential undermining of good will towards the school system.

[33] N.J.A.C. 6A:24-3.2 requires full-day kindergarten for all five-year-old children in Abbott districts, staffed by one teacher and one aide, and prescribes that maximum class size "shall not exceed 21 children." It does not, however, prohibit a smaller class size.

arrangements are expected to last only two years. Transferring young children, now that the children are just getting accustomed to their new routine, would be highly disruptive and likely to have adverse educational and social effects.

14. Supplies and Materials Totaling $175,000

Entries in this cost center are for "amounts paid for material items of an expendable nature that are consumed, worn out, or deteriorated by use." DOE did not cut any school-based supplies used by teachers or children, such as paper, pencils, erasers and books, so that the proposed reductions are addressed to non-instructional consumables used by district personnel such as board members, central-office administrators, custodians, substance-abuse counselors and computer technicians. Due to the lack of a relevant indicator on the comparative spending guide, Turek made his determination solely on the basis of the RosenfarbWinters study, which flagged inefficient spending of $215,753 in the total supplies and materials account.

Turek refined his analysis into an alleged inefficiency of $75,000 for maintenance supplies and materials and $100,000 for administrative office supplies and materials. Reportedly, this more precise breakdown came from some unidentified "documentation" that never made its way into RosenfarbWinters' final report. Prior to the hearing, DOE failed to make a copy of this document available to Phillipsburg. During the hearing, Turek could neither produce the document nor recall its contents in detail. He admitted making "a quick evaluation" of these other accounts.

Phillipsburg had originally budgeted $229,300 for maintenance supplies and materials in FY '03, but expended only $151,412 because of a self-imposed "freeze" on expenses instituted mid-year. Average expenditure for this line item over the last four years has been $180,438. Director of Facilities Tom Scerbo testified that he had deferred much-needed repairs to the FY'04 budget, including the purchase of new motors for the heating system and an ejector pump for Green Street School. A cut of an additional $75,000 from the amount spent last year would virtually cut his supplies budget in half and devastate his capacity to maintain the safety of the school buildings.

Because of a lack of storage space, Phillipsburg keeps a very low inventory of replacement parts. In response to an inquiry, William Poch assured the DOE that Phillipsburg participates in a cooperative purchasing arrangement with over one hundred school districts and obtains quotes for every expense that exceeds the statutory threshold.

Referring to unaudited figures, Poch testified that last year Phillipsburg budgeted $257,500 for administrative-office supplies but spent only $150,517. Over the most recent four-year period, the average cost has been $161,915. A large part of this category is for copy paper purchased in bulk for sending newsletters to parents and for the drug-and-alcohol program and whole school reform. Paper alone costs $24,000 to $30,000 per year.[34] Another big-ticket item is computer supplies, including replacement parts, which last year came to $58,658.

I **FIND** that DOE has not adequately demonstrated that Phillipsburg has inefficient expenditures in the two named accounts. Unable to specify the information on which he relied, Turek cited composite data from the RosenfarbWinters study that does not provide adequate detail. Phillipsburg's voluntary budget freeze in this cost center in FY '03 resulted in considerably less spending for supplies and materials in these categories than its average annual expenses during the preceding four years. Forced to accept an additional $175,000 cut on top of its self-imposed budgetary discipline, Phillipsburg would not have sufficient supplies and materials to carry out its essential responsibilities.

15. Part-Time Substitute Caller Totaling $13,000

Relying on RosenfarbWinters study of total administrative salaries, Turek postulated that Phillipsburg could dispense with employment of a substitute caller and shift her duties to existing personnel without incurring additional expense. RosenfarbWinters highlighted inefficiencies totaling $1.4 million in the non-instructional

[34] Some of the paper supplies were apparently distributed to schools "without charging back" and probably should have been reported in the school-based budget accounts.

salaries account, but did not single out the substitute caller in particular. While Turek did not explore the feasibility or cost of other alternatives, he speculated that "maybe" someone else could handle the task in exchange for "comp time" or a lesser stipend.

Every school district must make some arrangement to obtain substitutes for absent teachers and staff members. Summarized in a written job description, Phillipsburg's substitute caller "works early mornings (M-F) and early evenings (Sun-Th) to arrange coverage for employees who are using sick, vacation, family illness or personal days." Currently, the retired person who occupies this part-time position earns salary of $13,000 per year and does not receive paid vacation time or health insurance benefits. Even though she is only paid for a thirty-hour workweek, she is usually available on call throughout the school day.

Jackie Attinello, assistant superintendent in charge of operations, calculated that it would cost an average of $26,945 per year to assign a secretary to perform the same service. Secretaries working an identical thirty-hour workweek would be entitled under their contract to overtime at time-and-a half. Requiring secretaries to come early and stay late in order to perform this routine clerical task would interfere with performance of their secretarial duties. In an informal survey, Phillipsburg ascertained that nine other Abbott districts also employ a substitute caller, four others use secretaries and one uses an outside service. Burlington City, with roughly half the student enrollment of Phillipsburg, pays its substitute caller $7,000 per year.

I **FIND** that DOE has not shown that Phillipsburg's employment of a substitute caller is inefficient or that someone else is willing to do the work more cheaply. To the contrary, payment of a secretary at overtime rates is likely to be more costly and take away time from important secretarial duties.

Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that the DOE's emergency regulations are fully consistent with the New Jersey Supreme Court's

order to establish standards for evaluating the effectiveness and efficiency of non-instructional programs.

Long before its recent reminder, the Court recognized the obligation of DOE to devise firm administrative controls to ensure that the increased funding made available to Abbott districts "was spent effectively and efficiently." *Abbott V*, 153 *N.J.* at 492. Delegation of rulemaking authority to an administrative agency is designed to permit the appropriate governmental body with the staff, resources and expertise to understand and solve highly specialized problems. Steven L Lefelt, 37 *N.J. Prac. Series*, "Administrative Law & Practice," §2.12 (West 2003). The Legislature has vested the Commissioner of Education with broad supervisory powers over the public school system, including express power to withhold State aid from any school district which fails "to obey the law or the rules or directions of the state board or the commissioner." *N.J.S.A.* 18A:55-2. *Jenkins v. Twp. of Morris Sch. Dist.*, 58 *N.J.* 483, 507 (1971).

Preliminarily, Phillipsburg argues that the Commissioner deviated from binding judicial interpretation by adopting a "maintenance budget" standard that excludes programs or services "approved" but not actually "provided" in the base year. *N.J.A.C.* 6A:10-1.2. Orders entered by the Office of Administrative Law have uniformly rejected Phillipsburg's legal argument, either on the substantive ground that the Commissioner's regulation is consistent with the Supreme Court's ruling, Judge Martone's view in *Board of Educ. of Neptune. v. N.J. Dep't of Educ.*, OAL Dkt. No. EDU 4096-03 (Sept. 11, 2003), or on the procedural ground of lack of jurisdiction, Judge Tassini's view in *Board of Educ. of Asbury Park v. N.J. Dep't of Educ.*, OAL Dkt. No. EDU 4095-03 (Sept. 4, 2003). The rationale of those cases is equally applicable here.

In passing, it is worth noting that the subtleties of the situation may require analysis of the particular facts in order to resolve what Phillipsburg conceptualizes as a legal question. When an Abbott district accepts state aid for an approved service, but fails to provide it and diverts the money to other purposes, one can easily see why that amount should be deducted from the maintenance budget in the following year. Results may be different, however, where a district makes a good faith effort to provide

a particular service, but cannot find a qualified person willing and able to do the job. These niceties need not concern us, however, since Phillipsburg made no showing that it was prevented from delivering approved goods or services in FY '03 due to circumstances beyond its control.

Emphasis in the Supreme Court's recent ruling is on controlling wasteful spending in administrative overhead and non-instructional programs, without hampering a district's capacity to provide quality school-based services directly to students. Abbott funding was never intended to create additional layers of bureaucracy, but rather to expand educational opportunities and promote greater learning. Emergency regulations adopted by DOE foster the academic goal of enabling students to achieve core curriculum content standards and read at appropriate grade level. In keeping with the spirit of this approach, this decision gives close scrutiny to central office and supervisory expenses not directly related to classroom teaching.

Lastly, Phillipsburg raises the perplexing issue that DOE has been inconsistent in applying the same regulatory standard to different Abbott districts. As one of many examples, DOE slashed petitioner's custodial and maintenance expenses because Phillipsburg ranked 23rd from the top of the relevant indicator, but did not take similar action against Newark, which ranked 30th on the same scale. Turek was not responsible for conducting the review of Newark's budget and was unable to say what local circumstances may have led his colleague to make a different judgment call. Equal protection does not require mathematic exactitude, so long as distinctions are reasonably related to a legitimate state objective. *Security Heritage, Inc. v. City of Cape May,* 361 *N.J. Super.* 281, 300 (App. Div. 2003). If Phillipsburg is inefficient in providing custodial and maintenance services, the condition cannot be ignored merely because another district happened to get away with it.

Order

It is **ORDERED** that the DOE restore $94,049 for in-class support teachers, $160,749 for preschool handicapped teachers, $60,000 for instructional aides, $40,000

for an athletic trainer, $100,000 for legal fees, $116,500 for custodial and maintenance serves, $49,855 for armory rental costs, $175,000 for supplies and materials and $13,000 for a substitute caller.

It is further **ORDERED** that, in all other respects, DOE's determination of Phillipsburg's maintenance budget for 2003-2004 is upheld.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within the time allowed under the existing orders of the New Jersey Supreme Court and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Notwithstanding the provisions of any rule to the contrary, exceptions to Initial Decisions of the Office of Administrative Law in *Abbott* District budget appeal matters shall be filed within five (5) days of the date of mailing of the Initial Decision, and reply exceptions shall be filed within two (2) days of receipt of exceptions. File written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

9/26/03
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

September 26, 2003
DATE

E-mailed Initial Decision to the parties on:

DATE

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APPENDIX
List of Witnesses

(b) Gordon Pethick, superintendent of schools, Phillipsburg public school district

(c) William Poch, school business administrator/board secretary, Phillipsburg public school district

(d) James Turek, coordinating budget manager for northern region, New Jersey Department of Education

(e) Pat Cawley, director of elementary education, Phillipsburg public school district

(f) Jackie Attinello, assistant superintendent, Phillipsburg public school district

(g) George Chando, director of secondary education, Phillipsburg public school district

(h) Larry McKenna, director of technology, Phillipsburg school district

(i) Tom Scerbo, director of facilities, Phillipsburg school district

9. John Consentino, director of special services, Phillipsburg public school district

List of Exhibits

No.	Description
J-1	Copy of letter to Dr. H. Gordon Pethick from Gordon Maclinnes, dated August 27, 2003
P-1	Copy of letter to Dr. H. Gordon Pethick from Gordon MacInnes, dated May 30, 1999

P-2 Copy of budget expenditure report for the legal account No. 00230331, for the period July 1, 2001 to June 30, 2003

P-3 Copy of actual kindergarten enrollment in the Phillipsburg public school district as of September 3, 2003

P-4 Copy of job description for substitute caller, adopted July 2002

P-5 Copy of Abbott district substitute caller information, undated

P-6 Copy of substitute caller information, undated

P-7 Copy of job description for supervisor of elementary curriculum, undated

P-8 (a) Copy of job tasks of Ro Manmiller for 2002-03, dated May 20, 2003

(b) Copy of job tasks of Jason Bing, dated May 20, 2003

P-9 Copy of job description of director of elementary education, dated January 2001

P-10 Copy of Phillipsburg data regarding maintenance, custodian and security, undated

P-11 Copy of list of custodians for 2003-2004, undated

P-12 Copy of article entitled "Privatization of Custodial Services-Lessons Learned," on the Paterson public school district website, dated September 11, 2003

P-13 Copy of letter to Thomas P. Dunn Jr., from Gordon MacInnes, dated August 27, 2003

P-14 Copy of letter to Dr. Charles T. Epps from Gordon MacInnes, dated August 27, 2003

P-15 Copy of letter to Marion Bolden from Gordon MacInnes, dated 27, 2003

P-16 Copy of letter to Dr. James H. Lytle from Gordon MacInnes, dated August 27, 2003

P-17 Copy of corrected letter to Antonio Lewis from Gordon MacInnes, dated August 27, 2003

P-18 Copy of letter to Dr. Laval Wilson from Gordon MacInnes, dated August 27, 2003

P-19 Copy of letter to Dr. Edward F. Gola from Gordon MacInnes, dated August 27, 2003

P-20 Copy of letter to Constance Frazier from Gordon MacInnes, Dated August 27, 2003

P-21 Copy of letter to Barbara A. Trzezkowski from Gordon MacInnes, dated August 27, 2003

P-22 Copy of job description for position of custodian, adopted July 2002

P-23 Copy of job description of fields-grounds maintenance, adopted July 2002

P-24 Copy of document entitled "Supplies and Material for Maintenance," for 1999-2000 to 20003-2004

P-25 Copy of total salary increases for 2002-2003 and 2003-2004

P-26 Copy of document entitled "Supplies and Materials On-Instructional Administrative Office," for 1999-2000 to 2003-2004

P-26 (a) Copy of memorandum of agreement between the Phillipsburg board of education and the Phillipsburg Education Association, undated

P-28 Copy of increase in health benefits for 2003-2004 (actual rates), dated June 2003

P-29 Copy of special education tuition costs for 2002-2003 and 2003-2004

P-30 Copy of document entitled "CPI at 2.11% non-salary other items for net base 2002-2003 budget

P-31 Copy of document entitled Outlay Transportation-School Budget, dated July 21, 2003

P-32 Copy of document entitled "Social Security FICA," for 2002-2003

P-33 Copy of document entitled "Non-Recurring Items Lease-Purchase and Supervisor's Early Retirement," for 2002-2003 and 2003-2004

P-34 Copy of document entitled "Non-Recurring Item – E.C.P. Positions Ended 6/30/03," for 2002-2003 and 2003-2004

P-35 (a) Copy of allocation notice for IDEA funds for FY 2003

(b) Copy of allocation notice of IDEA funds for FY 2004

P-36 Copy of document entitled "Teaching Staff 2003-2004 School Year Due to Enrollment Increase," undated

P-37 Copy of document relating to special education teachers at Andover-Morris School, undated

P-38 Copy of document entitled "Preschool In-Class Support Staff," undated

P-39 Copy of list of preschool special education teachers for in-class support, dated September 22, 2003

P-40 Copy of document entitled "Revenue Adjustment Miscellaneous Revenue" comparing 1999-2000 to 2003-2004

P-41 Copy of CAFR audited revenues for the fiscal year ending June 30, 2000, June 30, 2001 and June 30, 2002

R-1 Copy of memorandum to Jim Turek from William W. Poch, dated June 6, 2003

R-2 Copy of memorandum to Jim Turek from William W. Poch, dated July 1, 2003

R-3 Excerpt from the Board's 2003-2004 budget submission (pages Jc 1, Jc 2, Jc 3, Jc4, Jc7 and Jc 8)

R-4 Excerpt from Board's 2003-2004 budget submission (page F33)

R-5 Copy of I and J spending profile, prepared by the New Jersey Department of Education

R-6 Copy of Abbott district spending profile prepared by the New Jersey Department of Education

R-7 Copy of athletic costs in Abbott districts for 2002, 2003 and 2004 prepared by the New Jersey Department of Education

R-8 Copy of food service enterprise fund comparative statement of revenues, expenses and changes in retained earnings for the fiscal year ending July 30, 2002 and July 30, 2001

R-9 Copy of New Jersey Department of Education Comparative Spending Guide for 2003-2004, dated March 2003

R-10 Report by RosenfarbWinters, LLC entitled "Appealing Abbott School District's Non-instructional Spending Inefficiencies," dated August 19, 2003

R-11 Copy of letter to Dr. Edwin Duroy from Gordon MacInnes, dated August 27, 2003

R-12 Copy of article entitled "Absence of Resources" from the website of American School & University, dated April 2003

R-13 Copy of DOE's maintenance work sheet for fiscal year 2003-2004, dated August 27, 2003

R-14 Copy of KPMG accounting report including Schedules A to J, undated

OAL-1 Copy of news release from the website of the New Jersey School Board's Association, dated September 4, 2003

OAL DKT. NO. EDU 5501-03
AGENCY DKT. NO. 207-6/03

BOARD OF EDUCATION OF THE TOWN OF PHILLIPSBURG, WARREN COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

The record of this local "Abbott" District's appeal of the Department's decision on its supplemental funding request for the 2003-04 school year, and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties' exceptions and replies were duly submitted in accordance with the schedule established in response to the Court's order for expedition and were considered by the Commissioner in reaching this decision.

Upon careful and independent review of the record, the Commissioner initially concurs with the Administrative Law Judge (ALJ) that the OAL does not have jurisdiction to determine directly or indirectly the validity of *N.J.A.C.* 6A:10-1.2, as such determination is solely within the jurisdictional purview of the Appellate Division or the Supreme Court. R. 2:2-3(a); *see, also*, *Pascucci v. Vagott*, 71 *N.J.* 40, 51-52 (1976); *Wendling v. N.J. Racing Com'n*, 279 *N.J. Super.* 477, 485 (App. Div. 1995). Even if it were to be assumed, *arguendo*, that the OAL has jurisdiction to consider petitioner's argument regarding the validity and applicability of the regulation at issue, the Commissioner agrees with the ALJ that the Department's definition of

"maintenance budget," as detailed in *N.J.A.C.* 6A:10-1.2, does not differ in any appreciable way from the Supreme Court's definition of that term contained in its Budget Order of July 23, 2003.

Further, based on the record before him and the credibility assessments of the ALJ, *N.J.S.A.* 52:14B-10(c), the Commissioner accepts the ALJ's factual findings and determines that his analysis and legal conclusions are consistent with the Supreme Court's Order, as well as the Department's regulations.[1] [2] In so concurring, the Commissioner finds that, except as specifically noted in the text of the Initial Decision, the Department's determination of Phillipsburg's maintenance budget is upheld.

Accordingly, the Initial Decision is adopted for the reasons expressed therein.[3]

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: 10/20/03

Date of Mailing: N/A

[1] In so concluding, the Commissioner finds that, to the extent positions were restored herein, all such positions, together with their concomitant health benefits, if any, are subject to the findings and conclusions at pages 7 and 8 of the Initial Decision regarding the application of the Department's methodology to determine increases in salaries and health benefits.

[2] The Commissioner clarifies that in concurring with the ALJ's conclusion that five of the vacant custodial positions remain unfilled, it is his intent that these positions be *eliminated.*

[3] The Commissioner so determines, based upon the proofs brought to *this* record, while acknowledging that the presentation of such evidence may have been disadvantaged by both a Court Order to expedite proceedings and the unavailability of the Comprehensive Annual Financial Report (CAFR) until November 2003. In any event, beyond his determination herein, the Commissioner underscores the availability of a mechanism for Abbott districts to address needs, arising during the year due to unanticipated expenditures or unforeseen circumstances, for additional resources to implement Department-approved programs and services. *N.J.A.C.* 6A:10-3.1(g).

[4] Pursuant to *P.L.* 2003, *c.* 22, "*Abbott*" determinations are final agency actions appealable directly to the Appellate Division of the New Jersey Superior Court.

594-03

BOARD OF EDUCATION OF THE TOWNSHIP OF PEMBERTON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning Abbott District challenged what should properly be included in its budget as "non-discretionary" items and the Department of Education's determination of excess fund balance as of June 30, 2003.

The ALJ notes there are two issues: (1) whether the District has demonstrated that certain items are nondiscretionary and should, therefore, be added to the base 2002-03 budget and (2) whether the District has demonstrated that the 2% undesignated fund balance and excess surplus were improperly calculated by the Department. The ALJ found that No Child Left Behind (NCLB) Supplementary Services, the NCLB ESL Paraprofessional Position, the two ESL Positions and the two Balanced Literacy Positions should be considered "non-discretionary," but that radon testing, the Tienet testing and the position of Director of Security should not. Additionally, the ALJ found that the District had carried its burden of demonstrating that the 2% undesignated fund balance and excess surplus were improperly calculated by the Department.

The Commissioner modified the Initial Decision. On the latter issue, the Commissioner adopts the conclusion of the ALJ, subject to the Comprehensive Annual Financial Report (CAFR) in November 2003. However, the Commissioner set aside the ALJ's conclusion that items (a), (b), (c), (d), (e) and (h), in part, are properly considered "non-discretionary," within the intendment of the Supreme Court's Order.

October 28, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4162-03

BOARD OF EDUCATION OF
THE TOWNSHIP OF PEMBERTON,
Petitioner,

v.

STATE OF NEW JERSEY,
DEPARTMENT OF EDUCATION,
Respondent.

Richard E. Shapiro, Esq., for petitioner

Kathleen Asher, Deputy Attorney General, for respondent (Peter C. Harvey, Attorney General of New Jersey)

Record Closed: October 2, 2003 Decided: October 3, 2003

BEFORE **ROBERT S. MILLER,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner ("BOE" or "the District") appeals the determination by respondent ("DOE" or "the Department") of the BOE's maintenance budget for the 2003-2004 school year, including the Department's estimated need for discretionary additional *Abbott v. Burke* State aid (Exhibit R-1).

A detailed procedural history of this year's *Abbott* cases is set forth in the September 20, 2003 initial decision of Administrative Law Judge John R. Tassini in the case of *Board of Education of the City of Asbury Park v. State of New Jersey, Department of Education,* (OAL Dkt. # EDU 4095-03) and need not be repeated here.

The hearing in this matter was scheduled to begin on September 23, 2003 but had to be adjourned and rescheduled because petitioner's counsel was still in trial on another *Abbott* case in which he had been retained.

A further complication arose on September 19, 2003 when the Department advised the District that it had discovered a mathematical error in its calculations of the District's maintenance budget, resulting in a reduction of supplemental aid from $10,076,681 to $2,453,449. This dramatic reduction led the District to raise a host of new and unanticipated issues. A new hearing date was set for September 30, 2003, and the hearing began late that afternoon. Prior thereto, after extensive discussions and negotiations, most of the issues were resolved. The hearing concluded on October 1, 2003.[1] Counsel submitted letter memoranda on October 2, 2003, on which date the record closed.

The following stipulations were made by counsel at the outset of the hearing:

1. The District stipulates to all DOE figures on the DOE's maintenance budget worksheet through the EC Plan figures for 2002-03 and 2003-04. The District reserves its right to challenge the DOE's definition of "maintenance budget."

2. The District stipulates to the figures in the DOE maintenance budget worksheet for salaries, health benefits, charter school tuition, and CPI as 2.1%

[1] Altogether five witnesses testified for petitioner and one witness for the Department. All of them were candid, credible, and helpful. However, I was most impressed with the District's witnesses, whom I found to be very knowledgeable and well-prepared.

3. The DOE stipulates to an increase of $640,200 plus the increase of $76,210 or a total increase of $716,410 in special education tuition.

4. The DOE stipulates to the amount of $241,800 for Haines WSR implementation.

5. The DOE stipulates to an increase of $464,654 for curricular materials/books.

6. The DOE stipulates to an increase of $240,000 for basic skills math teachers.

7. The DOE stipulates to an increase of $360,000 for world language teachers.

8. The DOE stipulates to an increase of $130,00 for two police officers.

9. The District stipulates to the withdrawal of the Information Technology Salary.

10. The DOE stipulates to an increase of $151,966 in utilities.

11. The District stipulates to the DOE's figure of $25,830 in decrease in federal aid.

12. The District stipulates to the revenue figures for 2003-04 with the exception of IDEA revenue and excess surplus.

13. The DOE stipulates to the District's food service deficit calculation, subject to receipt of the CAFR.

14. The District withdraws the appeal on the issue of the reserve for encumbrances, based on the understanding that no later than October 21, 2003, the parties will meet and determine the encumbrances allocable to the 2002-2003 school year budget.

15. The DOE stipulates that on Exhibit R-2A (the revised maintenance budget worksheet) the difference between the District's EC Plan 03-04 and EC Plan 02-03 should be $631,000 rather than $669,000.

16. The DOE has agreed to a contracted transportation runs increase in the amount of $35,290.00.

17. The District and the DOE have agreed that on page 2 of Exhibit R-2A, the IDEA revenue increase should be $173,741 instead of $62,371.00.

The parties have agreed that two major issues remain. They are as follows:

1. Whether the District has demonstrated that the following items are non-discretionary items that should be added to the base 2002-2003 State Program budget:

(a) NCLB Supplementary Services
(b) NCLB Supplementary Services (2 additional schools)
(c) NCLB ESL Requirements
(d) Other ESL Requirements
(e) Balanced Literacy Requirements
(f) Radon Testing
(g) Tienet Testing
(h) Approved positions for FY 2002-2003

2. Whether the District demonstrated that the 2% undesignated fund balance and excess surplus were improperly calculated by the Department.

For the reasons to be expressed hereafter, I am of the opinion that - - with the exception of items 1.(f) and (g) and one position in (h), to be discussed below - - these questions should be answered in the affirmative.

1.

Iliana Okum, the District's Assistant Director of Elementary Instructional Services, testified at length about the educational requirements imposed by both federal and state law. She explained that the federal "No Child Left Behind Law" ("NCLB"), which became effective on January 2, 2002, requires that certain school districts (of which Pemberton is one), provide extra instructional services to eligible students[2] immediately after the regular school day has ended. These extra services are primarily in "Language Arts" (reading, writing, speaking and listening) and in mathematics, *i.e.,* the fundamentals or basic skills required of an educated person.

Out of the 11 schools in Pemberton Township, five have been designated "Category I" schools (schools in need of improvement). Two of the five have only recently been identified. According to a formula devised by the Department, approximately $1000 per student must be "set aside" by the District for the provision of such extra instruction, *i.e.*, cannot be used for any other educational services, as had been the case in the 2002-2003 school year. Thus, a substantial number of other educational services (which *had* been funded in 2002-2003) will not be provided in 2003-2004 unless the District receives additional monies. The additional monies being sought total $401,638, including monies for the two recently added "Category I" schools.

According to Ms. Okum, there are requirements under both the NCLB law and under state regulations, to help Limited English-Proficient ("LEP") students. There are additional mandates to assist the "lowest performers" of the student population to pass the ESPA and GEPA tests given to all students every year. Yet, in the 2002-2003 school year, *none* of the 47

[2] There are approximately 350 students in five schools who are so eligible.

LEP students in the school system passed the ESPA and GEPA tests, and preliminary indications are that there will be an increase in the number of LEP students in the 2003-2004 school year.

Further, according to Ms. Okum, the District has not yet been able to fully comply with the Department's mandate (found in *N.J.A.C.* 6A:15-1.4) to establish a bi-lingual education program, although it does have one ESL (English as a second language) teacher serving the Denbo School and another ESL teacher serving three other schools. The teacher serving the Denbo School does not speak Spanish, even though Spanish-speaking students are the most numerous of the District's LEP students.

In order to comply with the aforesaid requirements and mandates, the District needs *at least* one ESL paraprofessional to assist a regular ESL teacher ($12,000), two new ESL teachers ($80,000), and two reading specialists (to serve the middle school and the high school) ($80,000).[3]

One of the subjects on which Patricia Austin (the District's Business Administrator) testified was a $10,000 item for radon testing. Referring to Exhibits R-8 and R-9, she noted that in accordance with *N.J.S.A.* 18A:20-40 all public schools must be tested for radon by September 2005 and that DOE "strongly recommends that schools . . . begin planning and budgeting for radon testing now [January 29, 2003]." She declared that the $10,000 item was calculated based on the District's having to place radon test kits (at $20 per kit) in 500 school rooms, and that the $20 figure was a minimum dollar amount.

Another of petitioner's witnesses was Charles A. Highsmith, Jr. (Director of Instructional Services). He stated that the "Tienet" item ($83,775) was the cost for obtaining and using a new test to "disaggregate" statistics and data so as to show the educational performance of students by designated sub-groups (primarily racial, ethnic, sex, and socioeconomic), required by the NCLB Act. The test used in 2002-2003, the "Stanford 9" test, did not effectively do this. Tienet was chosen after an investigation by a committee of administrators and teachers indicated that it was the best of several alternative programs and could do the job.

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[3] At present, there are *no* reading specialist serving the middle school and the high school.

The Department did not offer any testimony or evidence disputing the District's claim that it needed the funding to meet state and federal mandates. Its only witness, Andrew Bishop, is not a program manager and stated that he had little knowledge of programmatic requirements under federal or state law. Indeed, he did not believe that he was responsible for providing funding to meet legal mandates, but only to approve funding for *Abbott* remedies.

A determination of which of the foregoing items is allowable depends on the definition of the phrase "maintenance budget." In applicable part, *N.J.A.C.* 6A:10-1.2 states that:

> 'Maintenance budget' means . . . a budget funded at a level such that the District can implement 2002-2003 approved and provided programs, services and positions and includes documented increases in *non-discretionary* expenditures and adjustments for actual 2002-2003 expenditures . . . . Maintenance does not include . . . new programs, positions or services . . . . (emphasis supplied)

As indicated, the operative phrase is "non-discretionary." The question is whether the phrase should be given a broad and expansive interpretation or a narrow and restricted one. In essence, the District argues for the former and DOE for the latter. I agree with the District.

The District has no discretion in deciding whether to comply or not with the NCLB Act and with state laws and regulations. It is *required* to do so, and, in my opinion it has clearly demonstrated that it needs the additional teachers and other instructional persons in order to do so.

Furthermore, the long history of *Abbott v. Burke* litigation manifests an unwavering intention by the Supreme Court to require the State and the Department to be generous in meeting the educational needs of all of the children of the State in order to comply with the Constitutional mandate of a "thorough and efficient education." It seems unlikely that the Court would now give the phrase "non-discretionary" the crabbed and narrow interpretation urged by the Department.

For these reasons, I believe that all of the items under numbers 1. (a) – (h) should be considered "non-discretionary" except for: radon testing (not actually *required* to be done until

September 2005; Tienet testing (insufficient evidence that present testing programs and methods are unable to do the job); and the position of Director of Security found in item 1. (h) (this position was not filled either in whole or in part during the 2002-2003 school year, but remained vacant).

2.

Testifying on behalf of the District on the issue of the 2% undesignated fund balance and excess surplus were Rodney R. Haines, C.P.A., [an independent auditor retained by the District to perform the Annual Comprehensive Financial Review ("CAFR")]; James J. Flanagan, C.P.A. (Assistant Business Administrator); and Patricia Austin (Business Administrator). Testifying for the Department was Andrew Bishop, C.P.A.

In Exhibit R-1, the budget decision letter dated August 27, 2003, DOE claims that the District had a sufficient excess fund balance, as of June 30, 2003, to eliminate the *Abbott v. Burke* State aid receivable for the 2002-2003 school year. Otherwise, the District would have been entitled to the amount of that receivable ($1,179,648) in July 2003 to apply to the 2002-2003 budget. DOE further contends that, even after that deduction, the District had sufficient excess balance to allocate to the 2003-2004 school year budget and, in addition, had sufficient funds to reach 2% in the undesignated general fund balance, the allowable amount under the FY 2004 Appropriations Act and applicable regulations. The District disputes these determinations.

Mr. Bishop testified that in his calculations he had used a $1.2 million number he obtained from the June 30, 2002 CAFR, but he did not produce the CAFR to support his statement. He admitted - - and it was confirmed by the testimony of Patricia Austin and Rodney Haines - - that this is the first time that the Department has *projected* a surplus balance and fund balance in advance of DOE's receipt and review of the CAFR. He could not explain why the Department made this change.

Ms. Austin testified that the District had *no* surplus in the 2001-2002 school year and that the only $1.2 million dollar item in the District's 2003-2004 budget relating to reserves was in the capital outlay account, which is a dedicated reserve allowable under DOE regulations. In

other words, Ms. Austin claimed the Department mistakenly assumed a $1.2 million dollar surplus from 2001-2002 that did not actually exist.

The second component of the Projected Surplus Balance was information obtained from the Board Secretary's Report. Mr. Bishop candidly admitted that this was based on a "snapshot" taken on June 30, 2003, and that Mr. Haines' figures on the excess surplus calculations are more current. Also, he conceded that the Department's projected surplus as of June 30, 2003 did not take into account the information derived from the accrual method of accounting, which is required under DOE regulations (*see N.J.A.C.* 6A:23-2.2(c)(3)), but rather focused on circumstances as of that date. Under the accrual method, the District must *record* expenses when legally obligated to pay them, even though they may not actually be paid until a much later date.

The result of DOE's surplus calculations is to: (1) deprive the District of the *Abbott v. Burke* receivable for 2002-2003 in the amount of $1,179,648; (2) require the District to add $539,957 in the 2003-2004 budget since DOE found alleged excess surplus for 2002-2003; and (3) deprive the District of funding needed in 2003-2004 to fill any shortfall below 2% in the excess surplus.

In contrast to the Department's methodology, Mr. Haines testified that he calculated the excess surplus using the official DOE calculation sheet and the procedures he would ordinarily follow in an audit. He also utilized information from the District based on accrual accounting rather than merely taking a "snapshot" as of June 30, 2003. The result of Mr. Haines' excess surplus calculation was that the District had a surplus of $1,029,540, well below the 2% allowable amount of $1,553,127.

In short, it appears that: (1) the basis of the Department's calculation of Projected Surplus Balance is unsupported by the record and conflicts with the accrual method of accounting; (2) the District's more current determination of the surplus balance follows applicable regulations and prescribed methodology for the annual audit; (3) until this year, DOE had waited for the audited numbers in the CAFR to make adjustments to the excess fund balance; and (4) DOE's method of calculating the 2% surplus results in depriving the District of an *Abbott v. Burke* receivable for 2002-2003 in the amount of $1,179,606, as well as the $523,588 it needs to reach the allowable 2% undesignated general fund balance. I believe, moreover, that the Department

has also mistakenly required the District to allocate $539,957 of alleged surplus fund balance in excess of 2% to the 2003-2004 budget when the evidence established that the District's actual surplus is considerably below the 2% allowable amount.

The sum total of these errors is to deprive the District of an Additional *Abbott v. Burke* State Aid receivable of $1,179,606 that the District was entitled to have in order to meet obligations in the 2002-2003 school year and to reduce the District's Additional *Abbott v. Burke* State Aid award in 2003-2004 by $1,063,544 (the sum of $539,956 and $523,588).

CONCLUSION AND ORDER

For the reasons stated above, I **CONCLUDE** that: (1) petitioner has been able to carry its burden of proving that Items number 1(a), (b), (c), (d), (e), and (h) (except for the Director of Security position) are non-discretionary and should be added to the base 2003-2004 State Program budget; and (2) the District has carried its burden of proving that the 2% undesignated fund balance and excess surplus were improperly calculated by the Department and should be readjusted as indicated heretofore. The Department should revise the District's Maintenance Budget, including the estimated need for discretionary Additional *Abbott v. Burke* State aid, accordingly. It is so **ORDERED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within the time allowed under the existing orders of the New Jersey Supreme Court and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Notwithstanding the provisions of any rule to the contrary, exceptions to Initial Decisions of the Office of Administrative Law in *Abbott* District budget appeal matters shall be filed within five (5) days of the date of mailing of the Initial Decision, and reply exceptions shall be filed

within two (2) days of receipt of exceptions. File written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 3, 2003
DATE

ROBERT S. MILLER, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

October 3, 2003
DATE

E-mailed Initial Decision to the parties on:

October 3, 2003
DATE

/tmp

APPENDIX

WITNESSES

For petitioner:

Iliana Okum

Charles A. Highsmith, Jr.

Rodney R. Haines

James J. Flanagan

Patricia Austin

For respondent:

Andrew Bishop

EXHIBITS

For petitioner:

P-1 Excerpt from No Child Left Behind ("NCLB") Application, dated August 28, 2003, listing proposed uses of federal funding in the 2003-04 school year. This document will demonstrate the dedicated purposes of NCLB funding in the 2003-04 school year.

P-2 No Child Left Behind Allocations for Pemberton Township in FY 2003 (from DOE website).

P-3 Preliminary FY 2004 NCLB Allocations for Pemberton Township from DOE.

P-5 September 8, 2003, memorandum to Chief School Administrator and School Principal regarding Preliminary School Status under NCLB and attachment identifying Alexander Denbo E.S.

P-6 September 10, 2003, memorandum to Chief School Administrator and School Principal regarding Preliminary School Status under NCLB and attachment identifying Pemberton High School.

P-13 Letter from Rodney R. Haines, Certified Public Accountant, to Patricia Austin, dated September 15, 2003, regarding undesignated fund balance and excess surplus fund calculation for 2002-03.

P-14 Letter from Rodney R. Haines, Certified Public Accountant, to Patricia Austin, dated September 15, 2003, regarding undesignated fund balance and excess surplus calculation for 2002-03.

P-15 Memorandum dated August 25, 2003, from Risk Assessment Services regarding pricing of Radon testing and removal.

P-16 Quote from Radata, Inc. re: Radon School Test Kit Pricing.

P-19 2002-03 Positions Created after September 1, 2002, that will be employed for the entire 2003-04 school year.

P-21 Excess Surplus Calculation showing that there is no excess surplus available over 2% for the 2003-04 school year.

P-22 2002-2003 – New Positions created worksheets of James Flanagan.

For respondent:

R-1 August 27, 2003 Decision letter from Gordon McInnes, Assistant Commissioner, Division of Abbott Implementation to Mark Cowell, Superintendent, Pemberton School District. This document sets forth the preliminary maintenance budget numbers which are the subject of this litigation.

R-2 Budget Worksheet, Pemberton School District. This document sets forth the corresponding calculations which support the findings set forth in the August 27, 2003 decision letter (R-1).

R-2A Revised Budget Worksheet for the Pemberton School District, completed in late September, 2003 and prior to hearing.

R-3 KPMG Audit Results – This is the result of an audit performed by the accounting firm KPMG, upon which the Department relied in coming to the calculations set forth in R-1 and R-2 above. This document is made up of a narrative portion as well as several schedules set forth as follows:

Schedule A – 2003 Total Projected Spending with 2004 Budget – Pemberton.

Schedule B – Audited Spending 2000-2002 – Pemberton.

Schedule C – Five Year Summary of Budget Appropriations Compared to 2004 Budget – Pemberton.

Schedule D – 2003 Total Projected Revenue – Pemberton.

Schedule E – 2003 Total Projected Revenues – With Comparisons to 200, 2001, and 2002 school years.

R-4 Board Secretary's Report dated June 30, 2003.

R-5 Pemberton's 2003-04 Budget.

R-6 Pemberton's 2002-03 Budget.

R-7 Resume of Andrew Bishop, Budget Manager for the Department of Education.

R-8 Memorandum from Richard Rosenberg, Assistant Commissioner, Division of Finance to Chief School Administrators and Business Administrators, dated January 29, 2003, regarding "Radon Testing in School.

R-9 Memorandum from Richard Rosenberg, Assistant Commissioner, Division of Finance to Chief School Administrator and Business Administrators, dated September 5, 2003, regarding "indoor Radon Testing in Public Schools."

R-10 Excerpt from NCLB guidelines.

Joint:

J-1 Stipulations (Letter dated September 29, 2003 from Shapiro to Miller)

J-2 Letter dated September 15, 2003 from Haines to Austin

BOARD OF EDUCATION OF THE TOWNSHIP OF PEMBERTON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	
	:	

The record of this local "Abbott" District's appeal of the Department's decision on its supplemental funding request for the 2003-04 school year, and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties' exceptions and replies were duly submitted in accordance with the schedule established in response to the Court's order for expedition and were considered by the Commissioner in reaching this decision.

Upon careful and independent review of the record, the Commissioner initially concurs with the Administrative Law Judge (ALJ) that the OAL does not have jurisdiction to determine directly or indirectly the validity of *N.J.A.C.* 6A:10-1.2, as such determination is solely within the jurisdictional purview of the Appellate Division or the Supreme Court. R. 2:2-3(a); *see, also, Pascucci v. Vagott*, 71 *N.J.* 40, 51-52 (1976); *Wendling v. N.J. Racing Com'n*, 279 *N.J. Super.* 477, 485 (App. Div. 1995). Even if it were to be assumed, *arguendo*, that the OAL has jurisdiction to consider petitioner's argument regarding the validity and applicability of

the regulation at issue, the Commissioner agrees with the ALJ that the Department's definition of "maintenance budget," as detailed in *N.J.A.C.* 6A:10-1.2, does not differ in any appreciable way from the Supreme Court's definition of that term contained in its Budget Order of July 23, 2003.

Next, the Commissioner recognizes that the Supreme Court's Order provides that the Department "shall bear the [initial] burden of moving forward to establish the basis for any proposed reductions to the [Abbott] district's maintenance budget based on the effective and efficient standard set forth in the DOE's emergency regulations."****Abbott v. Burke*, M-976 September Term 2002, at 7. However, the Department did not reduce the District's maintenance budget based on ineffectiveness or inefficiency. (Pemberton's Exceptions at 3) Therefore, the Commissioner notes that the District bears the burden of proving that the Department's calculations were unreasonable or otherwise improper. *N.J.A.C.* 6A:24-9.6(c).

There are essentially two issues before the Commissioner: whether the District has demonstrated that certain items are nondiscretionary and should, therefore, be added to the base 2002-03 budget and whether the District has demonstrated that the 2% undesignated fund balance and excess surplus were improperly calculated by the Department. On the latter issue, the Commissioner adopts the conclusion of the ALJ at page 10, subject to adjustment after receipt of the Comprehensive Annual Financial Report (CAFR) in November 2003.

The Commissioner does not, however, concur with the ALJ that the items proposed by the District, enumerated as (a), (b), (c), (d), (e) and (h)[1] in the Initial Decision at page 4, are properly considered "non-discretionary," within the intendment of the Supreme Court's Order.[2]

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[1] That is, positions other than the Director of Security.

[2] The Commissioner concurs with the ALJ's conclusion that item (f) Radon testing and item (g) Tienet testing, cannot be considered nondiscretionary maintenance budget items.

In this connection, the Commissioner notes that the pertinent regulations provide the following definition of maintenance budget:

> [F]or the 2003-2004 school year, a budget funded at a level such that a district can implement 2002-3003 approved and provided programs, services, and positions and includes documented increases in non-discretionary expenditures and adjustments for actual 2002-2003 expenditures. Examples of non-discretionary expenditures are increases in contracted salaries, health benefits, and special education tuition. Maintenance does not include the restoration of programs, positions or services that were provided in previous years or new programs, positions or services unless necessary to meet Paragraph 2c of the Supreme Court's order of June 24, 2003 in Abbott v. Burke. Maintenance also does not include non-recurring 2002-2003 expenditures. *N.J.A.C.* 6A:10-1.2.

Here, the District asserts that the No Child Left Behind (NCLB) Supplementary Services for the Busansky Elementary School, the Stackhouse Elementary School and the Fort Middle School ($251,638), the NCLB Supplementary Services for the Denbo Elementary School and the Pemberton High School ($150,000) and the NCLB ESL Paraprofessional Position ($12,001) should be considered nondiscretionary. The District reasons that, as a result of a mandatory set-aside of funds for supplemental services in these schools, it "does not have that funding to provide in 2003-04 the positions, programs and services in the basic skills area that were provided to students in these schools during the 2002-03 school year." (Pemberton's Post-hearing Brief, October 2, 2003, at 3)[3] Quite simply, the District asserts that, "[r]egardless of the source of the legal mandate, the District has an obligation to meet federal and state legal requirements, and that obligation renders such expenditures non-discretionary in the 2003-04 school year." (*Id.* at 4)

[3] Notably, however, the District does not provide detail with respect to those programs and services which, it alleges, were approved and provided for 2002-03 and will be sacrificed to the NCLB program and position requirements for the 2003-04 school year.

The Commissioner finds, however, that the District has failed to meet its burden of demonstrating that these items are "non-discretionary" within the intendment of the Supreme Court's Order and the implementing regulations, *supra,* where the NCLB Supplementary Services and NCLB ESL Paraprofessional Position were neither approved nor provided in 2002-03, and where the District failed to present evidence that it considered other resources or reallocations in order to meet these new requirements. In so finding, the Commissioner notes that *N.J.A.C.* 6A:10-3.1(g) provides a mechanism to obtain additional supplemental funding where unanticipated expenditures or unforeseen circumstances warrant.

Similarly, the Commissioner finds that the two ESL positions ($80,000) and the two Balanced Literacy Positions ($80,000) are unquestionably positions which were neither approved nor provided in the 2002-03 school year. As such, these positions cannot be considered within the definition of "maintenance budget" and are beyond the scope of the Supreme Court's Order and the implementing regulations.

Finally, the Commissioner acknowledges that the District seeks $312,353 in salary prorations that were filled for less than the full 2002-03 school year. However, the Department takes the position, and the Commissioner so upholds, that under the maintenance definition, positions are properly funded in accordance with the amounts actually spent on those salaries in the 2002-03 school year, along with the nondiscretionary salary increases, that is, "[t]he district will receive funding for any teacher or substitute that was employed last year based on the amount that the district paid to those individuals plus the agreed contracted salary rate increase agreed upon." (Department's Exceptions at 7-8)

In so finding, the Commissioner notes that the Department's overall charge in this matter was to determine the level of 2003-04 funding that would enable the District to continue

in a "maintenance" mode, that is, to implement in 2003-04 the programs, services and positions provided in 2002-03. While it is true that dollar amounts actually paid out for staffing prior to June 30, 2003 will not perfectly predict the cost of providing comparable staffing in the next, it is *equally* true that originally budgeted amounts and other similar projections are no less imprecise. Thus, in the Commissioner's view, a methodology which preliminarily establishes the 2003-04 cost of providing positions at "maintenance" levels by determining, as nearly as possible without benefit of audit, the actual approved cost of providing them in 2002-03 and then allowing for reasonable, nondiscretionary adjustments, is a uniform, fair and rational method for estimating future expenditures which cannot otherwise be determined with any degree of precision. In this connection, the Commissioner is not persuaded that this method does not take into account vacancies, retirements, substitutes and positions filled for only part of the year, since variances of these types occur every year and a preliminary district-wide salary budget is appropriately based on the assumption that staffing is a flexible and continuous process, with ebbs and flows that, absent specific evidence to the contrary, generally permit the projection of one year's experience onto the next.[4] To the extent that results may be imperfect, even after adjustment following audit, as noted above, *N.J.A.C.* 6A: 10-3.1(g) provides a mechanism to obtain additional supplemental funding where unanticipated expenditures or unforeseen circumstances warrant.

[4] Moreover, as the Department noted and the District does not dispute:

> [T]he District failed to meet its obligation under *N.J.A.C.* 6A:10-3.1(b)2 and 3, [which] required a district prior to submitting its application for additional supplemental funding, to consider its salary appropriations for vacant positions and salary breakage for replacement of retiring staff during the upcoming budget year. Mr. James Flanagan, Assistant Business Administrator for Pemberton testified that he had not completed a salary breakage analysis for the district for the 02-03 school year. (Department's Exceptions at 8)

Accordingly, the Initial Decision is modified as set forth herein.[5]

IT IS SO ORDERED.[6]

COMMISSIONER OF EDUCATION

Date of Decision: 10/28/03

Date of Mailing: N/A

[5] The Commissioner so determines, based upon the proofs brought to *this* record, while acknowledging that the presentation of such evidence may have been disadvantaged by both a Court Order to expedite proceedings and the unavailability of the CAFR until November 2003, which will reveal the District's true audited fund balance and available revenue, if any, as of June 30, 2003.

[6] Pursuant to *P.L.* 2003, *c.* 22, "*Abbott*" determinations are final agency actions appealable directly to the Appellate Division of the New Jersey Superior Court.

595-03

BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning "Abbott" District appealed the Department's determination of its 2003-04 preliminary "maintenance budget," alleging that the definition of "maintenance budget" set forth in *N.J.A.C.* 6A:10-1.2 conflicts with the July 23, 2003 Order of the Supreme Court and, therefore, should not govern the case; that the Department's calculation for charter school tuition did not take into account the correct and actual documented increases in tuition; and that the Department's calculation for utilities rate increases fails to include the utilities costs for two buildings that were not fully utilized in the 2002-03 school year.

The ALJ found: 1) the rule duly promulgated to implement the Court's Order for "maintenance" controlled in this proceeding, and that the Office of Administrative Law lacked jurisdiction to determine its validity; 2) that the Department properly adjusted the maintenance calculation for charter school tuition; and 3) that the proofs offered by the District in support of its projected utility rate cost increase were deficient and devoid of any competent evidence that would offer credence to the District's position in this regard. The ALJ upheld the Department's calculations, concluding that the Department properly determined the District's increase in utilities costs in accordance with established Supreme Court criteria and appropriate Department regulations, with such calculations being subject to adjustment upon receipt of supportive information from the District in the course of the Comprehensive Annual Financial Report (CAFR) process.

The Commissioner concurred with the ALJ's findings and conclusions and adopted the Initial Decision.

October 28, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 05492-03

AGENCY DKT. NO. 191-6/03

BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,

Petitioner,

v.

NEW JERSEY DEPARTMENT OF EDUCATION,

Respondent.

Richard E. Shapiro, appearing for petitioner

Francine W. Kaplan, Deputy Attorney General, appearing for respondent (Peter C. Harvey, Attorney General of the State of New Jersey, attorney)

Record Closed: September 30, 2003 Decided: October 3, 2003

BEFORE **LESLIE Z. CELENTANO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The Board of Education of the City of East Orange ("petitioner" or "District"), the operator of an urban special needs "*Abbott*" school district, appeals from the determination of the New Jersey State Department of Education ("DOE" or

"Department") establishing the District's "preliminary maintenance budget" for the 2003-2004 school year. *N.J.S.A.* 18A:7F-3.

On March 24, 2003, the DOE moved before the New Jersey Supreme Court for an Order modifying the decision in *Abbott v. Burke*, 153 *N.J.* 480 (1998) (*Abbott V*). Specifically, the DOE requested that discretionary supplemental aid be limited in the years 2003-2004 to providing support for programs, positions and services approved for 2002-2003. On April 8, 2003, the Education Law Center responded and cross-moved for an Order setting an expedited schedule for the DOE's decisions on district budget approvals and appeals. Following Court-ordered mediation, the parties agreed to an expedited schedule, pursuant to which respondent was to issue its determinations by May 30, 2003. The agreement further provided for a review process with hearings before the Office of Administrative Law (OAL). On May 20, 2003, the Court entered an Order incorporating the agreement.

On May 30, 2003, the DOE rendered decisions on the *Abbott* districts' budgets. In this matter, by letter of that date, the District was notified that DOE had completed its initial review of the 2003-2004 budget, and that the budget had passed all required edit checks with no errors, and further, that the budget had been approved except as delineated in the letter. On June 6, 2003, the District's Verified Petition of Appeal was filed with the Department and the matter was, in turn, transmitted to the OAL on June 9, 2003. On June 16, 2003, the Department's Answer was filed with the OAL.

Petitioner's appeal raised the issue of the proper standard for approving district budgets for the 2003-2004 school year. On June 24, 2003, the Supreme Court issued an Order scheduling oral argument for July 10, 2003, concerning the standard to be used. On July 23, 2003, the Supreme Court issued an Order approving a maintenance standard as set forth therein, for the 2003-2004 budget process. The Court also directed the DOE to promulgate emergency regulations, and established a schedule for further proceedings.

On August 22, 2003, the DOE promulgated emergency regulations, a key provision of which is a definition of "maintenance budget" as the standard for reviewing the applications of "Abbott Districts" for supplemental aid for the 2003-2004 school year.

On August 27, 2003, the DOE sent to the district superintendent, preliminary maintenance budget figures for the 2003-2004 school year, setting the District's budget at $166,433,502 inclusive of the District's general fund budget and restricted revenue accounts. The DOE's review determined that the District's need for discretionary Additional Abbott v. Burke State Aid was determined to be $2,606,739. The letter also noted that the preliminary maintenance budget and the estimated supplemental aid was subject to further adjustment after submission by the District of the 2002-2003 CAFR.

The hearing was originally scheduled to be conducted on September 4, 2003; however, on September 3, 2003, counsel for the District advised that his principal witness had been out of state for a week due to her father's serious illness, had only returned the day before, and had not had an opportunity to review the DOE documentation or discuss discrepancies between the District and DOE's budget numbers. The matter was thereafter scheduled to be heard on September 22, 2003, however, due to the multiple representations of the school districts by petitioner's counsel, it became impossible to begin the hearing until September 25, 2003, one day before the original filing deadline of September 26, 2003, pursuant to the Supreme Court's Order. The hearing was commenced on September 25, 2003. At the conclusion of the hearing, the parties requested the opportunity to file post-hearing briefs by September 29, 2003, which date was extended to September 30, 2003, following the Court's extension of the filing deadline to October 3, 2003. Briefs were received on September 30, 2003, and on that date the record closed.

ISSUES

Prior to the hearing, it was agreed that there were three issues in dispute. First, the District contends that the definition of "maintenance budget" set forth in N.J.A.C. 6A:10-1.2 conflicts with the Supreme Court's July 23, 2003 Order, and therefore should not govern the case. Second, the District argues that the DOE's calculation for charter school tuition did not take into account the correct and actual documented increases in tuition. Third, the District argues that the DOE's calculation for utilities rate increases fails to include the utilities costs for two buildings that were not fully utilized in the 2002-03 school year.

FACTS

Based on the relevant evidence I **FIND** the following as **FACT**:

1. On March 24, 2003, DOE moved before the New Jersey State Supreme Court for an order to modify the decision in *Abbott v. Burke,* 153 *N.J.* 480 (1998)(*Abbott V*). Essentially, DOE sought to limit the supplemental aid to an amount sufficient to support programs, positions and services in the Districts' approved budgets for 2002-2003.

2. On July 23, 2003, the Court granted DOE's motion to relax the *Abbott V* remedies as applied to the 2003-2004 budget process. The Order states in part:

> (1) The DOE's application to extend the relaxation of remedies granted in *Abbott V* is granted as follows: The DOE shall have the authority to treat the 2003-2004 school fiscal year as a maintenance year for purposes of calculating Additional *Abbott v. Burke State Aid* for the *Abbott* districts. During 2003-2004, K-12 programs provided for in the 2002-2003 school year will be continued, subject to conditions set forth in this Order.

(2) The Statewide aggregate amount of Additional *Abbott v. Burke* State Aid shall be presumptively calculated as the total amount of Additional *Abbott v. Burke* State Aid approved for the *Abbott* districts for Fiscal Year 2002-2003, subject to adjustment as required for a maintenance budget. A maintenance budget shall mean that a district will be funded at a level such that the district can implement current approved programs, services, and positions and therefore includes documented increases in non-discretionary expenditures. Examples of non-discretionary expenditures are increases in contracted salaries, health benefits, and special education tuition. Maintenance does not include the restoration of programs, positions, or services that were reduced in 2002-2003, or new programs, positions, or services, except in respect of Paragraph 2c. of the Court's Order of June 24, 2003 (pertaining to those elementary schools without a whole school reform developer in place in 2002-2003 and permitting whole school reform contracts in certain circumstances), irrespective of the timing for the promulgation of regulations governing that provision.

(3) For purposes of calculating Additional Abbot v. Burke State Aid and in furtherance of its pre-existing duty to implement administrative controls, the DOE shall promulgate an emergency regulation establishing the standard for evaluating the effectiveness and efficiency of the districts' non-instructional programs. (Non-instructional programs are defined as office/administrative expenditures and programs, positions, services and/or expenditures that are not school based or directly serving students.) Insofar as any *Abbott* district has not been informed of its total amount of last year's approved Additional *Abbott v. Burke* State Aid, the DOE shall provide written notice of that amount within two weeks of the date of this Order. The DOE's application of the effective and efficient standard in its review of a district's maintenance school budget may result in a reduction to a district's presumptive amount of Additional *Abbott v. Burke* State Aid.

(4) Within 30 days of the issuance of this Order, the DOE shall provide in a Notice to each district preliminary maintenance budget figures for the 2003-2004 school year consisting of the 2002-2003 approved budget and an estimate of the supplemental funding that will be needed to support that currently approved budget. If the DOE

> deletes an expenditure from a district's 2002-2003 budget related to the district's non-instructional programs and based on the effective and efficient standard, the DOE must include in the written notice to the district the expenditure deleted along with a specific statement explaining why the program or part thereof is no longer effective and efficient.
>
> (5) Abbott districts may appeal any reductions to their maintenance budgets by the DOE's application of the effective and efficient standard, which appeals shall be heard by the [OAL]. In those appeals, the DOE shall bear the burden of moving forward to establish the basis for any proposed reductions to the district's maintenance budget based on the effective and efficient standard set forth in the DOE's emergency regulations. If that initial burden is met, the district shall bear the burden of demonstrating that any budgetary reductions are not justified under that standard.
>
> ***
>
> (6) To the extent that monies are deleted by the DOE in the districts' non-instructional programs based on the effective and efficient standard, those monies shall be made available to the districts as follows: an *Abbott* district may apply for and the State may award such aid for demonstrably needed programs or services. The allocation of such available funds shall not be viewed as inconsistent with this Court's approval of use of a maintenance budget for Fiscal Year 2003-2004.

3. On August 22, 2003, DOE promulgated emergency regulations, which defined "maintenance budget" as the standard for evaluating the districts' programs. The regulation states:

> "Maintenance budget" means, for the 2003-2004 school year, a budget funded at a level such that the district can implement 2002-2003 approved and provided programs, services, and positions and includes documented increases in non-discretionary expenditures and adjustments for actual 2002-2003 expenditures. Examples of non-discretionary expenditures are increases in contracted salaries, health

> benefits, and special education tuition. Maintenance does not include the restoration of programs, positions, or services that were provided in previous years or new programs, positions, or services unless necessary to meet paragraph 2c of the Supreme Court's order of June 24, 2003 in *Abbott v. Burke.* Maintenance also does not include non-recurring 2002-2003 expenditures.
>
> [*N.J.A.C.* 6A:10-1.2]

4. On August 27, 2003, DOE issued a Notice of Preliminary Maintenance Budget for 2003-2004 for the District in the amount of $166,433,502. Further, DOE determined the District's estimated need for discretionary Additional *Abbott v. Burke Aid* is $2,606,739. The notice also states:

> It should be noted that the preliminary maintenance budget and the estimated need for discretionary Additional Abbott v. Burke State aid will be subject to further adjustment after submission by your district of the 2002-2003 CAFR.

LEGAL ANALYSIS AND CONCLUSION

The District contends that the definition of "maintenance budget" contained within *N.J.A.C.* 6A:10-1.2 conflicts with the Supreme Court's July 23, 2003 Order. This issue has been previously addressed by two Administrative Law Judges. In the matter of *Board of Educ. of the City of Asbury Park v. New Jersey Department of Education,* OAL Dkt. EDU 4095-03, decision by Hon. John R. Tassini, ALJ, on Order Relative To "Maintenance Budget" (September 4, 2003), Judge Tassini considered an *Abbott* district's challenge to the validity and applicability of the definition of "maintenance budget" set forth in *N.J.A.C.* 6A:10-1.2. Judge Tassini determined that a challenge to a duly adopted regulation, such as *N.J.A.C.* 6A:10-1.2, must be brought in the Superior Court, Appellate Division, pursuant to R. 2:2-3(a)(2), and that no jurisdiction exists at the OAL. He concluded, therefore, that the regulation must be applied at the OAL. Moreover, on September 10, 2003, in the matter of *Board of Educ. of the Township of Neptune v. State of New Jersey, Department of Education,* OAL Dkt. EDU 4096-03,

decision by Hon. Joseph F. Martone, ALJ, on Order Relative To "Maintenance Budget" (September 10, 2003), Judge Martone agreed with Judge Tassini's determination, and found that the definition of "maintenance budget" within *N.J.A.C.* 6A:10-1.2 was consistent with the Supreme Court's Order of July 23, 2003. As he concluded that the Supreme Court's Order provided a reasonable basis for the definition of "maintenance budget" in the regulation, he declined to disregard that definition in deciding an Abbott school district case. I concur with the analyses of both Judge Martone and Judge Tassini and the conclusions they reached regarding the definition of "maintenance budget" are incorporated here. I therefore **CONCLUDE** that the definition of "maintenance budget" as set forth in *N.J.A.C.* 6A:10-1.2 is applicable to this matter.

The District also contends that the DOE did not consider the correct and actual documented increases in two categories of non-discretionary expenditures, charter school tuition and utilities. None of the other specific maintenance budget calculations of the DOE were contested by the District and, after making two agreed-upon changes, the parties stipulated to most of the remaining numbers set forth in those calculations (J-2). With respect to the corrections, on page one of J-2, the parties agreed to an increase of $119,734 in "Salaries-Contracted Rate", and on the top of page two of J-2, the parties agreed to the elimination as a revenue line item of "$333,947.00" on J-2, under the heading "Budget: 2003-2004".[1].

Testifying for the district was Joyce DeVincenzi, Assistant Business Administrator. She has been employed for five years in that capacity and previously was employed with the Boonton Board of Education as Superintendent, and prior to that with the same district as Business Administrator. She is certified as a Business Administrator and an Assistant Superintendent for Finance. Her duties include collecting data and preparing the budget for final submission to the DOE.

[1] The District stipulated to the numbers in the maintenance budget calculations but reserved its right to challenge whether the regulation comports with the Supreme Court's July 23, 2003 Order.

With respect to the calculations for charter school tuition, DeVincenzi first explained that the District disagrees with the decrease in charter school tuition of $76,952 which represents the difference between the 2002-03 budgeted amount ($4,197,650) and the 2003-04 budgeted amount ($4,120,698). The decrease is disputed by the District because the budgeted amount for 2002-03 was not actually received by the District. The actual cost to the District for the year 2002-03 for charter school tuition, through June 30, 2003, was $4,102,207. Ms. DeVincenzi, referencing p. 6 of P-1, indicated that pursuant to the per mandate of February 2003, the District budget for 2003-2004 should have included $4,262,508 for charter school tuition. This was a reduction of $79,328 from the District's approved estimated appropriation for charter school tuition for October 15, 2002. DeVincenzi testified that usually she would not receive another estimated appropriation for charter school tuition costs until October 15 of each year and was not aware that a figure as of June 1, 2003 was issued until she arrived at the hearing in this matter. DeVincenzi testified that she submitted her Board Secretary's June 30, 2003 report to the DOE in August of this year and that report contains the District's calculations of what they actually will expend on charter school tuition for 2003-04. DeVicenzi alleges that the "actual expenditure" for charter school tuition for 2003-04 will be $4,102,207.[2] DeVincenzi urges the utilization of the calculation of actual expenditures of $4,102,207 for 2002-03 and the February 25, 2003 estimate of charter school tuition of $4,262,508 to compute the 2003-04 appropriations amount which would result in an increase of $160,301 in tuition costs for 2003-04. The District argued none of the current numbers from the DOE should be used because they are all "budgeted" numbers and not "actual expenditures." However, DeVincenzi used the February 25, 2003 "budgeted" number to arrive at the $160,301 number. DeVincenzi acknowledged that each year the District provides enrollment figures to the DOE which recalculates charter school tuition and adjusts the estimated appropriations for the District's charter school tuition costs during

[2] The DOE issued an estimated notice for Charter School tuition costs on June 1, 2003 that it utilized to arrive at the figures in its August 27, 2003 preliminary maintenance budget determination in the amount of $4,120,698, which is $18,491 higher than the figure given by DeVincenzi.

the year. *See N.J.A.C.* 6A:11-7.2(k). DeVincenzi also indicated that it was her understanding that the per pupil tuition has decreased since 2002-03 and that was the reason for the reduction in the initial budgeted amount for 2003-04 over last year's figure. The District's primary concern, however, is that if there is an upward adjustment of enrollment, the District would not receive actual cash funding from the state; rather, it would receive an account receivable entry, which it would not be able to utilize to meet current expenses.

With regard to the utilities calculations, DeVincenzi testified that the District is operating two additional buildings for classroom instruction, which have not previously been fully utilized. One facility is referred to as the Glenwood Avenue site, a building previously used by the Archdiocese of Newark. The second facility is referred to as the old East Orange High School building, located at 34 North Walnut Street, East Orange. DeVincenzi described the Glenwood Avenue site as being used to house an "alternative program", to provide a different setting for "certain students who are unable to function in a day-to-day classroom". She testified that she determined the square footage of the building and then compared it with the C.J. Scott building, another building in the District's inventory which is approximately the same square footage as the Glenwood site. She calculated what was spent on utilities at the Scott building and used that amount to set the utility costs for the Glenwood site, arriving at a figure of $98,330.14[3]. DeVincenzi indicated that these figures were obtained from the PSE&G bills for the Scott building. On cross-examination DiVincenzi was unable to offer testimony as to the age of either building, type(s) of heating system, age of the equipment, or any deficiencies in the equipment and indicated that she compared square footage only.

With regard to the old high school building, DeVincenzi testified that, for the past year, it has been largely unoccupied, with two people working in the kitchen occasionally, and no students in the facility for any portion of the year. Lights were kept on "as needed" for security purposes, and the building was heated to prevent pipes

[3] This figure consists of three line items as reflected on P-2 in the amounts of $82,738.92, $8,821.20 and $6,770.02, for a total of $98,330.14.

from freezing. The District now has transferred 1,000 students to that site with the attendant staffing, and runs a full educational program for the 9th grade at that location. The District arrived at its proposed utility figure for the building by doubling the total utility costs of $238,254.58 for the building in 2002-03.

Accordingly, the increases for utilities sought by the District for the 2003-04 school year, including the $529,812.50 calculated by the DOE to constitute utilities rate increases for existing buildings, is $866,397.22. DeVincenzi indicated that doubling the utilities expended at the old high school building last year for its new level of occupancy was her "best guess" of what utilities would be in 2003-04 for that building. She testified that the old high school building was last used in 2001-02 as a school; however, she was unable to provide any evidence of the cost of utilities for that year. She had no information relative to the temperature maintained in the building during the year when it was minimally used, did not know what type of heating system was in place, and had no information as to the amount of lighting utilized other than noticing "what lights were on as [she] drove by."

Testifying for the Department was Michael Arizechi, who has been employed by the DOE as Budget Manager for five years. Mr. Arizechi is a CPA, with an MBA and a BA degree in accounting. His responsibilities include reviewing the initial budgets of the school districts in February of each year and doing an analysis of the numbers. He reviewed the District's 2002-03 budget and its 2003-04 budget.

With respect to the reduction of $76,952 in the charter school tuition line item, Mr. Arizechi testified he arrived at this figure based upon the annual aid calculation as of June 30 for the year 2002-03. He utilized the chart (P-4), prepared by Yut'se Thomas, Director of the Office of School Funding within the DOE, entitled Aid Calculated for June 1, 2003 for the 2003-04 School Year, in his preparation of the DOE worksheet (J-2). The budgeted amount for charter school tuition for 2002-03 was $4,197,650 and the budgeted amount for the 2003-04 was estimated to be $4,128,698, resulting in a difference of $76,952. The decrease was reflected in the line item for

charter school tuition on the worksheet. The number appears as a negative number because the mandate is $76,952 less. Arizechi agreed that he had not used the actual expenditure for 2002-03 in his calculation; rather he utilized the budgeted numbers for 2002-03 and 2003-04 in arriving at his calculation. He testified that the 2003-04 figure of $4,120,698 must be budgeted by the District, and thereafter is subject to adjustment depending on enrollment. He agreed that in other areas the actual expenditures were reviewed in determining the increases for 2003-04.

Regarding the utilities issue Arizechi agreed that he had not taken into account the utilization of the Glenwood School and the old East Orange High School buildings in arriving at his figure for utility cost increases of $529,812.50. Rather, he looked at the history and the actual numbers and the auditors report to see what the expenditures had been. He compared the auditors report with the District numbers and used 50% of the difference (the increase) as his basis for arriving at a figure of $529,812.50 for non-discretionary increased utility costs for 2003-04.

With respect to charter school tuition, increases or decreases are considered non-discretionary and accordingly must be added to or subtracted from the maintenance budget calculation. Preliminary charter school tuition figures are provided to the districts by the DOE. The districts report their student enrollment figures to the DOE for District charter schools three times a year, in October, February and June of each year. Adjustments in charter school tuition calculations are made pursuant to *N.J.A.C.* 6A:11-7.2(k)(4) which provides in salient part as follows:

Enrollment counts, payment process and aid adjustments.

. . .

(k) The following delineates the payment process and payment adjustments made to a charter school by the district of residence and non-resident district(s) during any given school year.

. . .

(4) During the school year, a charter school shall conduct an enrollment count on October 15, February 15 and the last day of the school year. A charter school shall submit each count through a summary school register for the purposes of determining average daily enrollment.

i. The data shall be submitted to the Commissioner three days after the dates of each of the three required enrollment counts and all aid to a charter school shall be adjusted accordingly from estimated enrollments counts to average daily enrollments and then adjusted forward to the next four months.

. . .

In calculating the changes in the charter school tuition, the DOE reviewed the budgeted tuition for 2002-03 and the budgeted tuition for the 2003-04, resulting in a decrease of $76,852, which is reflected as a deduction from the preliminary maintenance budget. The District argues that they did not actually receive this sum of money as it was merely a budgeted figure, and therefore should not be "charged with" having received it. The District acknowledges that the budgeted amounts are adjusted throughout the course of the school year as enrollment figures are revised and updated. It urges that, because the budgeted amount for 2003-04 is $18,481 more than the actual costs for charter tuition in 2002-03, this constitutes a documented actual increase in charter school tuition expenditures for 2003-04. This clearly is not the case. Charter school tuition aid is revised throughout the course of the school year pursuant to *N.J.A.C.* 6A:11-7.2 as the enrollment figures change. The District's concern is that enrollment may rise, and there is no assurance that the District will receive actual cash funding to help meet other financial obligations rather than an account receivable adjustment. Concern over an accounting entry cannot serve as the basis for an upward adjustment in the 2003-04 figure in favor of the District. Based upon the foregoing, I therefore **CONCLUDE** that the DOE properly adjusted the maintenance calculation for charter school tuition.

As to the utilities issue, any increase or decrease in utilities is a non-discretionary item under the Department's maintenance budget calculation. The Department calculated utilities rate increases in the amount of $529,812.50, and agreed that it had not included in its calculation the utilities costs for two buildings which had not been previously fully utilized for classroom instruction. With respect to the Glenwood Avenue site, the utilities costs for a building with similar square footage were utilized by the District in arriving at its request for the Glenwood site[4]. No other comparisons were made to take into consideration any of the other factors influencing utilities costs, including the age of either building, the type of heating system (whether oil or gas), number or type of windows, efficiency ratings in the heating systems of either building, or the utilities costs incurred by the Archdiocese of Newark which had previously utilized the building. The Court's Order requires funding for documented increases in non-discretionary expenditures. Clearly, the utility costs for the Glenwood Avenue site which the District urges be included are not documented, and contrary to the District's assertion, there is no "persuasive evidence" of $98,330.14 in utilities costs attributable to the Glenwood Avenue site.

With regard to the old East Orange High School building, the District utilized the building only for limited purposes in 2002-03 to operate some catering functions out of the kitchen. The building will now be used to house 1,000 ninth grade students and staff for the current school year and will be in full operation from September through June 2004. The District is seeking an addition $238,254.58 as the increase in utilities costs for this building for 2003-04, which figure was arrived at by doubling the utilities costs for last year. This figure is also an arbitrary figure and does not constitute competent evidence of an increase in utilities costs attributable to the East Orange High School property for 2003-04.

The District bears the burden of proving that the DOE's calculation of its maintenance budget failed to follow the maintenance budget review required under *N.J.A.C.* 6A:10-1.2. I **FIND** the proofs to be deficient and devoid of any competent

[4] No evidence was offered as to the square footage of either building.

evidence that would offer credence to the District's position with regard to utilities cost increases. The District has not established entitlement to the additional $336.584.72 sought, by a preponderance of the credible evidence, and I so **FIND.** I **FIND** that the DOE properly determined the District's documented increase in utilities costs in accordance with established Supreme Court criteria and appropriate DOE regulations. Further adjustments based upon actual spending should await the Comprehensive Annual Financial Report ("CAFR"). Pursuant to *N.J.S.A.* 18A:23-1, the District is to have an annual audit completed not later than four months after the end of the school fiscal year. *N.J.A.C.* 6A:23-1.2 defines the CAFR to be the official annual report of a governmental unit that includes all funds and accounts groups summarizing the activities and operations performed by all units. According to the DOE, if the District's new information is, after audit, included in the CAFR, then the adjustment will be made to the District's aid award pursuant to the Appropriations Act (New Jersey Fiscal 2003-04 Appropriations Act, P.L. 2003c. 122).

Moreover, *N.J.S.A.* 6A:10-6.1 provides a mechanism for the District to apply for additional supplemental funding. These options provide the District with a realistic approach under the circumstances, inasmuch as the severe time constraints in this matter[5] do not permit the record to be reopened in order for competent proofs to be received.

In a climate of extremely limited resources available for allocation, a concerted effort is mandated to guarantee that those resources are properly apportioned in a fiscally responsible manner. That apportionment cannot be based upon a "best-guess."

In light of this, I **CONCLUDE** that it is not only reasonable but appropriate that the District's *Abbott v. Burke* State Aid Award be adjusted based on the annual audit filed pursuant to *N.J.S.A.* 18A:23-1, if the District's supplemental information relative to

[5] Post-hearing briefs were received on the afternoon of September 30, 2003, and on that date the record closed.

documented utilities costs for the two buildings is, after the requisite audit, included in the CAFR. I, therefore, **CONCLUDE** that the DOE correctly adjusted the maintenance calculation for utilities, and that any further adjustments for supplemental information should be audited and adjusted with the 2002-03 CAFR.

ORDER

Based upon the foregoing it is hereby **ORDERED**:

1. That the definition of "maintenance budget" set forth in N.J.A.C. 6A:10-1.2 is applicable in this matter.

2. That the maintenance budget reflect the DOE's calculation relative to charter school tuition of ($76,952).

3. That the maintenance budget reflect the DOE's calculation for increased utilities of $529,812.50 with the actual utilities costs attributable to the two additional buildings to be added into the final calculation.

I further **ORDER** for the reasons set forth above that in all other respects, the determination by the DOE with respect to the District's 2003-04 budget as set forth in Assistance Commissioner MacInnes' letter of August 27, 2003 be **AFFIRMED** and that the appeal be **DENIED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within the time allowed under the existing orders of the New Jersey Supreme Court and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Notwithstanding the provisions of any rule to the contrary, exceptions to Initial Decisions of the Office of Administrative Law in *Abbott* District budget appeal matters shall be filed within five (5) days of the date of mailing of the Initial Decision, and reply exceptions shall be filed within two (2) days of receipt of exceptions. File written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 3, 2003
DATE

LESLIE Z. CELENTANO, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

October 3, 2003
DATE

E-mailed Initial Decision to the parties on:

October 3, 2003
DATE
da

APPENDIX

Witnesses

For Petitioner:

Joyce DeVincenzi

For Respondent:

Michael Arizechi

Exhibits

Joint:

J-1 Letter dated August 27, 2003, from Gordon MacInnes to Dr. Laval Wilson, Superintendent East Orange School District, 2 pages

J-2 Worksheet entitled "District East Orange, Maintnew, August 27, 2002" 2 pages

For Respondent:

R-1 The Report of Lerch, Vinci & Higgins, L.L. P., Certified Public Accountants, 38 pages

For Petitioner:

P-1 Worksheet entitled "2002-2003 Charter School", and attachments, 12 pages

P-2 Worksheet entitled "East Orange School District Utilities," 1 page

P-3 Worksheet entitled, "East Orange School District, Public Service Analysis, total Monthly Gas & Electric 2002-2003", 2 pages

P-4 Report of the Department of Education, Charter School Division, entitled, "Aid Calculated for June 1, 2003 for the 2003-04 school year", 1 page

OAL DKT. NO. EDU 05492-03
AGENCY DKT. NO. 191-6/03

BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

The record of this local "Abbott" District's appeal of the Department's decision on its supplemental funding request for the 2003-04 school year, and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. East Orange's exceptions were duly submitted in accordance with the schedule established in response to the Court's order for expedition and were considered by the Commissioner in reaching this decision.

Upon careful and independent review of the record, the Commissioner adopts the Administrative Law Judge's (ALJ) decision as he determines her factual findings, analysis and legal conclusions are consistent with the Supreme Court's Order of July 23, 2003, as well as the Department's regulatory amendments adopted on August 22, 2003.

Initially, it is noted that petitioner's exceptions object to the ALJ's failure to address an issue, raised in its post-hearing brief, with respect to the legal propriety of the Department's fund balance calculation. (Petitioner's Exceptions at 1, 2) In this regard, the District states that the Department's August 27, 2003 budget letter projected the District's excess fund balance, made reductions to what it had determined was a balance in excess of the required

two percent, and denied the District's *Abbott v. Burke* receivable for 2002-03 based on its projected calculations. It charges that the Department's "projection of excess fund balance prior to the receipt of the [Comprehensive Annual Financial Review] CAFR violates the language and intent of the FY 04 Appropriations Act." (*Id.* at 8, 9)

The Commissioner finds the District's charge in this regard without merit. It is observed that the Supreme Court's Order directed the Department to provide Abbott districts with their preliminary maintenance budget figures for the 2003-04 school year by August 27, 2003. In fulfillment of that directive, the Department, pursuant to *N.J.A.C.* 6A:10-3.1(c), reviewed the most recent budget calculations provided by the District to determine if all available resources and reallocations and other factors had been incorporated in the budget and that the budget submitted comported with the maintenance standard. Based on this review, the Department made the requisite projections in its August 27, 2003 *preliminary* maintenance budget letter. It must be emphasized that the preliminary maintenance budget figure for the District here is just that, *preliminary*, subject to the CAFR, which will establish the District's actual audited expenses for the 2002-03 school year. Likewise, the estimate of the District's discretionary *Abbott v. Burke* aid is also subject to the District's true audited fund balance and available revenue, if any, as of June 30, 2003.

Next, the Commissioner concurs with the ALJ, that *N.J.A.C.* 6A:10-1.2, the regulation duly promulgated to implement the Court's July 23, 2003 Order, must control in the instant proceeding, and that the OAL does not have jurisdiction to determine, directly or indirectly, its validity, as such determination is solely within the jurisdictional purview of the Appellate Division or the Supreme Court. R. 2:2-3(a); *see, also, Pascucci v. Vagott*, 71 *N.J.* 40, 51-52 (1976); *Wendling v. N.J. Racing Com'n*, 279 *N.J. Super.* 477, 485 (App. Div. 1995).

However, even if the Commissioner were to accept, *arguendo*, the District's contention that a "choice of law" may be made without passing on the validity of the rule itself, the Commissioner here agrees with the ALJ that the Department's definition of "maintenance budget," as set forth in *N.J.A.C.* 6A:10-1.2, is entirely consistent with the language and intent of the Court, with no conflict between it and the underlying order.

In his consideration of the District's remaining arguments herein, the Commissioner finds that a review of the respective parties' burdens of proof is particularly instructive. In this regard, the Commissioner recognizes that the Supreme Court's Order provides that the Department "shall bear the [initial] burden of moving forward to establish the basis for any proposed reductions to the [Abbott] district's maintenance budget based on the effective and efficient standard set forth in the DOE's emergency regulations."***_Abbott v. Burke_, M-976 September Term 2002, at 7. However, as indicated in the Department's preliminary maintenance decision letter dated August 27, 2003 (Exhibit J-1), the District's maintenance budget was not reduced based on ineffectiveness or inefficiency. Therefore, pursuant to *N.J.A.C.* 6A:24-9.6(c), the District bears the burden of proving that the Department's calculations were unreasonable or otherwise improper.

This said, the Commissioner agrees with the ALJ that the Department's calculation of charter school tuition must be sustained, as he finds that the District has not met its burden of establishing that the Department's use of an *approved* plan-to-plan review to determine the tuition calculation figure was unreasonable or otherwise improper. In the Commissioner's view, the process used by the Department, based on the only available "like" components for comparison, *i.e.*, approved 2002-03 and 2003-04 charter school tuition, in order to determine the change in the district need from one year to the next, fully allows for

reasonable, fair and consistent preliminary determinations under circumstances where precise calculations must necessarily await the results of the CAFR. As well articulated by the ALJ in her Initial Decision in *Board of Education of the City of Plainfield, Union County, v. New Jersey State Department of Education*, OAL Dkt. No. EDU 5502-03, Agency Dkt. No. 206-6/03, decided September 26, 2003:

> I have considered the arguments of counsel and must agree with the position espoused by the DOE. (footnote omitted) Although I agree with the District that the consistent use of the DOE's methodology does not in itself make it correct, I do not agree that simply because it does not work to the District's advantage makes it incorrect. The methodology utilized by the DOE has been applied to all "Abbott Districts" uniformly and has served to increase maintenance budgets in over half of the Districts. The District has not established that the use of this methodology is *per se* improper, illegal, inconsistent with the New Jersey Supreme Court's Order of July 23, 2003 or violative of any of its constitutional rights. The DOE is obligated only to utilize an approach that is reasonable and uniformly applied. Here they have done so. If the methodology is to be changed in each area in which an Abbott District is not advantaged, there will be no uniformity or equity to the provision of Abbott funds. Thus, I reject the District's argument and CONCLUDE that the DOE's methodology is reasonable and will not be second-guessed. (*Id.* at 8)

The Commissioner, however, underscores that, to the extent the results of the Department's reasonable approach may be imperfect, even after adjustment following audit, *N.J.A.C.* 6A:10-3.1(g) provides a mechanism for the District to obtain additional supplemental funding where unanticipated expenditures or unforeseen circumstances warrant.

Turning to the projected utilities increase calculation, the Commissioner, similarly, finds that the District has failed to satisfy its burden. The Commissioner is in full agreement with the ALJ that "the proofs [brought to the record are] deficient and devoid of any competent evidence that would offer credence to the District's position with regard to utilities cost increases." (Initial

Decision at 14, 15) The District's exceptions maintain that the ALJ, while recognizing that the Department had not included its two new buildings in the utility increase calculation for 2003-04 (Initial Decision at 14), erred in failing to award the District *any* funding increase based on a lack of documented evidence. (Petitioner's Exceptions at 16) Rather, it proffers, "the ALJ should have directed the DOE to develop appropriate documentation in conjunction with the District to determine what increase should be attributable to these two buildings." (*Id.* at 17)

Upon consideration, the Commissioner finds the District's arguments in this regard specious. The Initial Decision reflects that the Department's witness, Michael Arizechi, testified

> that he had not taken into account the utilization of the Glenwood School and the old East Orange High School buildings in arriving at his figure for utility cost increases of $529,812.50. Rather, he looked at the history and the actual numbers and the auditor['s] report to see what the expenditures had been. He compared the auditor['s] report with the District numbers and used 50% of the difference (the increase) as his basis for arriving at a figure of $529,812.50 for non-discretionary increased utility costs for 2003-04. (Initial Decision at 12)

Given the total unsupportability of the District's calculations in this regard, it cannot reasonably be argued that the Department's calculation for increased utility costs, subject to further refining after receipt of some logical, supportable additional information from the District during the course of the CAFR process, was unreasonable.

Accordingly, the Initial Decision of the OAL is adopted for the reasons expressed

therein and the instant Petition of Appeal is hereby dismissed.[1]

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 10/28/03

Date of Mailing: N/A

[1] The Commissioner so determines, based upon the proofs brought to *this* record, while acknowledging that the presentation of such evidence may have been disadvantaged by both a Court Order to expedite proceedings and the unavailability of the CAFR until November 2003. In any event, beyond his determination herein, the Commissioner underscores the availability of a mechanism for Abbott districts to address needs, arising during the year due to unanticipated expenditures or unforeseen circumstances, for additional resources to implement Department-approved programs and services. *N.J.A.C.* 6A:10-3.1(g).

[2] Pursuant to *P.L.* 2003, *c.*122, "Abbott" determinations are final agency actions appealable directly to the Appellate Division of the New Jersey Superior Court.

596-03
596-03

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning "Abbott" District appealed the Department's determination of its 2003-04 preliminary "maintenance budget" and supplemental aid, alleging that the Department's review and calculations were not in accordance with the July 23, 2003 order of the Supreme Court. The District also challenged the Department's reduction, as part of its review of noninstructional expenditures for ineffectiveness or inefficiency, of proposed costs for School Leadership Teams (SLTs), overtime, the Office of Design and Construction, the Office of Development Planning, resource teachers/coordinators, department chairpersons, food service deficits, consultants and drivers for the State District Superintendent.

The ALJ found that the rule duly promulgated to implement the Court's order for "maintenance" controlled in this proceeding, and that the Office of Administrative Law (OAL) lacked jurisdiction to determine its validity. The ALJ further found that, within the framework of that rule, the Department had made several appropriate determinations, but that the District was entitled to increases for certain previously undocumented encumbrances, salary adjustments and vacancies, workers' compensation reserves, special education tuition costs, CPI adjustments and utilities. The ALJ further found that, on the Department's findings of ineffectiveness and inefficiency, the District was entitled to restoration of all reductions except those for the Superintendent's drivers.

The Commissioner adopted the ALJ's decision with respect to OAL jurisdiction and several of its specific determinations, but rejected its acceptance of the District's claims for increases in allowable encumbrances, salary adjustments and vacancies, workers' compensation reserves, special education tuition costs, CPI adjustments and utilities. With respect to inefficiencies, the Commissioner rejected most of the ALJ's recommendations and restored only those funds supporting Resource Teachers/Coordinator positions. Additionally, the Commissioner directed the Department to conduct an analysis of the District's workers' compensation needs and to make thereafter any necessary adjustments to the District's budget and supplemental aid.

October 28, 2003

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 5497-03

AGENCY DKT. NO. 193-6/03

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION,

Respondent.

Richard E. Shapiro, Esq., for petitioner

Perry L. Lattiboudere, General Counsel, for petitioner

Michael Walters, Deputy Attorney General, for respondent, (Peter C. Harvey, Attorney General of New Jersey, attorney)

Record Closed: September 25, 2003 Decided: October 3, 2003

BEFORE **EDITH KLINGER**, ALJ:

On June 5, 2003, the petitioner, State-Operated School District of Newark (District), filed a Verified Petition of Appeal before the Commissioner of Education appealing the May 30, 2003 determination of Assistant Commissioner Gordon

MacInnes relating to the District's 2003-04 K-12 budget and Additional Abbott v. Burke State Aid application for the 2003-04 school year. On June 9, 2003, the Commissioner of Education transmitted the matter to the Office of Administrative Law (OAL) as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. The respondent, Department of Education (Department), filed its answer with the OAL on June 12, 2003.

On July 23, 2003, the Supreme Court of New Jersey (Court) issued its Order in *Abbott* v. *Burke* authorizing the Department to treat the 2003-2004 school fiscal year as a maintenance year for purposes of calculating Additional Abbott v. Burke State Aid for the Abbott districts, including the Newark District. *Abbott v. Burke*, __ *N.J.* __, 2003 WL 21700375 (July 23, 2003) The Court defined a maintenance budget to mean:

> that a district will be funded at a level such that the district can implement current approved programs, services, and positions and therefore includes documented increases in non-discretionary expenditures. Examples of non-discretionary expenditures are increases in contracted salaries, health benefits, and special education tuition. Maintenance does not include the restoration of programs, positions, or services that were reduced in 2002-2003, or new programs, positions or services.

The Court directed the Department to promulgate an emergency regulation for "purposes of calculating Additional Abbott v. Burke State Aid and in furtherance of its pre-existing duty to implement administrative controls." The emergency regulation was to establish:

> the standard for evaluating the effectiveness and efficiency of the districts' non-instructional programs. (Non-instructional programs are defined as office/administrative expenditures and programs, positions, services and/or expenditures that are not school based or directly serving students.)

In accord with the Order of the Court, on August 22, 2003, the Department promulgated emergency amendments to *N.J.A.C.* 6A:10, originally promulgated on July 1, 2003. Specifically, the Department amended *N.J.A.C.* 6A:10-1.2, 3.1, 4.2 and 4.7.

In the matter entitled *Board of Education of the City of Asbury Park v. State of New Jersey Department of Education*, OAL Dkt. No. EDU 4095-03, presently pending before Administrative Law Judge John R. Tassini, Asbury Park, another Abbott district, challenged the definition of "maintenance budget" in *N.J.A.C.* 6A:10-1.2 as inconsistent with the Court's Order. Asbury Park argued that its maintenance budget should be considered its approved 2002-2003 budget and not limited to programs, positions, services and/or expenditures actually provided, plus non-discretionary expenditures. In his order, dated September 4, 2003, Judge Tassini ruled that the regulation could not be challenged in this forum because the OAL is without jurisdiction to hear this issue.

The same motion was brought by the District before the undersigned who adopted the ruling made by Judge Tassini and declined to hear this issue in the present appeal for the same reasons.

In its Order of July 23, 2003, the Court also directed the Department to:

> provide in a Notice to each district preliminary maintenance budget figures for the 2003-2004 school year consisting of the 2002-2003 approved budget and an estimate of the supplemental funding that will be needed to support that currently approved budget. If the DOE deletes an expenditure from a district's 2002-2003 budget related to the district's non-instructional programs and based on the effective and efficient standard, the DOE must include in the written notice to the district the expenditure deleted along with a specific statement explaining why the program or part thereof is no longer effective and efficient.

The Order further provides:

> To the extent that monies are deleted by the DOE in the district's non-instructional programs based on the effective and efficient standard, those monies shall be made available to the districts as follows: an Abbott district may apply for and the State may award such aid for demonstrably needed programs or services. The allocation of such available funds shall not be viewed as inconsistent with this Court's approval of use of a maintenance budget for Fiscal Year 2003-2004.

On August 27, 2003, the Department issued its Notice of Preliminary Maintenance Budget Figure for 2003-2004 and Estimate of Discretionary Additional Abbott v. Burke State Aid (Notice) to the District as directed by the Court. The issues to be addressed in the present proceeding are as set forth in this Notice. (J-1) The

analysis contained therein was performed by an independent accounting firm retained by the Treasurer to review the District's financial information in cooperation with representatives of the Treasury and the Department.

CALCULATION OF THE BASE 2002-2003 STATE AND LOCAL PROGRAM BUDGET

Mary Byrne, a licensed CPA, has been employed by the Department of the Treasury, Office of Management and Budget, for four years. She is responsible for oversight of the State budget for the Department of Education and reviews the Department's yearly requests for funding as part of the State budget. She also provides advice and recommendations and monitors the Department's budget throughout the year.

In her testimony, Byrne referred to worksheets showing adjustments made to the budget and the Budget Analysis and Independent Accountant's Report on Applying Agreed-Upon Procedures (R-2) (Report).

These documents show that the independent accountants first considered the District's Approved General fund budget for 2002-2003 which was $642,662,024. It then subtracted $17,090,489 as the local contribution to Special Revenue. It added $53,661,167 in Early Childhood (EC) aid, $20,103,295 in DEPA Aid and $1,975,257 in Distance Learning aid to reach an Adjusted 2002-2003 State program budget of $701,311,254. This amount does not include funds paid to the District from federal sources so that they are subtracted from the budget items for purposes of computing Abbott aid.

The original Budget 2003 Spending, Local Contribution – Transfer, was $17,090,489; the projected spending for this item was $9,312,771. The difference between these two amounts, $7,777,718, was transferred to the Special Revenue Fund (SRF). The reduction was due to decreased enrollment in the program.

The independent accountants next considered the original Budget 2002-2003 Spending for Funds 11, 12 and 13, salaries and benefits, ($328,606,179) and determined that the unaudited 2002-2003 spending for these funds was $318,133,342. This showed that the District underspent its budgeted amount by $2,695,119 and this amount was deducted from the 2002-2003 base budget.

Byrne explained that all unaudited amounts are subject to finalization at the time the school districts are audited yearly and Comprehensive Audited Financial Reports (CAFR) are prepared in early November. All calculations based upon unaudited data will be revised at that time using audited figures and Abbott aid adjusted up or down as necessary.

In a similar manner, the accountants determined that the District had underspent its 2002-2003 budgeted amount for Fund 15, the segment of the District budget used to account for the individual school based budgets, by $2,337,739. Since seven percent of this fund is attributable to federal resources and 93% to State and local funding, the Adjusted 2003-2003 budget was reduced by $2,165,403, or 93% of the underspending.

These two adjustments resulted in a Base 2002-2003 state and local program budget (Base Budget) of $696,450,732.

ADJUSTMENTS TO THE BASE BUDGET

Early Childhood Plan

The EC Plan for 2003-2004 ($66,454,818) exceeded the EC plan for 2002-2003 ($52,104,130) by $14,350,688 and this amount was added to the budget.

Encumbrances

In the Notice, the Department excluded $25,510,005 in 2002-2003 encumbrances that appeared to be 2003-2004 expenditures and $5,860,928 in prior

year encumbrances that are considered cancelled pursuant to Department accounting/audit guidance. The Notice invited the District to provide documentation to the Department in the event that it disputed the assessment of encumbrances. Due to time constraints, this documentation was presented at hearing.

Byrne explained that an encumbrance is a commitment of funds for an order placed for goods and services. In accord with the regulations, maintenance is based upon actual spending. Since encumbrances are not actually spent, they were accounted for as surplus and not included in the approved budget which is restricted to maintenance.

When the goods or services are received, their costs then become an account payable, which are maintenance, and as such are included in the approved budget. If goods and services were received but not billed, they remain encumbrances. According to the Report of the Secretary of the Board of Education, Newark Public Schools (R-3) (Secretary's Report), the total current encumbrances for 2002-2003 in Funds 10 and 15 was $25,510,004; the total encumbrances for these two funds for the prior year was $5,860,482. The total for the two years together was $31,370,392.

Byrne testified that, in the Department's accounting procedures, any encumbrances for goods and services not received within six months after the end of the fiscal year, June 30, are deemed cancelled. The only exceptions are for encumbrances attributed to long term projects, such as capital improvements, or undertaken pursuant to a contract. These exceptions do not apply to the encumbrances discussed here.

As a result, the Department deemed all encumbrances from the 2001-2002 school year to be cancelled. According to the accountants, they relied upon for information contained in columns in the Secretary's Report entitled "accounts payable" and "cash expenditures." The items in the Secretary's Report listed as "encumbrances" for the 2002-2003 fiscal year were all open items and not included as additional

spending in the Report or accounted for in the 2003-2004 Approved Budget since they were deemed to be 2003-2004 expenditures.

Byrne explained that only expenditures were included in the maintenance budget and it was assumed that all open encumbrances would become expenditures in the 2003-2004 school year. The District was given the opportunity, as outlined in the August 27, 2003 letter, to present documentation that would support the expenditures of any of the $25,510,005 in encumbrances by supplying a listing of purchase orders that were invoiced for services or items received by June 30, 2003. Byrne noted that the District would then be given credit toward the maintenance calculation for 2003-2004.

The District presented testimony by Ronald Lee, School Business Administrator, that it is entitled to additional expenditures of $9,735,823.31 for invoiced encumbrances through June 30, 2003. It supported its claim by supplying a listing of purchase orders and the amount of invoices and accruals. Lee confirmed that these amounts represent goods and/or services that were received and invoiced in accordance with the standard outlined by Byrne. His testimony and the supporting documentation were never rebutted by the Department. Therefore, it is the District's position that the $9,735,823.31 should be added to the maintenance calculation in accordance with Supreme Court Order and regulations for the maintenance budget.

The Department argues that it will make appropriate adjustments after it reviews the District's Comprehensive Annual Financial Review ("CAFR") for the 2002-03 school year. This is required to be submitted to the DOE by early November 2003. The Department's present position is contrary to its position in its letter of August 27, 2003, in which it agreed to make these adjustments as soon as the appropriate documentation was submitted to the Department. Due to the constraints of time, that documentation was provided at the hearing and the Department should live up to its commitment to adjust the budget accordingly.

The District is concerned because historically adjustments are not made by the State when they receive CAFR information which should cause additional revenue to be paid to a district. Its experience has been that no additional revenues were provided and the District was forced to reallocate the scarce dollars within its budget.

Lee testified about a specific example in 2002-2003 relating to additional Charter school costs. When the actual costs exceeded the amount budgeted by the District, he requested additional funding from the State in the amount of $3.6 million dollars. The DOE responded by only providing $1.9 million and noted that the District would have to look within their budget to reallocate funds for the difference. As such, the District maintains that the $9,735,823.31 should be added to the maintenance calculation in accordance with Supreme Court Order and regulations for the maintenance budget.

Based upon the testimony of Lee and the supporting documentation, I **FIND** that $9,735.823 should be removed from encumbrances and treated as expenditures for the 2003-2004 school year. I, therefore, **FIND** that $9,735.823 should be added to the Base Budget.

Projected Surplus

The Department determined that the projected surplus balance for the 2002-2003 budget would be $17,526,672. This amount includes, among other items, the audited surplus balance of June 30, 2002 ($9,073,437), the total unspent appropriations from the General Fund and Fund 15 ($4,860,522), and the cancelled encumbrance of $5,860,928. It also includes a projected revenue surplus of $639,761 in the General Fund. ($631,524,067 - $ 630,884,306) (R-2, Schedule D, revised in Schedule F) It does not include a Budgeted Fund balance of ($4,000,000) or an increase in reserve for encumbrances ($2,366,185) for 2002-2003. The analysis incorrectly included cancelled encumbrances for the 2001-2001 year of $3,458,209. If this is removed, the projected excess surplus is reduced to $14,068,463. The District must maintain a surplus balance of 2%, or $12,988,365, so the projected excess surplus balance is $1,079,698. ($14,068,063 - $12,988,365)

The District did not address this issue and I **FIND** that this calculation stands as reported by the Department.

Other Adjustments

In Schedule D, R-2, the accountants erroneously deleted $18,382,753 from the actual 2002-2003 revenues because this amount had accrued but was not yet paid. This was corrected in Schedule F, R-2, according to generally accepted accounting principles (GAAP) for government, which say that this can be done if there is a statute permitting it, as there is in this case. Schedule D is accurate in all other respects.

The District has a remaining receivable of $9,751,008 in 2002-2003 Abbott aid. This will become a receivable of $13,209,217 because of the cancelled $3,458,209 encumbrance. This change is an adjustment to a receivable and does not affect the Additional Abbott aid for 2003-2004.

Non-Discretionary Items - Salaries

Ben Rarick is employed by the Department as the Director of the Office of State-Operated School Districts. He has held this position for the last three years. In this capacity, he also serves as the budget manager for three districts, Jersey City, Paterson and Newark.

Rarick initially testified as to the treatment of non-discretionary items in the budget. Non-discretionary costs are those, such as contractual increases in wages, that will increase beyond the control of the District.

He first reviewed the salary analysis worksheet (R-8) (Funds 11, 12, and 13). He compiled the information contained in the salary accounts, using the Report as his source, and concluded that non-discretionary salaries for the 2003-2004 budget year would be $18,886,540.37. This is derived from the salary expenditures for 2002-2003

plus the estimated union contractual raises of 4.884%. Any funds not spent on salaries were excluded. $18,886,540.37 was added to the Base Budget.

Funds in the amount of $31,718,771, consisting of $77,092,000 for substitutes, $21,347,833 for overtime, stipends and per diems, and $3,278,938 for summer school salaries were not included in the calculation of non-discretionary contractual salary increases but the salaries themselves were accounted for elsewhere in the budget. Raises for non-affiliated staff of approximately $300,000 were deemed to be discretionary and excluded. This treatment was uniform across all of the Abbott districts. Rarick never considered whether the employees receiving these salaries were covered by union contract increases or salary increases pursuant to employment contracts.

The District agrees with the Department's calculation that the salaries expended in 2002-2003 amounted to approximately $424,035,384. However, it argues that Rarick improperly failed to take into account contractual increases in salaries for substitutes, overtime, stipends, per-diem and summer schools. These are areas that are historically and ordinarily subject to contractual increases. Therefore, Rarick erroneously deducted $7,092,000 for substitute costs, $21,347,833 relating to overtime, stipend and per-diem costs plus an additional $3,327,938 in summer school costs when calculating the non-discretionary increases and reduced the expended salary for 2002-03 to $392,316,613.

Rarick then applied a projected salary rate increase of 4.884%, the amount he considered the average salary increase for the Newark Teacher's Union ("NTU") contract. He applied this amount to all the contracts without supporting information as to the actual rate and the rate of settlements within the State and Essex County. His analysis yielded a total projected increase of $19,160,743.38 from which he arbitrarily deducted $274,203 in salary increases he contended should not be provided to the District's unaffiliated (non-union) employees.

Rarick conceded that he failed to consult any District handbooks with respect to the contractual salary increases for non-union employees. He also made the

unwarranted assumption that the substitutes, overtime, stipends, per-diem and summer schools categories would not be entitled to contractual increases without checking the contract or inquiring about the status of negotiations with the District's unions.

Using contractual documents and current county averages for salary increases, the District, through Ronald Lee, the District Business Administrator, presented evidence that a more accurate and up-to-date calculation would amount to an increase of $32,585,087.15. Lee derived his numbers from the Summary Budget report for Funds 11, 12, 13 and 15 as reported in the District's current financial records.

With respect to substitutes, overtime, stipends, per-diem and summer school increases, Lee noted that those categories historically increased every year and he supplied copies of the actual contracts to prove his assertion.

The contract provided that teacher substitutes were paid a rate of $95.00 for the contract ending June 30, 2000. In the contract from July 1, 2000 to June 30, 2003, that rate increased to $100.00, or a 5.26% increase. For the same contract term, the per-diem rate for Aides, the smallest group in the bargaining unit, was $10.40 raised to $10.60 or a 1.92% increase. The substitute per-diem rate for clerks was $62.00 and increased to $70.00, for the respective year, or a 12.9% increase.

With respect to overtime, Mr. Lee explained that increases in overtime rates follow directly from the increase in the employee annual salary rates. The District showed that, if the salary rate increased by 5%, the overtime cost would also increase by 5%, so therefore a non-discretionary increase for overtime should be included in the calculations.

Items such as supplemental and extra pay are subject to contractual increases. Contract excerpts show that the stipend costs in the NTU contract increase from year to year, not just from one contract to the next. The percentage increases range from 4.58% to high of 4.96%.

Summer school rates are expected to increase again as they have under previous contracts. As support for this analysis, the District provided the summer school rates for the contract ending June 30, 2003 governing the salaries for teachers, school clerks, coordinators, psychologists and aides. This shows that, in July 1, 2001, the summer school rate for teachers was $29.00 but on July 1, 2002 the rate increased to $31.00 or a 6.9% increase. The District argues that, since the rates will continue to increase, the maintenance budget should reflect a non-discretionary increase in these categories.

After taking all of the above contractual increases into account, the District's financial records reflect that the total amount expended on salaries for 2002-2003 was $424,181,743, to which a contracted salary increase of 5% was applied to all categories. The District's rate was reached by analyzing the salary increase rate for 2003-2004 statewide (4.95%) but the Essex County rate increases (6%) were slightly higher than that. For example, Irvington has a salary increase for 2003-2004 in the amount of 6%.

Lee asserts that the 5% rate increase applied by the Department was too conservative an estimate. Lee realized that 5% was slightly above the state average but he believed it to be less the average for the county because of the contract reached Irvington. He testified that, when the 5% increase is applied to the $424,181,743.00 actually expended for salaries in 2002-2003, the non-discretionary increase for salaries $21,209,087.00.

Based upon the evidence, I **FIND** that the contractual increases in the salaries for substitutes, overtime, stipends, per-diem and summer school categories are non-discretionary and should have been accounted for in calculating the necessary budget increase. I **FIND** that the same thing applies to the contractual raises for non-affiliated employees. There is no evidence supporting the Department's assertion that these increases are discretionary. As a result, I **FIND,** based upon the historical expenses of the District, that the non-discretionary salary increases should be calculated using a total salary amount of $424,181,743.

With respect to the projected rate of increase, I **FIND** from the District's testimony that not all of the District's projected salary increases are at a rate comparable to that in Irvington and, therefore, there is no reason to disturb the Department's projection of a 4.884% increase, the State average.

Accordingly, I **FIND** that the projected non-discretionary salary increases for the 2003-2004 school year are $20,717,036 and this amount should be added to the Base Budget.

Unfilled Vacancies:

Rarick excluded salaries for teachers who left during the 2002-2003 school year and were not replaced. He stated that this was required under the "maintenance" standard so that the District would not be funded in 2003-2004 to fill teaching positions vacated during or after the prior school year.

Both the District's Deputy Superintendent, Anzella Nelms and Lee, testified to the devastating effect this decision would have on instructional programs. Lee demonstrated the manner in which instructional vacancies have a direct effect on the ability to provide educational programs at current levels. Nelms added that eliminating vacancies would deprive the District of the ability to hire certified teachers, resulting in the loss of classrooms and an increase in enrollments in the elementary and secondary levels in excess of statutory maximums.

The District explained that it is not always possible to replace a teacher who leaves after the start of the school year, particularly in certain subject matter areas such as math, music, and physical education. The best time for hiring is the period from the end of school, when recent teacher graduates are available, through the end of the summer vacation. Under the Department's interpretation of "maintenance," this would leave the District without a teacher during the following year through no fault of the District.

Lee requested the addition of $11,373,000.00 to the calculation of the maintenance budget, the amount needed to fund instructional vacancies. The instructional vacancies include instructional and classroom based personnel such as paraprofessionals. The total for the instructional vacancies was 164 FTE (Full Time Equivalents) and 73 FTE for paraprofessionals, for a total in the classroom for instructional purposes of $11,376,000.00. The District is only seeking to fill instructional vacancies and is not seeking funding for the approximately 200 other non-instructional FTEs consistent with its understanding of the maintenance budget mandates.

The definition of "maintenance" in *N.J.A.C.* 6A:10-1.2 allows funding for positions approved and provided during the 2002-2003 school year. It does not include the restoration of positions that were provided in previous years. The "maintenance" standard addresses the maintenance of "positions," not the maintenance of the District's actual expenditures in filling them. I **CONCLUDE** that any teaching or paraprofessional position that was filled by a permanent employee at the start of the 2002-2003 school year was "provided" within the meaning of *N.J.A.C.* 6A:10-1.2, irrespective of whether it subsequently became vacant during the year and that employee could not be replaced. Therefore, I **FIND** that the District should be provided with funding for any instructional vacancy that arose during the course of the 2002-2003 school year, providing that there was a permanent employee in the position at the start of the year and the position could not subsequently be filled notwithstanding the efforts of the District to locate a permanent replacement.

The District has estimated this amount to be $11,376,000 to replace 164 FTE (Full Time Equivalents) for teachers and 73 FTE for paraprofessionals, and I **FIND** this amount should be added to the Base Budget subject to the conditions above.

Non-Discretionary Items - Benefits

Non-discretionary health benefits were calculated by taking the actual spending on benefits in 2002-2003 and applying a growth factor of 4.884%, the same as the

projected rate of increase in salaries. In addition, the Department consulted with the State Health Benefits Program (SHBP) to determine if it would increase its rates. This increase had to be adjusted because the SHBP's fiscal year is the calendar year while the District's fiscal year is July 1 to June 30. As a result, the SHBP rate increase affects the non-discretionary benefits costs differently from January 1 to June 30, 2003 (20%) and then from July 1 to December 31, 2003 (10.8%). The Department calculated that the effective rate of increase over the 2002-2003 fiscal year was 14.5%. This rate is not an average but accounts for the compounding of increases over the twelve month school year.

The Department calculated the maintenance supplement for benefits to be $8,138,460. Rarick testified that the State included social security contributions of $12,408,220, the amount the District had expended in 2002-2003, and added a $4.884% increase to account for contractual salary increases. This resulted in an increase of $660,017.

Rarick then applied the 14.5% increase in health benefit costs to the Fund 11 amounts for an increase of $1,502,556 and to the Fund 15 amounts for an increase of $6,029,088.00. His total non-discretionary increase for benefits was $8,138,460.81.

Rarick failed to consider increases in other benefit categories, such as workers compensation, unemployment and retirement contributions. There was no explanation for these omissions. Worker's compensation will be discussed separately below.

I **FIND** that there should be no adjustment for State unemployment insurance contributions (SUI) at this time because of the projected rate of salary increases. The amount of SUI contribution per employee per year is capped and the rate of increase is determined by the State. The District has shown no relationship between the rate of an SUI contribution increase and the contractual rate of salary increase.

The District argues that pension contributions should increase at the projected rate of salary increases. However, there is insufficient information in the record to make an adjustment so that I **FIND** no adjustment can be made at this time.

Lee calculated the non-discretionary increase in benefits to be $14,894,159.10. This was based on actual rates published and supplied by the SHPB and the dental, prescription, and podiatry benefit providers multiplied by the actual number of employees enrolled in each plan. Lee's calculations included the amounts in the original budget, transferred amounts in the revised budget and any amount paid for 2002-2003. The base number for the amount paid for 2002-2003 did not differ from the Department's amount, $26,875,972.07, for Fund 11. The differences in the parties' results arises from the different rates applied in the District's calculations.

With respect to FICA or social security, Lee testified the District added a 5% increase to the 2002-2003 expenditures based upon its projected salary increases for 2003-2004. Since the Department's projected increase has been accepted, this increase will be calculated using the projected 4.884% increase. Likewise, the increase in contributions for pensions and unemployment will be calculated at the same rate.

In reaching his conclusions regarding health benefits, Lee used the actual rates that are delineated by the SHBP for coverages on the dental, prescription, and podiatry supplemental fringe benefits for a total of $66,842,044.00 (the largest amount being from health benefits of $48,361,268.00). That amount was then reduced by the amounts budgeted in Early Childhood, Title I and Title II, bringing the total supplement required to $62,965,542.10 minus $51,947,885.00, the amount expended in 2002-2003 for health benefits.

The support for the rates applied to the District's benefits calculation stem from a State Benefits and Pension division letter, dated September 2002, stating that the increase in NJ Plus was 28.4% in the Traditional plan and 21% in the HMO. In addition, an August 28, 2003 letter from the same agency provides the rate increases for 2003-2004. The District then applied the increased rates to the number of

employees enrolled in the individual plans under the health benefits plan in calculating the actual cost. It claims its need in the health benefits maintenance cost category is $14,894,159.10.

Based upon the gaps in the record and the time constraints preventing implementation of the record, I **FIND** that the Department's $8,138,460.81 estimate of the non-discretionary benefit increases should be applied at this time. Adjustments can be made at a later time when the District's actual needs can be determined with some degree of accuracy.

Non-Discretionary Items - Worker's Compensation

The District is self-insured for worker's compensation. As of September 3, 2003, Allied Risk Services (Allied Risk), the District's fiscal agent for its worker's compensation program, required an additional deposit of $3,500,000 in its reserve to meet the program's obligations from September 9, 2003 to June 30, 2004. This projected increase was based upon Allied Risk's analysis of the program's history of claims.

In another portion of the District's maintenance budget, the Department made a reduction of $2,000,000 in insurance costs as a non-recurring expense. The District had included the increased contributions to worker's compensation as insurance expense so the Department's reduction effectively eliminated the District's possibility of receiving supplemental funding to address this additional expense.

The District has the obligation to adequately fund its worker's compensation plan. The source of the dollar amount of funding needed based upon the history of claims is the fiscal agent, Allied Risk. The District documented its history of past contributions and its fiscal agent's notice to increase the fund to meet projected needs.

The Department's position is that there should be no increase in funding because the amount to be kept in the reserve for claims is speculative. It suggests that

the reserve be maintained at its prior level and, if additional funding is necessary because the fund has unforeseen expenditures, the District can apply to the Department for additional Abbott aid.

There are several problems with this suggestion. To begin with, the required expenditures are not unforeseen but are based upon an unrebutted actuarial analysis by Allied Risk. Further, if the worker's compensation plan is inadequately funded so that the District has a problem paying claims and has to apply to the Department for emergency relief, affected workers may not be comforted by the fact that an Abbott supplement will be provided in due course.

The Department has produced no actuarial evidence to refute the District's claims history causing the need for additional funding. I, therefore, **FIND** that this increase is no more speculative than the projected need to increase the size of any insurance reserve and is entitled to the same respect.

The District requires $3.5 million in additional funds over the $1,450,000.00 previously contributed by the District to its workers' compensation fund. Unless the Department subsequently analyzes the need for the large increase appropriately, I **FIND** that the additional contribution of $3,500,000 is a non-discretionary increase and should be added to the Base Budget.

Non-Discretionary Items – Charter School Tuition and Pupil Transportation

The Department stipulated that the costs of Charter School Tuition ($4,427,159), and the contracted increase in transportation costs ($3,085,209) were non-discretionary and $7,512,368 was added to the Base 2002-2003 budget for both items.

Non-Discretionary Items – Special Education Tuition in Private Schools for the Disabled

This was the only item in the request for supplemental aid in the area of special education tuition that was reduced by the Department. The total amount budgeted for

all special education tuition in 2002-2003 was $41,307,680. The amount budgeted for 2003-2004 is $50,979,758. The District requested an increase of $9,259,855 for all tuition which was substantially reduced by the Department because of the manner in which the tuition in private schools for the disabled was calculated.

In 2002-2003, the District requested a budget of $24,904,661 for special education tuition in private schools for the disabled. It actually spent $20,318,603. Its projected need is $26,837,590 for 2003-2004 because of an increase of twenty-nine children and increases in tuitions. The initial increase requested by the District for the 2003-2004 school year is $7,685,703, less the projected IDEA funds for this purpose anticipated from federal sources, or $6,518,987.

Rarick determined that projected increases in tuition supported by the record are only about $1,900,000 so the Department replaced the requested increase of $6,518,987 with $1,900,000. This reduced the total increase in Abbott aid for all special education tuitions to $4,673,697 from $9,259,855. When this was adjusted to account for projected IDEA funds of $1,159,116 from federal sources, an increase of $3,514,681 was added to the Base Budget as a non-discretionary item.

Rarick had information that, during the fiscal year 2002-2003, approximately $5,752,000 was transferred out of this account and used for non-special-education purposes so it was not used to calculate the increase in aid. Records from the District business office showed that only $135,705 was actually transferred. In addition, the IDEA grant for 2003-2004 for this purpose was reduced to $500,000.

Rarick stated that the numbers used to calculate the spending for special education were obtained from the District Director of Special Education. Rarick requested that Steven Hoffmann, a Department coordinating auditor, learn how the District paid for its special education program when the budgeted amount was less than actual expenditures. Hoffmann learned that the program's creditors were paid and there were no significant purchase orders outstanding or cancelled. He did not verify any transfers out of the special education account since he was just told to identify

amounts transferred in. Neither Hoffmann nor Rarick confirmed any information with the District business office.

The District requested additional increases for other non-discretionary special education tuitions that were not provided by the State. There was an additional $30,384.11 in increases for tuition to other regular local education agencies within the State and a difference of $1,162,530 for tuition to the regular County Vocational School District. These were excluded by the Department as increases in regular, not special education, tuition. The District provided no evidence to the contrary and the requested increases for these items will not be included.

Based upon the above, I **FIND** that the non-discretionary tuition increases for the private schools for the disabled should be revised in accord with the evidence. This results in the need of $1,900,000 for tuition increases for private schools for the disabled in 2003-2004 rather than the $6,518,986.69 requested by the District. When this substitution is made in the total requests for special education tuitions, the amount of increase becomes $4,640,868. This, however, should be reduced by the anticipated decreased IDEA grant of $500,000 for the fiscal year. I **FIND** the additional need for non-discretionary special education tuition increases to be $4,140,865 rather than the $3,514,681 calculated by the Department.

Only the special education tuition was treated as a non-discretionary item. All other special education spending was adjusted upward using the consumer price index for the tri-state area. (See below.)

Non-Discretionary Items – Rent/Lease Obligations and County Vocational School Tuition

The increase in rent/lease obligations of $222,483 was accepted as a non-discretionary item and added to the base budget. The increase of $932,228 for County Vocational School Tuition was also accepted and added.

Non-Discretionary Items – Consumer Price Index Adjustment

The Department compiled all non-salary accounts (R-12) except utility costs and adjusted them upward by 2.11%, the consumer price index (CPI) for the tri-state region. This added an additional $932,228 to the Base Budget.

N.J.S.A. 18A:7F-3 defines the appropriate CPI as follows:

> "CPI" means the average annual increase, expressed as a decimal, in the consumer price index for the New York City and Philadelphia areas during the fiscal year preceding the prebudget year as reported by the United States Department of Labor.

The Department used the average of the increases in the CPI's for the New York and Philadelphia areas to arrive at an average of 2.11%. No explanation of this percentage increase was provided. The District used the 3% CPI for New York, Northern New Jersey, Long Island, NY-NJ-CT-PA, for July 2002 to July 2003 based upon the U.S Department of Labor, Bureau of Labor Statistics, News, Table 3. Since this does not include the Philadelphia area, as required by the statutory definition, the increase of 1.5% for the Philadelphia, Wilmington, Atlantic City, PA-NJ-DE-MD area for August 2002 to August 2003 was taken from the same source and averaged with the 3.1% CPI for New York, Northern New Jersey, Long Island, NY-NJ-CT-PA, for the same month. This results in a CPI of 2.3% instead of the 2.11% utilized by the Department. These values are as close to the CPIs for the fiscal year preceding the prebudget year as is possible without further information.

Since there is no dispute as to the base number used by the Department for this calculation, I **FIND** that the CPI adjustment should be $44,181,440 times 2.3%, or $1,016,173.

Non-Recurring Items – Legal Expenses

Rarick next discussed the treatment of non-recurring items in the budget. He explained that, in some years, the District incurs unusually high expenses for certain

items and these expenses return to within normal limits in subsequent years. The abnormal increases need not be accounted for in subsequent budgets.

In 2002-2003, the District budgeted $800,000 for legal expenses but $1,523,311 was actually spent. $723,311 was subtracted from the Base Budget as a non-recurring expense. The District did not revise its 2002-2003 budget to reflect the additional expenditures and Rarick did not ask the District if more funds were needed.

The District states that the request of $1,500,000 is necessary based upon outstanding and pending litigation but no documentation or testimony was provided to specifically support this increase. I **FIND** that the District did not carry its burden to support this increased budget amount for the 2003-2004 fiscal year.

Non-Recurring Items – Insurance Expenses

In 2002-2003, $1,470,009 was budgeted for insurance but $4,530,404 was actually spent because of extraordinary costs. The Base Budget was reduced by $2,379,227 to $2,151,175, the increase requested by the District. Rarick did not make any adjustment for worker's compensation increases. (See above.)

I **FIND** that the increase in worker's compensation has been accounted for elsewhere and the Department correctly deducted $2,379,227 from the Base Budget for insurance expenses.

Non-Recurring Items – Utilities

The District originally requested Abbott aid for utilities in the amount of $10,180,000 which is less than it requested the year before. The request was accepted and $828,352 removed from the Base Budget for non-recurring utility expense. Rarick did not look at the amount actually spent and took no rate increases into consideration. He said he was not aware of any.

The District has demonstrated that it has ongoing utilities costs and is subject to significantly increased rates for service. I **FIND** that its projection of the necessary funding is supported by the record and is a non-discretionary expense. The District can not operate without adequate funding for electricity and fuel.

I, therefore, **FIND** that the District should receive additional funding for utilities at its projected level. As a result, I **FIND** that an additional $1,055,681 should be added to the Base Budget for utilities instead of a decrease of $828,352.

Non-Recurring Items – Belmont Runyon School

The District is in the process of constructing the Belmont Runyon School. The funding for this project comes from multiple sources: the New Jersey Department of Transportation, bond proceeds and approximately $2.8 million from the Department to cover "soft costs and furniture." Some of the specifications for constructing Belmont Runyon exceed the State standards and the Department will not fund them. This treatment is no different from that afforded to all schools in the State. At this time, the Department claims that it has already provided more than it had agreed to provide.

Because of the sources of its funding, Belmont Runyon is not part of the District's Long-Range Facilities Plan, pursuant to the Educational Facilities Construction and Financing Act, *N.J.S.A.* 18A:7G-1 to -44 (Act). Rarick argues that the Act allows Districts to amend their Long Range Facilities Plan to include the remaining costs for finishing Belmont Runyon and the District should do this instead of relying upon its budget.

The problem with this suggestion is that the District is planning to complete the school during the 2003-2004 school year and an application for funding under the Act may delay completion still further. The testimony shows that the District is presently starving for safe and efficient school buildings. (See below.) The end result of the suggested procedure would be to simply transfer funding to complete the project from one State department to the another to the detriment of the District.

As of May 21, 2001, the $2.8 million in costs for "furniture, equipment, exterior costs and other amenities and minor finishing work" on Belmont Runyon were to be deferred to the 2002-2003 General Fund budget. Rarick determined this to be a non-recurring amount for purposes of the 2003-2004 budget.

It was recently found that there are still open encumbrances on Belmont Runyon because it is a construction project. The District actually spent $1,589,609 on this school during 2002-2003, but $2,977,365, not including encumbrances, was initially removed from the Base Budget as a non-recurring cost before Rarick recalculated the amount. He made the correction during his testimony at hearing to add $1,387,756 back into the Base Budget and the final number may be further adjusted after the November 2003 CAFR audit.

Superintendent Bolden testified that the District had an agreement with former Commissioner Hespe of the Department that the District would be allowed to use up to $2,700,000 in general revenue to complete Belmont Runyon in exchange for the District's agreement to utilize $12,000,000 in bond funds raised for Belmont Runyon to close a budget deficit in the 2001 school year.

Since the District has already used $1,589,609 of its general revenue for Belmont Runyon pursuant to its agreement with the Department, it should still be able to utilize the remaining $1,387,756. I **FIND** that Rarick allowed for this by replacing $1,387,756 back into the budget and removing only $1,589,609 as a non-recurring expense.

Non-Recurring Items – Replacement of Title 1 Funds

The final non-recurring item was an increase of $322,759 to replace Title 1 funds that will not be received by the District in 2003-2004. This amount was added to the Base Budget only because the Department made a commitment to replace missing

Title 1 funds. Rarick was not aware that there were changes in the law and made no adjustment to compensate for them.

The District claims that it will lose $4,657,730 in funding from the federal No Child Left Behind, Pub. L. 107-110, 115 Stat. 1425, 20 *U.S.C.A.* §7231, (NCLB) program for the 2003-2004 fiscal year. It contends that this funding should be replaced by the Department under the same agreement as replacement of Title 1 losses. The Department responds that there is no provision for this in the regulations and its agreement with the District covers only Title 1.

It further argues that the "District's maintenance budget already includes all expenditures related to special education in 2002-2003, and assumes that in 2003-2004 it will not incur any of the same costs incurred in 2003-03. Newark has provided no documentation to support this assumption." This argument is included here to preserve it. It is not clear what specific costs are meant since NCLB has implications for special education but is by no means solely special education legislation.

In the past, the District has been able to divert funding from the Title 1 program in the WSR portion of its budget. Now, because of the reduction in Title 1 funds, and the requirements of NCLB for 2003-2004, more dollars from Title 1 have to be used for Title 1 programs. This will leave the District with a projected shortfall of $4,657,730 for mandated services under NCLB.

The Department only agreed to replace Title 1 funds and Title 1 is only one aspect of NCLB. The District failed to demonstrate what requirements under the NCLB cannot be met and would create such a large need for supplemental funding in 2003-2004. I **FIND** that it has not met its burden of showing that any NCLB funds should be replaced beyond the Title 1 funds the Department has already agreed to As there is no provision in the Abbott regulations for replacing all lost federal funding, I **FIND** that the Department correctly added only the missing $322,759 to the budget.

Inefficiencies - SLTs

Rarick next began to address inefficiencies for items budgeted in 2002-2003. The first of these concerns the five School Leadership Teams (SLTs) in the District. There are seventy-seven schools in the District and these are divided among the five SLTs for purposes of administration. Each SLT is responsible for about fifteen schools. Jersey City, the second largest district in the State, has a similar system and the reduction in the number of teams would bring the District in line with Jersey City.

This was deemed an inefficiency because of a Projected Five Year Cost Saving Actions agreement between the District and a prior Commissioner of Education to reduce the number of teams from five to four by the 2002-2003 school year. The remaining SLTs were to be restructured to meet K-12 feeder patterns. If this were done, it allegedly would have resulted in a savings of $2,000,000 in the 2002-2003 school year. Rarick would not consider a staff reduction affecting all SLTs to meet the terms of the agreement, even if it met the cost savings objective.

The SLT staff is not funded from the SLT account. Its staff's salaries are paid from different accounts and the roster of their employees was derived from their location, not the source of their pay.

Rarick also relied upon the report of Rosenfarb Winters, LLC (Rosenfarb), a forensic accounting firm retained by the Department to prepare a report to establish standards by which to quantify inefficiencies in the districts as they relate to non-instructional programs. Rosenfarb was provided with the CAFR reports for all Abbott districts for the 2000-2001 and 2001-2002 school years and with available budget expenditures for the 2002-2003 school year.

Rosenfarb then utilized the Abbott districts' performances on the corresponding Elementary School Proficiency Assessment - Language Arts (ESPA LA) tests for the fourth grade to develop a ratio between the test scores and the per pupil non-

instructional costs for each district. When these were plotted on a chart, certain districts fell within the middle range for each of these fiscal years and they were classified as "generally efficient spending" Abbott districts. Rosenfarb then selected the four districts (Elizabeth, Gloucester, Long Branch and Phillipsburg) that consistently fell within this range and denoted them "Benchmark Abbotts." They then developed an average cost per pupil for non-instructional expenses for the Benchmark Abbotts and used this as the standard of comparison for the other Abbott districts. Rosenfarb designated the quantification of inefficiency in dollars as an "unfavorable variance" from the Benchmark Abbotts.

This was strictly a quantitative analysis. No attempt was made to inquire into the underlying reasons for the differences in spending. There were no allowances made for regional differences, numbers of school buildings, conditions of school buildings or student populations. Keith Balla, a partner in Rosenfarb, testified that unique needs were not considered because there would have been no way to quantify areas of inefficiency if they had been taken into account. Rosenfarb attributed $52,394,669 in inefficient spending to all salaries.

Rarick looked at those salaries attributed to the fifth SLT and determined that, although there had been a decrease in personnel in the SLTs, the projected $2,000,000 had not been saved. He further compared the District with Jersey City and Paterson and, finally, he looked at the Rosenfarb report which confirmed his determination of inefficiency. As a result of these considerations, he reduced the Base Budget by $1,208,080.

As the Department pointed out, *N.J.A.C.* 6A:10-3.1(c)(2) also requires that the Department consider historical spending patterns and district-specific information as to staffing needs, neither of which were considered in the Rosenfarb report.

I **FIND** the District to be unique in the State in many ways and its problems are long-standing and pervasive. The facts supporting this finding, which appear throughout this Initial Decision, are the size of its enrollment, the age and condition of

its buildings, the obstacles it faces in maintaining and replacing its deteriorated buildings and its long history of neglect. *See, Contini v. Board of Education of Newark,* 286 *N.J. Super.* 106, (App. Div. 1995), *cert. den.*, 145 *N.J.* 372 (1996). In light of the uniqueness of the District's problems, this Initial Decision will rely heavily upon District-specific information in determining whether an inefficiency exists. If the item or organizational structure is found to be serving a necessary function, it will not be deemed an inefficiency in the absence of a more effective and immediate alternative.

Marion Bolden became the State Superintendent for the District in 1999. One of her goals was to make the District efficient financially as well as educationally. Between June 19, 2000 and October 27, 2000, she attended weekly meetings with auditors and District and Department personnel to identify areas that were inefficient and to develop strategies to improve them. These meetings were continued for almost two years and resulted in the development of the Projected Five Year Cost Saving Actions agreement in September 2001 during the time the Whole School Reform (WSR) plan was being implemented. The items that were the subject of the agreement represented areas of concern that could not be handled immediately. It was determined that there were redundancies of services that would be phased out as part of the agreement.

Bolden attempted to follow the plan by reorganizing the SLT system to group high schools together with their feeder elementary and middle schools. This did not work because of programmatic concerns with the secondary schools. The District has implemented a schools-to-careers initiative that requires uniform application and the new feeder grouping interfered with the District's ability to carry out this and other programs specific to secondary schools in a uniform manner. The schools were then regrouped to the prior SLT system and the programs now function more efficiently as a result.

Before entering into any further into the discussion of the administrative structure of the District, the following must be taken into consideration: Newark has 76 schools,

whereas Paterson has 49 schools and Jersey City has 39. Newark has approximately 43,000 students and Jersey City approximately 36,000 students.

Dr. Raymond Lindgren, Executive Assistant to the Superintendent, prepared a chart that showed Paterson was grouped into four administrative units with an average of 12.25 schools per unit. Newark's five SLTs have an average of 15.2 schools per unit. Jersey City was divided into two administrative units with an average of 19.5 schools per unit. This puts Newark about midway between Paterson and Jersey City in the number of schools per administrative unit.

Rarick testified that he compared Newark with Jersey City because the two are the first and second largest districts. He considered the fact that the District has two special assistants in each SLT while Jersey City only has one in each of its two clusters. Lindgren testified that one of the special assistants is non-instructional and is paid significantly less than the special assistant for instruction. Lindgren also pointed out that Jersey City has one special assistant and one administrative analyst per cluster. The function of the administrative analyst is similar to that of the District's non-instructional special assistant.

Nelms testified that, prior to the state takeover of the District, the schools were grouped into four clusters for purposes of administration. She was the head of one of these clusters and supervised twenty-six schools so that she had insufficient time to spend on the needs of the individual schools that were her responsibility. When the District was reorganized into five units, now designated as SLTs, she was able to perform her duties much more effectively.

Bolden testified that, when she assumed the position of superintendent in July 1999, there were sixty-eight employees in the SLTs with a budget of approximately $18,000,000. She has reduced the roster of employees to its current level of forty with a budget of $6,000,000. Of the seventy-four employees shown in the present roster of the five SLTs, thirty-four are paid through other departments in the District and are not part of the SLT budget. Rarick included these employees as evidence of inefficiency

but did not show that the thirty-four employees, or any category of them, serve no useful function. To the contrary, he arbitrarily eliminated the salaries of all employees of one SLT irrespective of the function performed or the source of their salaries.

Based upon the testimony, I **FIND** that the District has realized more than the savings projected by the plan even though it was not accomplished through implementation of the plan. I **FIND** that the District attempted to implement the structural reorganization contemplated by the plan but it found it to be less efficient than the five SLTs and it restored the more effective system. I **FIND** the Department's preference for implementing a five-year-old agreement, which creates a system that did not work as well as the one in place, to be arbitrary. Furthermore, its position does not take into consideration that creation of a massive reorganization of the District by suddenly withholding funds could easily lead to chaos. This matter should be resolved by negotiation, not through an attack on the District's funding.

I **FIND** the comparison of the District to Jersey City to be unpersuasive since it is based solely on numbers and ratios and ignores the requirement of the regulations that the spending history of the District and its specific staffing needs also be taken into consideration.

For all of the above reasons, I **FIND** that the fifth SLT is not an inefficiency and, therefore, $1,208,080 should be restored to the budget.

Rarick basically ignored the result of the Rosenfarb report in this instance and in those that follow. It will not be taken into consideration by this forum since it does not appear to be a useful measure of inefficiency in any of the areas it explored.

Inefficiencies - Overtime

Rarick reduced the Base Budget by $700,000 for excess overtime payments to blue collar workers. He characterized this as an inefficiency because the District was expected to reduce overtime spending by this amount. He did not explain the source of

his expectation. Rarick was concerned about the amount of overtime paid in general, $5,700,000, and, specifically, the amount paid to certain individuals. There were two employees, a night electrician and a foreman of electrical workers, earning over $50,000 each in overtime during the 2000-2001 school year. He was also concerned about the unfavorable comparison between overtime spending in Newark and in Jersey City. Paterson is the smallest of the three districts he is involved with and it outsources its custodial services so that Rarick did not stress this comparison with Newark.

He conceded that there were certain problems during the 2002-2003 school year, such as the number of snowstorms, that led to increased use of overtime. He further conceded that there is provision in the union contracts for custodians and maintenance workers that require to District to pay for a minimum of four hours of overtime if a worker is called out to an emergency after school hours. In spite of these District-specific factors, he still based his decision on a comparison with other Abbott districts.

Steve Morlino, the Executive Director of Facilities Management for the District, testified that Newark has seventy-six schools but there are eighty-two school buildings. The average age of a District school building is eighty-five years. Newark is the only district with twenty-six buildings over 100 years old.

He testified that a significant amount of the overtime expense is weather-related. When the temperature drops below thirty degrees, the District's custodians are bound by contract to check the buildings' heating systems. When the temperature drops below twenty degrees, he requires the custodians to operate the school boilers on a 24-hour basis to avoid emergencies such as damaged boiler systems and freezing and bursting pipes. He stated that this was necessary to avoid losing the use of classrooms in already overcrowded classes.

Five of the buildings have boilers that are beyond repair. They have temporary boilers located in trailers outside the schools. These require considerable overtime attention to avoid freezing and to protect them from vandalism. Constant fuel deliveries

are required because of the small capacity of the boilers. They create additional expense because they emit "cold oil smoke" which dirties the surrounding homes. The District cleans this up as a matter of public relations.

The age and condition of the school buildings exacerbate the overtime expenditures. Skilled trade workers are called out at all hours of the day and night to make emergency repairs or remedy vandalism so that the building can be used for school purposes.

The State performs renovation projects through an agency which will be identified here as the SCC. (This will be explained fully below.) Although the District does not do the work, the State workers do not clean up after the job is over so that District employees incur overtime carrying out this function.

When summer school is in session, custodial workers clean the buildings daily. When summer school is over, custodial and skilled trade workers are called upon to conduct a massive clean up and repair of schools for the regular school year.

Morlino performed a cost/benefit analysis and determined that adding additional staff would not reduce the need for overtime.

Rarick did not explain the basis for his expectations, but, given the problems, it is surprising that the District has been able to reduce the cost of overtime as much as it has. According to Morlino, it will attempt to negotiate the four-hour overtime minimum from the workers' contracts to save even further on this expense. In the meantime, I **FIND** that the cost of overtime is necessary given the historical expense and the staffing needs of the District. I, therefore, **FIND** that $700,000 should be restored to the Base Budget.

Inefficiencies – Office of Design and Construction

The District's Office of Design and Construction was also considered an inefficiency. Rarick determined that the functions of this office duplicated those of the District's office devoted to maintenance and plant services and also duplicated services provided by the New Jersey School Construction Corporation (SCC), a subsidiary of the New Jersey Economic Development Authority formed pursuant to the Educational Facilities Construction and Financing Act, *N.J.S.A.* 18A:7G-1 to –44 (Act), to administer school construction and renovation. For this reason, he deleted $2,154,000 from the Base Budget as inefficient use of funds.

Abbott districts are required to use the SCC to construct their school facilities projects. Districts, such as Newark, that have approved long-range facilities plans may undertake pre-development activities consistent with the approved plans under the auspices of the SCC. *N.J.A.C.* 19:34-1.1. Further, the SCC promulgated rules to implement section 13(a) of the Act which permits the SCC to "authorize a school district to undertake the acquisition, construction and all other appropriate actions necessary to complete" a school facilities project whose eligible costs are less than or equal to $500,000 and to enter into a grant agreement with the District for the payment of the State share. *N.J.S.A.* 18A:7G-13(a).

Rarick never spoke to anyone in the SCC to confirm his analysis of the responsibilities of the District. It was based only upon his perception and the spending by the District. Newark ranks the highest in the state in spending per pupil, $2215. The second highest is Trenton which spends $1856 per child. This means that Newark exceeds the second highest district by twenty percent, a significant margin.

The Rosenfarb report found an unfavorable variance in salaries for the Office of Design and Construction (ODC) of $9,040,609.70. Rarick looked more closely at the underlying considerations, that is, the District employees in the Office of Facilities which includes the ODC. There are four subdivisions of the Office of Facilities: project control;

building maintenance, performing SLT services in the schools; facility support; and ODC. He found no counterpart of ODC in any other Abbott district. He also considered that the staff of this Office had increased over time. Furthermore, there was a highly-paid consultant, Frost Associates, engaged by the District to assist with construction and renovation plans submitted under the Act.

Rarick conceded that the ODC had responsibility for projects less than $500,000 and emergency needs but stated that other districts had the same responsibilities and handled them without this type of office.

Rarick considered that there are 27 full-time equivalent (FTE) employees in the office, and calculated their total salaries and estimated total benefits to be $297,000. He estimated these benefits using an average per FTE employee of $11,000 per year times the twenty-seven employees. He then removed the result, $2,154,000, from the budget as an inefficiency.

William Parrish has been the District's Director of the ODC since July 2002. He testified that this office consists of a director, a chief engineer, a supervising engineer, eight project managers, a construction management specialist, an assistant building services management specialist, six assistant construction management specialists, a principal purchasing assistant and support staff.

The licensed professionals in the Office of Design and Development provide the technical expertise to develop all major capital projects of the district. They identify projects; draft specifications, including technical standards; and identify, select, and oversee outside professionals and contractors.

His staff also coordinates with agencies and the community with regard to land acquisition and predevelopment activities. The ODC is also involved in the day-to-day maintenance and oversight of the District's 80 buildings that are on average 85 years old, as well as the long-range improvements and recommendations for environmentally sound and energy efficient practices. The ODC also processes and oversees numerous

federal, state and local grants, including SCC 13 and 13A grants for projects under $500,000 and pre-development work (traffic studies, geo-technical work, site feasibility).

Parrish disagreed with Rarick's testimony that the SCC maintains all school buildings at this time, as well as the premise that the ODC is an overlapping function with the SCC, which handles construction of new schools as opposed to continued need for capital projects at existing schools. Parrish outlined a number of functions of the ODC completely unrelated to the SCC, the applicable subsidiary of the EDA.

He testified that many of the duties of the ODC impact upon safety of students, staff and visitors, and implicate serious District liability concerns, such as: (1) removal of underground storage tanks; (2) sidewalk and curb repairs; (3) playground resurfacing; (4) athletic field repairs; and (5) exterior and site lighting upgrades. Other duties of the ODC are directly related to, and desperately needed for, maintaining the District's curriculum, such as: (1) library renovations; (2) classroom conversions (*e.g.*, a $60,000 undertaking of transforming classrooms into a culinary arts program); (3) building and maintenance of vocational schools; (4) science labs; and (5) temporary classroom units. Indeed, some services are mandated by NCLB, such as creating media labs and writing centers in classrooms.

The ODC also addresses all emergency structural repairs at any of the District's 80 school buildings, a critical function not handled by the SCC. In fact, an emergency situation had just occurred the day before when a roof collapsed at a school, and his staff was called upon to stabilize the situation. He added that, without a staff, he would not have been able to respond adequately and the District would have incurred great expense.

Parrish testified that no other District had approximately 50 capital improvement projects at this time valued at over $20 million. The Belmont Runyon school alone is an approximately $30 million project. As an example, Parrish indicated that the SCC evaluated Jersey City's "health and safety" funding at $40 million and assessed Newark's at $130 million, largely in part due to the significantly greater amount of

buildings, and the condition of those buildings. Therefore, contrary to Rarick's statements, a comparison to other Abbott districts can not properly be made.

Parrish disputed Rarick's assertion that the ODC staff was growing at a time that it should be reduced. He said that the District's Long Range Facilities Management Plan involves more than $1.6 billion in projects, and, at each stage of building, a higher level of District coordination is needed to interface with the SCC. This requires representatives of the ODC to ensure efficiencies for subsequent construction of buildings based on prior experience. Among other things, it eliminates the need for contracted professionals to educate themselves at the expense of the District or State each time a new project is undertaken.

Parrish made a cost/benefit analysis of retaining the staff in the ODC. Given the current $20 million in capital improvement projects, an industry standard of 15 to 20 percent in construction "soft" costs and management fees and private industry salaries, elimination of the ODC would cost the District approximately double the cost of maintaining the ODC.

Finally, Parrish testified that neither Rarick nor Hoffman, who, despite being stationed in the District's Internal Audit room outside of the ODC office, ever spoke to him regarding the functions or efficiency of the ODC.

George Gottuso is employed by the SCC as the senior project officer in charge of the District's public school construction programs. As part of its Long Range Facilities Plan, the District will construct forty new schools and renovate thirty others at an estimated cost of $1.6 billion dollars. The work will extend indefinitely into the future.

Gottuso testified that, once the Department approves a project, he works closely with the ODC. He attends meetings with District staff and educators to set up the design and construction of new and renovated schools at which the ODC educates prospective architects as to what is needed before a design is submitted. He works with Parrish and other District facilities staff when the design drawings are considered

and approved. The design phase of each project can go on for up to eighteen months depending on the size and complexity of the project. The District must approve and sign off on the construction drawings so that they meet its standards. The SCC monitors the whole process and keeps it moving forward. In small districts, the SCC works with a district on a few schools. In Newark, it works with the District on 40 schools.

At the present time, the Department has approved twenty-eight projects submitted by the District and there are additional ones being prepared for submission.

Gottuso confirmed that the SCC approves the District for grants for projects costing less than $500,000; however, once the grant is approved, the District does everything else. The SCC only receives invoices and pays the contractors for the project. It does not have the capacity to deal with all of these projects and has delegated the responsibilities to the districts as permitted by law. As a result, the work is performed by the ODC.

Gottuso said that the office of SCC devoted to the District consists of himself and two project managers. Given the number of projects in the District and his lack of staff, he relies heavily upon District resources to carry out the work of his office. The SCC has no plan to provide him with additional staff.

Based upon the evidence, I **FIND** the ODC performs necessary services that do not duplicate the services provided by the SCC and the District would incur greater costs by eliminating it. The Department never considered the staff requirements of the District before eliminating funding for the ODC. I, therefore, **FIND** that this office is not an inefficiency and the Department should restore $2,154,000 to the Base Budget.

Inefficiencies – Office of Development Planning

Rarick also considered the Office of Development Planning (ODP) to be inefficient and questioned the need for it. He stated that, at least as far back as August

2001, he has been trying to get an organizational chart of this office and the job descriptions of its employees. These employees are a director, a teacher of industrial arts reclassified as a resource teacher/coordinator, a legislative information officer and a secretary. He was concerned that the resource teacher/coordinator, who helps to plan facilities needs in the schools, was performing a job for which he was not hired. Rarick was also concerned that the legislative information officer performed duties already being performed by the District's Office of Public Information. He could not find a comparable office in any of the other Abbott districts and, so, could not justify this expenditure in Newark.

Rosenfarb found this to be an unfavorable variance of $8,969,320.68. Rarick calculated the measure of the inefficiency to be the salaries and benefits of three employees and he removed $190,000 from the Base Budget.

Lindgren testified that the ODP was originally created to address the *Abbott*-mandated Long Range Facilities Management Plan. The office has existed for four years and originally had five employees. The staff was reduced approximately two years ago to three positions, two of whom were reallocated from other District offices.

He asserted that, given the scope of the undertaking involving Newark schools, which alone accounts for 20 percent of all new schools in the state and 25 percent of all projected expenditures, comparison to other Districts regarding the need for this office is unsound. He testified that 130 of 230 million dollars in School Construction Corporation Health and Safety projects are in Newark. Overall, Newark is building 40 new schools and restoring 35 others.

He explained that with each school, the ODP staff faces unique challenges regarding, among other things, state and municipal approvals, community interaction, land acquisition procedures and coordination of educational specifications, District standards and community needs. Lindgren said that it is not uncommon for the building of each school to implicate multiple parcels of land; in fact, Newark's new University High School impacts 60 separate parcels of land, by far the greatest number in the

state. According to Lindgren, the ODP staff is uniquely qualified to implement these tasks.

The legislative information officer, whose job description is in evidence, is responsible for, among other things, coordinating between the state and municipal government and working with the multiple agencies of the City on a regular basis. Among his many responsibilities is his role as District liaison to the City Planning Board. He is uniquely suited to the position because of his familiarity with the municipal officials and the process. Lindgren testified that it is far more efficient to assign one experienced individual to this function rather than distribute individual tasks to random District staff.

Lindgren explained that the function served by the legislative information officer does not duplicate the functions of the District's Office of Public Information and Community Development. This office interacts with the District parents, the community and the media.

The industrial arts/facilities research teacher/coordinator, whose job description is in evidence, participates in meetings with the Department, the SCC, and the Facilities Task Force. He ensures compliance and continuity and uniformity with educational specifications and is charged with retaining voluminous records and coordinating documents relating to the educational side of the building process. Lindgren advised that this individual is also uniquely qualified for this position given his experience, as well as his knowledge and expertise of educational issues, drafting and design.

Lindgren was aware of the functions of the District's Office of Public Information and Community Development. He explained that the role of this offices was completely different than the role of the ODP and that there were no overlapping functions, with the exception of the sharing of information among the offices for community awareness. He added that the ODP performs functions that are not duplicative of any other District staff.

Finally, Lindgren testified that neither Rarick nor Hoffman spoke to him about the inefficiency of the ODP. The first time the Department of Education advised the District of this was in the August 27, 2003 letter.

Based upon the testimony of Lindgren and Rarick's admission that he had no understanding of the function of this office, I **FIND** that it performs a necessary function and should not be classified as an inefficiency. Therefore, I **FIND** that the Department should restore $190,000 to the District's Base Budget

Inefficiencies – Resource Teachers/Coordinators

The next item of inefficiency, resource teacher/coordinator positions, was another matter agreed upon in the Projected Five Year Cost Saving Actions agreement. The District was to reduce the number of math research teacher coordinators from sixty-three to five by the 2003-2004 school year, a savings of $50,000 per employee. As of the present, the number of these employees has only been reduced to twenty-nine. The District was to reduce the number of language arts teacher/coordinators from sixty-three to five by the 2003-2004 school years, also at a savings of $50,000 per employee. As of the present time, the number of these employees has only been reduced to twenty-seven.

Rarick did not consider any District savings in this area if they were not realized in accord with the five year agreement. He was not aware that the District had reduced the number of facilitators and tutors that used to be in the District and did not take this into account. He explained that he did not consider the educational impact of reducing the number of resource teacher/coordinators because he felt that this should have been contemplated by the District when the five year agreement was developed and agreed upon.

Rosenfarb arrived at an unfavorable variance of $14,343,938.77 for these positions. Rarick compared the District to Jersey City and Paterson and found that there were a few employees performing similar functions but not on the scale found in

Newark. [illegible] inefficiency for this item in the following manner. $59,556.69, of a math resource teacher/coo[illegible] number of employees that should have been remo[illegible] of $1,452,772.67. He calculated the savings o[illegible] rce teacher/coordinators by taking their average s[illegible] by twenty-two. This resulted in a savings of $1,331,[illegible] on benefits for these forty-six employees in the mar[illegible] about $506,000. The approximate total of all of [illegible] emed to be the amount of funds spent inefficien[illegible] from the Base Budget.

Bol[illegible] er/coordinators as "master teachers" involved [illegible] ntoring teachers, assisting in curriculum development[illegible]

She[illegible] er/coordinators are a component of the District's [illegible]. She has reviewed this model with the Departmen[illegible] ve approval from the Commissioner. In fact, Bolds[illegible] ad reviewed the District's model and comment[illegible] he concluded that the Department's decision to elimina[illegible] research teacher/coordinator positions would have a se[illegible] rict's ability to implement its model.

Bo[illegible] urce teacher/coordinator position to WSR in compar[illegible] s and tutors. She found that the resource teachers [illegible] district from a programmatic standpoint given the fact th[illegible] vices were directly linked to an upswing in crucial te[illegible] cted that the work done by facilitators was not as closely [illegible] trict goals. Because of the value of the research[illegible] de the decision to reduce the number of facilitators[illegible] ar exceeded the cost savings proposed in the Septe[illegible] Specifically, the Superintendent reduced the

number of facilitators by 26.5 with a corresponding saving of $1.85 million and reduced the tutors by 50 with a corresponding cost saving of $3.53 million.

Bolden stated that the elimination of the research teacher/coordinators would deprive the District of the extensive additional training they have already received. She described in detail how the research teacher/coordinators were trained in programs that, in some instances, spanned two and one-half years. In addition to their greater effectiveness, she determined to retain the resource teacher/coordinators in math and language arts because of the high cost of training them. According to Bolden, the need for language arts and math resource teacher/coordinators was explained to Rarick and he approved the District's plan.

In addition, she noted that the proposed reduction of research teacher/coordinators would result in placing the District's $5.7 million National Science Foundation (NSF) grant in jeopardy. The grant required maintaining at least 30 resource coordinators in math as a condition of continued funding. Rarick testified that he was unaware of the NSF grant when he identified the math research teacher/coordinator position as an inefficiency and failed to talk to anyone in the District about the need for the position.

Based upon the evidence, I **FIND** that, irrespective of the five-year plan, the positions of math and language arts resource teachers/coordinators do not constitute an inefficient use of funds. I, therefore, **FIND** that $3,290,000 should be restored to the Base Budget for this purpose.

Inefficiencies – Department Chairpersons

Rarick calculated that the District had inefficient spending in the amount of $3,024,000 because its department chairpersons do not teach classes. This is a situation unique to the Newark district. He could not find any other Abbott districts where department chairpersons were not required to teach. The Newark chairpersons

teach voluntarily on occasion but Rarick could not factor this into the budget because there was no regularity.

In Paterson, the department chairpersons are required to teach at least one class. In Jersey City, the department chairpersons carry a full load of classes and receive a stipend for their additional administrative duties. In the District, the department chairpersons are full time administrators. Rarick suggested that department chairpersons were performing functions similar to supervisors and vice principals and suggested to the District that thirteen of them be reclassified to the latter position. He did not take into account whether any or all of them have the proper certification for this. According to Rarick, the department chairpersons not reclassified should be made to carry a full time teaching load and receive a stipend for their administrative duties.

The District has very few vice principals. In Rarick's opinion, if department chairpersons were reclassified, it would result in a more even distribution of vice principals throughout the District and bring it more in line with other districts.

Rarick calculated the dollar amount of this inefficiency to be the average salary of the fifty four department chairpersons ($45,000) times the fifty-four unnecessary positions plus the benefits associated with them. He arrived at $3,024,000, which he deducted from the Base Budget.

His analysis does not take into account that, if funding for the non-teaching positions were completely eliminated from the budget, the District would not have money to pay these individuals as vice principals and/or classroom teachers or to pay these teachers a stipend.

Bolden testified as to the responsibilities of department chairpersons as they exist in the District. In fact, she herself served as a department chairperson at one time and voluntarily taught while working in that capacity in order to remain current in her

content area. She agreed that having department chairpersons teach is generally a benefit to the teachers and the system.

Bolden noted that department chairpersons are the instructional leaders in their respective content areas in the District's secondary schools and, as such, they are critical from a programmatic standpoint. They carry out important staff development functions and assist teachers in implementing the curriculum in their content areas. They are also responsible for the disciplinary functions in their respective departments. She observed that, if the positions were eliminated, the District would lose the benefit of the twenty additional days department chairpersons are contractually required to work each school year.

The Superintendent challenged the Department's contention that department chairpersons could be re-classified as vice-principals by pointing out that vice principals do not engage in the staff development function. She consulted with her colleagues in other districts who indicated that they realized no cost savings from having department chairpersons teach. In addition, she found that, in these other districts, adding teaching responsibilities resulted in the need for additional positions such as "Deans of Discipline" to carry out duties presently performed by department chairpersons and/or necessitated paying a teacher a stipend for the staff development function. When reviewed in that light, Bolden noted that the number of administrators in the high schools in the three State-operated districts supervised by Rarick were equivalent.

This testimony was verified by Lindgren. He took into consideration that the District's department chairpersons serve dual functions in that they supervise instruction and enforce student discipline. Based on his discussions with administrators at Jersey City and Paterson, he compiled a chart that confirmed the District's administrative structure to be consistent with the other state-operated districts, because Newark does not have the position of "Dean." Lindgren testified that Paterson has six "Deans of Discipline" and Jersey City has 18. Further, Lindgren ascertained that Jersey City has now assigned a number of supervisors to the high schools to assist with supervision of instruction. This information was also confirmed by Rarick in his testimony.

Finally, Bolden outlined the limitations to department chairpersons teaching contained in the District's collective bargaining agreement. This document only allows these individuals to teach if a staffing shortage exists. She explained the difficulty in negotiating changes to clauses embedded in a collective bargaining agreement and admitted that she would change those terms if she could.

Based upon the evidence, I **FIND** that the comparison of the District to other districts with respect to the job functions of department chairpersons is invalid since it is undisputed that the functions are different in Paterson and Jersey City. I **FIND** that the District has demonstrated that the positions are necessary as the District is presently structured and elimination would not necessarily result in any particular cost savings. I, therefore, **FIND** that the non-teaching department chairpersons are not an inefficiency and $3,024,000 should be replaced in the Base Budget.

Inefficiencies – Food Service Deficits

The District has a food service deficit of $3,200,000, or $176 per child, the highest in the State. This problem has been the subject of discussion since the CAFR of 2000. The District must contribute money from the General Fund to make up for the deficit in the food service budget which was $8,000,000 in 1999. A few strategies were developed. The first was to reduce the number of staff. The second was to create a two-tiered salary structure so that newly hired workers would be employed at a lower hourly rate. According to Rarick, this should have produced a $2,000,000 reduction in the deficit by this time. Therefore, since the budget for the fiscal year 2001 showed a deficit of $7,000,000 and there should be a $2,000,000 savings, the current deficit should only be $5,000,000. The actual current deficit was $8,195,000, subject to adjustment at the time of the annual audit. Rarick determined that the dollar amount of the inefficiency was the difference between what the deficit is and what he determined it should be. As a result, he deducted $3,200,000 from the Base Budget.

Rarick was not aware of which of these remedial strategies had been implemented by the District to lower the food service deficit.

Rosenfarb identified the unfavorable variance for food service as $5,926,274, but Rarick relied upon his own method to attribute a dollar amount to this inefficiency.

The District commissioned a September 1998 study seeking ways to reduce the deficit. Valerie Wilson, the District's Executive Director of Operations, stated that the District implemented the majority of its recommendations. It addressed the District's high labor costs by reducing staffing levels through attrition and outsourcing.

Specifically, Wilson testified that the staffing level was reduced from a high of 446 employees in 1996 to the current level of 259. Outsourcing and the negotiation of a tiered wage level ensured that newly hired employees would receive a significantly lower wage rate. Wilson pointed out that no employee had been hired for a food service position since 1997. There are no District employees in schools where the food service is outsourced.

The study also found that the District would always carry a food service deficit unless it was able to implement a more efficient, cost-saving central food kitchen. Wilson testified that the District followed up on the recommendation by requesting, in a September 11, 2002 letter, that the Department, through the SCC, approve the central kitchen as part of the District's Long Range Facilities Plan. No specific response was provided, but verbal statements were made regarding the need for the District to do another study and noting that this project could not be completed unless it was attached to a school project.

Wilson detailed the effect that the proposed $3.2 million budget reduction would have on the District's ability to maintain its meal program. She explained that the reductions would eliminate the District's ability to provide a hot lunch meal, eliminate the breakfast program, and impede the District's ability to provide free lunches for children with limited financial resources.

In addition, Newark is a school district that requires its students to remain in their buildings for lunch. It is required to provide a number of meal choices for the children. They have only about twenty-five minutes for their lunch periods. The lunchrooms are crowded and, if there is a shortage of staff to move the process along expeditiously, the children may not be able to select, purchase and eat their meals in the allotted time. This would impinge on their subsequent instructional time.

Based upon the testimony, I **FIND** that, irrespective of the desire of the District and the Department to reduce the number of employees in the food service program, there is no way to do this at the present time without seriously impinging upon other necessary and required services. I **FIND** that, under the existing circumstances, the District has lowered its food service staff to the extent possible and the remaining staff can not be considered an inefficiency because the food service program will not work without them. I, therefore, **FIND** that the food service staffing, which is creating the deficit, cannot be considered an inefficiency and $3,200,000 should be replaced in the Base Budget.

Inefficiencies - Consultants

The next area of inefficiency is the amount spent by the District for the services of four consultants. The Department specified just four consultants in its testimony and only these allegations of inefficiency will be considered. A fifth consultant was identified for the first time at hearing during the cross-examination of the District's witness but no adjustment was made for it in the budget. Therefore, it will not be considered an inefficient use of funds in this appeal.

The four consultants identified by Rarick as inefficiencies are Ciber, Inc., Accuent, Systems 3000, and Brokerage Concepts. He stated that Ciber duplicates the District's staff in the payroll department as does Accuent ($479,052.75). Systems 3000 ($23,450) is involved in the District's budget functions which overlap the others.

Therefore, he asserts, there are three separate consultants performing overlapping functions.

Ciber Inc.:

Ciber was paid $424,041.70 in the fiscal year 2003. It provides day-to-day technical assistance to the District in running its payroll program. Its function is described as the provision of "facilities management of the PeopleSoft human resource/payroll system." The District uses PeopleSoft software to run its payroll.

Paul Mailloux, the District's Chief Information Officer since February 1997, testified that his office oversees the processing of over 9,000 payroll checks every two weeks. There are about eight different employee unions whose requirements need to be accounted for. He explained that the Newark Public Schools retained Ciber in October 1998 to provide the District with on-site technical support, operations support, and maintenance for its human resource payroll systems and Oracle-based systems (PeopleSoft, SubFinder, Resumix, Tuxedo, Pay Base, Citrix, and SASI).

Bolden testified that, when she became State Superintendent for the District in 1999, she found the District's payroll to be unstable. The District had 11 full-time employees associated with processing payroll, and it was not unusual for these employees to incur more than 350 hours of overtime on a bi-weekly basis, the equivalent of five additional employees. The vast majority of the overtime was associated with running the payroll operation and recovering from the frequently occurring payroll operations errors that plagued the system. For example, employees were not being paid; records, such as W-2 forms, were erroneous; and required reports, such as the Board Secretary's Report and the Treasurer's Report, could not be generated and were not submitted. Ciber was hired in order to remedy this situation.

After engaging Ciber, this work is now performed by a total of four individuals: a systems engineer with specific hardware certifications; an Oracle-certified experienced database administrator; and two computer system operators.

The District's present payroll employees collect employees' time records and prepare the data to be processed by Ciber into payroll. This is a large operation given the number of District employees involved.

Ciber also provides the district with a "Disaster Recovery Hot Site" and "hot site administrative services" for its payroll operations. This network and systems infrastructure provides backup of critical data offsite and supports Human Resources and Payroll operations during emergencies and secures delivery of critical payroll applications with remote point-to-point access and local check printing capabilities in the event of disaster. During the recent blackout of August 14, 2003, a Wednesday before a scheduled payday, his office was required to utilize these emergency services.

Mailloux stated that his office conducted a cost/benefit analysis and determined that it is cost beneficial for the District to engage Ciber. The analysis concluded that the estimated annual savings is approximately $230,000 to $300,000. Replacing Ciber's services would cost the District approximately $780,000. It was Mailloux's opinion that he would not be able to process payroll in the event the Ciber contract was terminated.

Mailloux testified that Rarick never spoke to him about Ciber's functions, and never questioned the efficiency of its operations.

Accuent and Systems 3000:

Valerie Wilson, the District's Executive Director of Operations, testified that the District needs both Accuent and Systems 3000. Accuent is a human resource/payroll software implementation partner for PeopleSoft, the human resource-related software. The PeopleSoft company requires an implementation partner. Its software is not "plug and play." It requires constant monitoring and adaptation to meet the needs of the District. Furthermore, the software is proprietary; that is, the information required to provide critical functional and technical support for it is not available to the District so

that no District employee can take the place of Accuent (which is licensed by PeopleSoft for this purpose).

The District had engaged another PeopleSoft certified partner before Accuent but Wilson described the situation as "a mess." This partner was replaced by Accuent and the system has been functioning well since. The function of Accuent does not overlap Ciber. Ciber is involved with the day-to-day operation of payroll while Accuent services and adjusts the payroll software.

Systems 3000 is proprietary software used for the District's finances as a whole, not just for human resources. It incorporates data generated by the consultants serving the District's human resources function for that segment of the budget but does not eliminate the need for their services nor do they eliminate the need for Systems 3000. Wilson testified that, as Director of Operations, she relies upon Systems 3000 on a daily basis.

Wilson confirmed that no other office or District staff provides the District with the services performed by these two consultants.

Brokerage Concepts:

Brokerage Concepts ($90,000) is the third party administrator for prescription, vision and temporary disability claims and administrative fees for the employees in two unions. There are a very small number of such employees. Rarick felt that this was an unnecessary function and deducted the cost even though the expense arises from an existing contract between the District and the union involved. The union has reserved the right to be serviced by this specific provider and, even though the Director of Labor Relations for the District believes this provision to be an infringement of management prerogative, it is still part of the existing contract.

Rarick found the costs for consultant services in the District to be significantly higher than those in other districts. He proposed that Newark create a Department of

Operations Technology consolidated and handled mainly by District empl ow quickly this could be accomplished, but neve tal amount paid to these consultants as inefficient al of $1,057,000 from the Base Budget correspond

Based upon the s of Ciber, Accuent and Systems 3000 are nec dundant and their services can not be provided by seeable future, if at all. I, therefore, **FIND** that the and $1,057,000 should be restored to the Base Bud

Inefficiencies - Drivers

The final inefficien ayment of $78,000 for two full-time drivers for Mario ndent. This payment was based upon an employ 7, 2001 between the New Jersey State Board of Ed xpired under its own terms on June 30, 2003.

The contract para

7. TRANSPORTA

In recogni NTENDENT will be required to travel such as the County Superintendent's on, etc., and in light of the fact that th m time to time travel throughout the S cts to carry on her responsibilities, t assigned a school District automobil used for work-related travel as well as is vehicle, but not the driver, may also b for her personal use.

Rarick explained prior State Superintendent of the District. It was p receiving death threats at

the time he assumed the position. The drivers were to serve as bodyguards, as well as transportation for the Superintendent. The Department states that, at the present time, there is no special threat to Bolden different from what the superintendents face in other Abbott districts. It thinks that she can be transported by other District employees as necessary and no full time drivers are needed.

Furthermore, the Department believes that this expenditure, although relatively small, is a highly visible one and symbolizes waste to the public. No other Abbott district superintendents have full time drivers.

Since Bolden's contract has expired and will no longer be in effect in the upcoming fiscal year, the Department believes that the two drivers' positions can be eliminated as unnecessary. Rarick deleted $78,000 from the Base Budget to correspond to the elimination of these position. He pointed out that the Department may reallocate these funds for classroom costs if the District requests it.

Bolden testified that she customarily works late hours and is concerned for her safety when leaving the District's offices on Cedar Street. Nelms, her deputy superintendent, works approximately the same hours and has no driver.

Bolden also explained that she spends a significant amount of time driving to various meetings and appointments. If she has a driver, she is able to conduct District business from her car, thus making more effective use of her time.

I **FIND** that the District has failed to demonstrate that it is not possible to transport Bolden safely and efficiently by using District employees that can be used for other purposes if not needed by her. I, therefore, **FIND** that the use of two full time drivers by the Superintendent is an inefficiency and the Department correctly removed $78,887 from the Base Budget for this reason.

DEPARTMENT CALCULATION OF ADDITIONAL ABBOTT AID

The Department determined that the District's preliminary maintenance budget, that is, its total state program budget and maintenance for the 2003-2004 school year is $744,264,093. The projected General Fund revenue in Newark's Budget submission for 2003-2004 is $764,501,305 including the District's request for additional Abbott aid in the amount of $201,226,579. It will also have ECPA revenues of $36,370,678 and DEPA revenues of $20,103,295 for a total of $820,975,278. When the District's request for Abbott aid is subtracted, this leaves projected revenues of $619,748,699.

The District will receive an unbudgeted increase of $198,344 in pre-school expense and Projected Carryforward Balances – ECPA of $228,318, resulting in revenues of $426,662. This makes $620,175,361, the 2003-2004 total General Fund revenues available.

If the District receives maintenance budget revenues of $109,186,765 in additional Abbott aid, the total state program budget and maintenance, adjusted for inefficiencies, will be $744,264,093.

REVISED CALCULATION OF ADDITIONAL ABBOTT AID, 2003-2004

The Department approved $109,000 in Supplemental Abbott aid for the 2003-2004 school year. Based upon the findings above, I **CONCLUDE** that the following additions should be made to the proposed additional Abbott aid in accord with the maintenance standards set by the Court and the regulations.

Restore from encumbrances	$9,735,823
Non-discretionary increases:	
Salaries	$1,830,496
Replace Instructional Staff	$11,376,000
Worker's Compensation	$3,500,000
Special Education	$626,184

CPI	$83,945
Non-Recurring Costs:	
Utilities	$1,055,681
Belmont Runyon	$1,387,756
Inefficiencies:	
SLTs	$1,208,080
Overtime	$700,000
ODC	$2,154,000
ODP	$190,000
Resource Teachers	$3,290,000
Department Chairs	$3,024,000
Food Service Deficit	$3,200,000
Consultants	$1,057,000
Total Additional Aid	$44,418,965
Proposed Additional Aid	$109,186,765
Total to be Provided	$153,605,730

ORDER

It is **ORDERED** that additional Abbott aid be provided to the District in the amount of $153,605,730 for the 2003-2004 fiscal year.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within the time allowed under the existing orders of the New Jersey Supreme Court and unless such time limit is

otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Notwithstanding the provisions of any rule to the contrary, exceptions to Initial Decisions of the Office of Administrative Law in *Abbott* District budget appeal matters shall be filed within five (5) days of the date of mailing of the Initial Decision, and reply exceptions shall be filed within two (2) days of receipt of exceptions. File written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 3, 2003
DATE

EDITH KLINGER, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

October 3, 2003
DATE

E-mailed Initial Decision to the parties on:

October 3, 2003
DATE

pb

APPENDIX

Witnesses:

For Petitioner:

Marion Bolden
Ronald Lee
Paul Mailloux
William Parrish
Steven Morlino
George Gottuso
Raymond Lindgren
Anzella Nelms
Valerie Wilson

For Respondent:

Mary Byrne
Ben Rarick
Steven Hoffmann
Keith Balla

Exhibits:

J-1 Notice of Preliminary Maintenance Budget Figure for 2003-2004

P-1 E-mail, Azzara to Rarick, May 31, 2002
P-2 SLT Staff Positions Not Funded Through the SLT Budget
P-3 Cornyn Fasano Group, Report, September 17, 1998
P-4 Letter from Department to District, May 30, 2003
P-5 Binder, Documents Related to Alleged Inefficiencies

P-6 Binder, Supporting Documents, 2003-2004 School Budget Appeal

P-7 Binder, Documents Relating to Encumbrances

P-8 Job Description, Legislative Information Officer

P-9 Job Description, Industrial Arts/Facilities Resource Teacher/Coordinator

P-10 Comparison of High School Administrators, Paterson, Jersey City, Newark

R-1 Department Worksheets

R-2 Independent Accountant's Report

R-3 Report of the Secretary to the Board of Education

R-4 Newark Reserve for Encumbrances

R-5 Department Worksheets, Projected Surplus, attached to R-1

R-6 Newark Public Schools, Governmental Funds, Balance Sheet

R-7 Department Worksheets, Auditor's Adjustment, attached to R-1

R-8 Worksheet, Salaries, Fund 11, 12, 13, Fund 15

R-9 Worksheet, Benefits, Fund 11, 12, 13, Fund 15

R-10 Worksheet, Special Education

R-11 Worksheet, Rent and Property Expenses

R-12 Compilation of Salary Accounts

R-13 No Exhibit

R-14 Documents, Belmont Runyon School

R-15 Projected Five Year Cost Saving Actions, 9-27-01

R-16 2001 Roster of Employees, SLTs

R-17 2003 Roster of Employees, SLTs

R-18 Salaries by SLT

R-19 RIF Assumptions, SLTs

R-20 Worksheet, Title 1 Funds

R-21 Comparison of Newark School District with Other Abbott Districts

R-22 Rosenfarb Winters Report

R-23 Memorandum, Rarick to Bolden, August 2, 2001

R-24 Overtime Paid, 2001

R-25 Staff, Office of Facilities

R-26 Roster, Office of Design and Construction, 2001

R-27 Policy Manual, Office of Design and Construction

R-28 Operation & Maintenance of Plant, Comparative Spending (Page 1)

R-29 Operation & Maintenance of Plant, Comparative Spending (Page 2)

R-30 Memorandum, Rarick to Bolden, August 1, 2001

R-31 Resource Teacher Roster, 7/2003

R-32 Resource Teacher Roster, 8/2001

R-33 Calculation of Savings on Resource Teachers

R-34 Vice-Principal Information, Paterson

R-35 Vice-Principal Information, Jersey City

R-36 No Exhibit

R-37 Newark Public Schools, General Fund, Budget Comparison Schedule

R-38 Audit of District's Food Services, December 27, 2000

R-39 Memorandum, Hespe to Bolden, Food Services, November 28, 2000

R-40 Consultants, Fiscal Year 2002-2003

R-41 Memorandum, Hoffman to Rarick, HRS/Payroll Costs

R-42 Newark Internal Audit, Brokerage Concepts, November 2001

R-43 Food Service, Comparative Spending Guide

OAL DKT. NO. EDU 5497-03
AGENCY DKT. NO. 193-6/03

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions were filed by both the Board of Education (Board) and the Department of Education (Department) in accordance with the schedule established in response to the Court's order for expedition, as were replies by each to the other's exceptions, and all were considered by the Commissioner in reaching his decision herein.

Initially, the Commissioner concurs with the ALJ that the Department's methodology in reviewing the District's budget fully comports with the "maintenance" standard established by the Court and implemented by regulations promulgated in accordance with *P.L.* 2003, *c.* 122. The Commissioner concurs that the OAL does not have jurisdiction to determine directly or indirectly the validity of *N.J.A.C.* 6A:10-1.2, such determination being solely within the jurisdictional purview of the Appellate Division or the Supreme Court. R. 2:2-3(a); *see, also, Pascucci v. Vagott,* 71 *N.J.* 40, 51-

52 (1976); *Wendling v. N.J. Racing Com'n*, 279 *N.J. Super.* 477, 485 (App. Div. 1995). However, to the extent that he may appropriately do so in an administrative proceeding, the Commissioner also opines that the Department's definition of "maintenance budget," as set forth in *N.J.A.C.* 6A:10-1.2, is fully consistent with the language and intent of the Court. Thus, like the ALJ, the Commissioner finds the regulatory definition controlling herein, with no conflict between it and the underlying Court order.

Accordingly, pursuant to the standard set forth in rule, the Commissioner makes the following determinations on the specific points in dispute, adopting in part, rejecting in part and modifying in part the Initial Decision of the OAL.

ADJUSTMENTS TO THE BASE BUDGET

Encumbrances

The ALJ ordered restoration of the full amount of $9,735,823.31 excluded from the maintenance budget set by the Department, based on "undisputed" documentation of qualifying encumbrances presented by the District at hearing and on testimony to the effect that the Department has a history of not increasing aid when Comprehensive Annual Financial Report (CAFR) adjustments warrant. On exception, the Department reiterates that, at the time of the determination under appeal, the District had not yet shown this amount, or any part thereof, to represent 2002-03 expenditures in accordance with established guidelines, and it contends that the Commissioner should, instead of uncritically accepting the District's claims, direct preliminary adjustments to the maintenance budget based on the results of the now-in-progress review of the District's supporting documentation, which the Department saw for the first time during testimony at OAL despite repeated attempts to secure and review it so as to resolve this

matter prior to hearing. (Department's Exceptions at 1-3) In reply, the District characterizes the Department's position as "nothing more than a delay tactic designed to further impede the operation of schools in the District," and reiterates that its documentation at hearing, which it had every right to present at that point and not before, was "uncontested" and, thus, must stand as found by the ALJ. (District's Reply at 3-5, quotation at 4)

Upon review, the Commissioner concurs with the ALJ's recitation of the standard for determining whether encumbrances are to be considered part of the maintenance budget, but does not concur that the District's claim should be accepted wholesale merely because the Department was unable, in effect, to complete a detailed fiscal review of documentation previously available to the District but first proffered at OAL hearing. The Commissioner notes that the Court directed the Department to provide districts with preliminary maintenance figures for the 2003-04 school year by August 27, 2003, and, in fulfillment of that directive, the Department utilized the most recent information provided by the District. The Commissioner, therefore, finds it entirely appropriate and consistent with the Department's established accounting practices[1] for the Department to have excluded from the District's maintenance budget expenditures for which the District did not provide requisite documentation. Moreover, although the Commissioner recognizes the Court's "encouragement," as noted by the District, to accept ongoing supplemental documentation, the Court's holding cannot be construed to require the Commissioner to accept data without benefit of appropriate fiscal

[1] These practices are both set forth in testimony herein and embodied in instructions to districts with respect to the processing of year-end purchase orders as provided in Assistant Commissioner Richard Rosenberg's letter of September 16, 2003, see *Board of Education of the City of Burlington, Burlington County v. New Jersey State Department of Education*, decided by the Commissioner on October 20, 2003.

review, particularly where the District did not proffer the documentation when requested and the CAFR will be submitted in just over a week from the date of this decision so as to bring finality to the data in question.

Accordingly, while recognizing that adjustments in this area may well prove necessary, because the Commissioner is unable to determine definitively which of the District's encumbrances have become accounts payable by virtue of the receipt of the encumbered goods or services on or before June 30, 2003, the Commissioner concludes that the disputed encumbrances were properly excluded by the Department and rejects the ALJ's recommendation for adjustments to the maintenance budget, instead directing that such adjustments await the results of the impending CAFR.

Projected Surplus

The Commissioner concurs with the ALJ that the Department's calculation, to which the District did not object, shall stand, subject to final adjustment following the CAFR.[2]

Other Adjustments

The Commissioner notes the ALJ's recitation of corrections made to revenues and receivables, to which neither party objected and which did not result in a finding, conclusion or order.

[2] The Commissioner notes, however, that the ALJ errs in stating at page 8 of the Initial Decision that the District *must* maintain a surplus balance of 2%. Although that is the threshold for determining *excess* surplus, there is no requirement that surplus actually be *maintained* at 2%.

NONDISCRETIONARY ITEMS

Salaries

The ALJ ordered adjustment of the District's maintenance budget to allow for salary increases for substitutes, overtime, stipends, per-diem, summer school and nonaffiliated employees, reasoning that these were nondiscretionary based on past practice as evidenced by prior contracts; she declined, however, to disturb the 4.884% rate of increase applied by the Department to those salaries it found subject to nondiscretionary increase. The Department takes exception to the former, reiterating that these are not *contracted* increases, and that annual contracts expiring in June 2003 but not yet negotiated at the time of hearing are fully within the discretionary control of the District. (Department's Exceptions at 3-5) In reply, the District urges adoption of the ALJ's recommendation, reiterating that it provided evidence at hearing that these categories of employees are, in fact, subject to expected wage increases based on past practice. (District's Reply at 5-6)

The ALJ also found that any teaching or paraprofessional position filled by a permanent employee at the start of the 2002-03 school year, but later vacated, must be considered "provided" within the meaning of "maintenance budget," so that full-year salary amounts for such positions (237 Full-Time Equivalents at $11,376,000) must be added to the 2003-04 budget. The Department notes on exception that it does not disagree with the ALJ's determination as to positions filled for part of the year being "provided" for maintenance purposes, but contends that the District offered no credible evidence for its claims as to positions meeting this criterion. (Department's Exceptions at 5-7) The District, in reply, characterizes the Department's position as arbitrary and

baseless, with the potential to leave the District without critical staff through no fault of its own. (District's Reply at 6-7)

Upon review, the Commissioner modifies the ALJ's analyses, findings and conclusions with respect to additional salary monies for noncontractual salary increases and filling of specific vacancies. Initially, the Commissioner notes that the Department's overall charge in this matter was to determine the level of 2003-04 funding that would enable the District to continue in a "maintenance" mode, that is, to implement in 2003-04 the programs, services and positions provided in 2002-03. With respect to salary costs, the Commissioner recognizes that, while it is true that dollar amounts actually paid out for staffing prior to June 30, 2003 will not perfectly predict the cost of providing comparable staffing in the next, it is *equally* true that other types of projections are no less imprecise. Thus, in the Commissioner's view, a methodology which preliminarily establishes the 2003-04 cost of providing positions at "maintenance" levels by determining, as nearly as possible without benefit of audit, the actual approved cost of providing them in 2002-03 and then allowing for reasonable, nondiscretionary salary adjustments, is a uniform, fair and rational method for estimating future expenditures which cannot otherwise be determined with any degree of precision. With respect to salary increases, the Commissioner finds that applying the District's currently contracted increase rate of 4.884% was a reasonable method of projecting preliminary nondiscretionary costs for 2003-04, and, moreover, that increases requested in anticipation of upcoming annual negotiations where a contractual obligation does not presently exist cannot properly be considered "non-discretionary" costs appropriate for preliminary State support in a "maintenance" year occasioned in significant part by the

need for fiscal austerity. The Commissioner is likewise unpersuaded by the Board's argument that the Department's method does not take into account vacancies and positions filled for only part of the year, since variances of these types occur every year and a preliminary district-wide salary budget is appropriately based on the assumption that staffing is a flexible and continuous process, with ebbs and flows that, absent specific evidence to the contrary, generally permit the projection of one year's experience onto the next. Finally, while the Commissioner recognizes that the results of the Department's method may be imperfect, even after adjustment following audit, he is also cognizant that *N.J.A.C.* 6A:10-3.1(g) provides a mechanism to obtain additional supplemental funding where unanticipated expenditures or unforeseen circumstances warrant. Therefore, the Commissioner adopts the ALJ's recommendation with respect to application of a 4.884% rate of salary increase for preliminary calculation purposes, but rejects her recommendations adding additional monies to the maintenance budget for noncontractual salary increases and filling of specific vacancies.

Benefits

The ALJ declined to make adjustments to the Department's calculations for benefits, generally because there was insufficient information on record or because the District did not provide evidence to support its claims. On exception, the District argues that the Court, in its July 23, 2003 Order, anticipated that nondiscretionary cost determinations would be based on actual, current numbers, not on a "reasonable methodology," so that the ALJ's acceptance of the Department's projections violates the Court's directive. The District also objects to the ALJ's determination not to order adjustments at this time, alleging that such ruling conflicts with her prior ruling on

encumbrances and ignores the District's testimony about the Department's historical failure to increase aid following the CAFR. Finally, the District contends that the ALJ, in rejecting the District's claim for increased pension costs, ignored testimony that such costs are based upon salaries and, thus, increase as salaries do. (District's Exceptions at 9-12) In reply, the Department reiterates that its method of calculating health benefits, which relies on applying the 2003-04 rate of increase in health benefit plan costs to the District's 2002-03 expenditures for health benefits, is superior to the District's, which takes a "snapshot" of its payroll at a specific point in time and then projects what those individuals' plans would cost in the following year, without regard for the fluctuations that occur during any given year in both numbers of employees and elections of coverage. The Department also urges adoption of the ALJ's finding on pension costs, noting that no documentation was offered in support of the referenced testimony. (Department's Reply at 3-4)

Upon review, the Commissioner concurs with the ALJ that no adjustments to the Department's calculations are warranted at this time, in the case of health benefit costs because the Department's methodology for preliminary determination is sound and the District's arguments and evidence are insufficient to disturb it, and in the case of pensions because no specific evidence was brought to the record to support the District's claims.

Workers' Compensation

The ALJ recommended adjustment of the District's maintenance budget to include $3.5 million in additional workers' compensation costs, based on the actuarial analysis of the District's fiscal agent for its self-insured workers' compensation program,

"[u]nless the Department subsequently analyzes the need for the large increase appropriately***." (Initial Decision at 18) On exception, the Department urges the Commissioner to direct the analysis suggested by the ALJ and decline to order adjustments to the District's maintenance budget until such analysis is completed. (Department's Exceptions at 7-8) In reply, the District again accuses the Department of delay tactics. (District's Reply at 7-8)

Upon review, although the Commissioner is mindful of the reasoned basis for the District's claim and the ALJ's conclusion, he is also mindful that the District is not *required* to maintain insurance reserves at the level recommended by its actuarial analyst, and that the need for fiscal austerity is one of the primary bases for the Court's maintenance order. Accordingly, in the interest of balancing competing concerns, and because this issue is not amenable to resolution by the CAFR, the Commissioner directs the Department to conduct forthwith the analysis suggested by the ALJ, and to make thereafter such adjustments to the District's budget and supplemental aid as may prove warranted.

Charter School Tuition and Pupil Transportation

The Commissioner notes the ALJ's recitation of the Department's determination that the District's charter school tuition and transportation costs represent nondiscretionary increases, so that $7,512,368 was included in the District's maintenance budget and no further order results herein.

Special Education Tuition—Private Schools for the Disabled

The ALJ found the evidence to show a need for $1,900,000[3] for private school tuition increases, as determined by the Department, rather than the $6,518,987 requested by the District; however, she also found that the total amount of the District's special education increase should be offset by $500,000 in anticipated IDEA monies rather than by $1,159,116 as determined by the Department. The District excepts to the ALJ's recommendation for IDEA offset, contending that she erroneously took into account the Department's disproved "transfer" analysis and failed to consider the substantially decreased IDEA resources available to the District, to which the Department replies that its calculations were not based on transferred funds, but rather on actual 2002-03 expenditures and actual numbers of new students and tuition increases. (District's Exceptions at 13-15; Department's Reply at 4-5) The Department, too, excepts to the ALJ's finding with respect to IDEA funds, without reply from the District, but does so on the basis that the District's IDEA Part B plan has not yet been approved by the Department and that, to the extent that the District is not required to do so as a result of a corrective action plan, it may allocate Part B funds to offset tuition increases. (Department's Exceptions at 8-9)

Upon review, the Commissioner finds the Department's calculation of a $1,932,929[4] nondiscretionary increase in this category of special education tuition, exclusive of any offset, to be fully supported by the record and not at all, as suggested by

[3] The ALJ's discussion references an adjustment of $1,900,000; however, Exhibit R-1, which sets out in summary form the calculations underlying the Department's maintenance budget and supplemental aid determinations as announced in it August 27, 2003 letter (Exhibit J-1), includes a total special education calculation of $4,673,797, confirming $1,932,929, as calculated in Exhibit R-10, as the actual amount of allowed increase in private school tuition.

[4] See note 3 above.

the Board, dependent on the Department's inquiries regarding transfers. With respect to allocation of IDEA funds for offset purposes, however, the Commissioner cannot conclude from the present record that the District has shown its inability to make further discretionary allocation from IDEA funds. Accordingly, the Commissioner directs that the District's total need for increased special education tuition, including the $1,932,929 disputed herein for tuition at private schools for the disabled, be set at $4,673,797 as determined by the Department, but that this amount be offset by $1,159,116 in IDEA funds for a total increase of $3,514,681; *subject,* however, to further increase should the District demonstrate to the Department that any portion of the referenced IDEA funds are, in fact, required to support positions and services required by a corrective action plan.

Rent/Lease Obligations and County Vocational School Tuition

The Commissioner notes the ALJ's recitation of the Department's acceptance of certain rent/lease obligations and vocational school tuition as nondiscretionary increases, so that $222,483 and $841,410,[5] respectively, were included in the District's maintenance budget and no further order results herein.

Consumer Price Index Adjustment

The ALJ found that the appropriate rate for Consumer Price Index (CPI) adjustment was 2.3%, obtained by averaging the 3% CPI for New York, Northern New Jersey, Long Island, NY-NJ-CT-PA, for July 2002—July 2003 with the 1.5% CPI for Philadelphia, Wilmington, Atlantic City, PA-NJ-DE-MD, for August 2002—August 2003. On exception, to which the District did not reply, the Department argues that the

[5] This amount is incorrectly reported in the Initial Decision as $932,228. *See* Exhibit R-1.

ALJ recognized the lack of data on record reflecting the fiscal year preceding the prebudget year as required by *N.J.S.A.* 18A:7F-3, yet went on to make a finding in the District's favor notwithstanding that it offered nothing cognizable to counter the Department's calculation. (Department's Exceptions at 9)

Upon review, the Commissioner finds that the District did not meet its burden of demonstrating that the CPI rate of adjustment employed by the Department, which was calculated pursuant to Department procedures for all school districts and in full accordance with applicable statutory requirements, was in any way infirm or improper. Accordingly, the ALJ's recommendation is rejected and the Department's calculation upheld.

NONRECURRING ITEMS

Legal Expenses

The Commissioner concurs with, and adopts as his own, the ALJ's analysis and conclusion, to which neither the Department nor the District took exception. Accordingly, the Department's calculation is upheld.

Insurance Expenses

The Commissioner notes the ALJ's recitation of this calculation, regarding which there is no dispute other than the Workers' Compensation issue discussed at page 66 above.

Utilities

The ALJ found that the District had demonstrated its need for the full amount of its utilities request and restored the Department's reduction of $828,352. On

exception, the Department argues that the District spent $828,352 more for utilities in 2002-03 than it budgeted in 2003-04; thus, that amount was properly treated by the Department as a nonrecurring expense in calculating a maintenance budget based on adjusted 2002-03 expenditures, and the District cannot use the supplemental funding appeal process to, in effect, revise its 2003-04 budget appropriations. (Department's Exceptions at 10-11) In reply, the District urges adoption of the ALJ's recommendation, as "corrected" to reflect *both* the $1,055,681 adjustment ordered in the Initial Decision *and* restoration of the Department's $828,352 reduction for a total increase of $1,884,033, contending that the actual and current information supplied at hearing was entirely appropriate and amply demonstrated the District's need. (District's Exceptions at 15-16; District's Reply at 8)

Upon review, the Commissioner finds the Department's rationale in considering $828,352 a nonrecurring expense for purposes of calculating a maintenance budget to be sound, and he further finds the present appeal process to be an inappropriate venue for the District to be, in effect, attempting to revise its approved 2003-04 budget. However, even if the Commissioner were to accept that the increase sought by the District could be considered in this context, he finds the evidence on record (Exhibit P-6, Tab 9) insufficient to support the District's claims, particularly in view of the unique considerations surrounding energy issues, such as ongoing fluctuations in rates and changing patterns of usage. Moreover, if it transpires that the District does, in fact, require funds for utilities beyond those appropriated, and additionally beyond those available through transfer of funds from over-budgeted accounts, the Commissioner notes that *N.J.A.C.* 6A:10-3.1(g) provides a mechanism by which the District can obtain

additional supplemental funding where unanticipated expenditures or unforeseen circumstances warrant. Accordingly, the ALJ's recommendation that $1,055,681 be added to the District's maintenance budget is rejected and the Department's calculation upheld.

Belmont Runyon School

The ALJ recommended no further increase to the District's maintenance budget beyond the additional $1,387,756 conceded by the Department at hearing, so as to permit the District, to the extent previously agreed by the Department, to use general fund dollars for completion of the Belmont Runyon School. On exception, the District claims that it provided ample evidence of its need for $2.9 million and of the Department's prior agreement to fund the project to completion, and that the ALJ clearly understood the difficulties of addressing completion of this project through the District's Long-Range Facilities Plan; therefore, the ALJ should have ordered additional funding consistent with the evidence. (District's Exceptions at 16-18) In reply, the Department contends that Newark is improperly seeking to extend its agreement to transfer a limited amount of 2001-02 and 2002-03 general fund monies, and it reiterates that the appropriate action to be taken by the District in addressing any remaining costs is amendment of its Long-Range Facilities Plan. (Department's Reply at 6-7)

Upon review, the Commissioner finds the evidence on record insufficient to support the District's claim that its maintenance budget should be increased by an additional $1.5 million dollars, over and above the approximately $1.4 million already conceded by the Department, so as to enable it to complete the Belmont Runyon School in 2003-04 with general fund monies supported by supplemental State aid rather than

through more appropriate and available means. Accordingly, the Commissioner adopts the ALJ's recommendation making no increase beyond the $1,387,756 conceded by the Department at hearing consistent with its prior agreement.

Replacement of Title 1 Funds

The Commissioner concurs with, and adopts as his own, the ALJ's analysis and conclusion, to which neither the Department nor the District filed exceptions. Accordingly, the Department's calculation is upheld.

INEFFICIENCIES

With one exception, the ALJ recommended restoration of amounts reduced by the Department on the basis of ineffectiveness or inefficiency, generally because, although the Department had demonstrated a *prima facie* basis for its various determinations, the District was able to counter with fact-specific demonstrations, largely unrebutted by the Department, to the effect that the structures, positions, and services at issue had a useful function and made sense in light of the District's particular circumstances.

On exception, the Department generally contends that the ALJ applied the wrong standard with respect to inefficiency/ineffectiveness, misunderstanding the controlling rule to extend the requirements of *N.J.A.C.* 6A:10-3.1(c)1i and 6A:10-3.1(c)1ii for consideration of "historical spending patterns" and "district-specific information regarding staffing needs" to *all* the listed bases for determination of effectiveness and efficiency, thereby ignoring that *N.J.A.C.* 6A:10-3.1(c)1 lists four *separate* bases, each with its own elements, and erroneously expecting the Department to

have addressed each and every element in any identified inefficiency.[6] Thus, the ALJ erred in considering "district-specific information regarding staffing needs" in any instance where the Department's determination of inefficiency was made on a basis other than *N.J.A.C.* 6A:10-3.1(c)1ii , and ignored that a district's particular circumstances are not pertinent where the Department's determination of inefficiency was made on the basis of a comparative analysis among Abbott districts pursuant to *N.J.A.C.* 6A:10-3.1(c)1i or cost savings and/or inefficiencies identified or proposed by the district or by the State Auditor or Office of Legislative Services audit pursuant to *N.J.A.C.* 6A:10-3.1(c)1iv. (Department's Exceptions at 11-16)

In reply, the District generally counters that the ALJ was correct in her application of the rule, and that the Department's suggested interpretation would compromise the integrity of the regulations. Moreover, according to the District, "virtually all of the Department's identified alleged inefficiencies--such as the elimination of an SLT, resource teachers, consultants, or entire departments--were in fact based upon an analysis of district *staffing needs*, an analysis that is inextricably intertwined with the comparative analysis," and "both the New Jersey Supreme Court and the Department have recognized that all Abbott districts are unique districts in terms of need," so that it is "fundamental that a credible and legitimate comparative analysis

[6] The Department notes that part of the confusion may result from the applicable rule as printed in the *New Jersey Register* (35 *N.J.R.* 4329) differing from the text adopted by the Commissioner and transmitted to the Office of Administrative Law, which was effective upon filing pursuant to *P.L.* 2003, *c.* 122; the District denies this, contending that the ALJ cited and quoted the appropriate regulatory language. (Department's Exceptions at 12, footnote; District's Reply at 9, footnote) In fact, examination of these documents reveals that *N.J.A.C.* 6A:10-3.1(c)1, as filed, is punctuated by periods consistent with the Department's contention that the bases listed are separate and distinct, whereas the punctuation in the *Register* version (a series of semicolons with a penultimate "; and") creates the impression that they are cumulative.

cannot be accomplished without an analysis of district-specific information." (District's Reply at 8-10, 12; quotations at 9-10, emphasis in text)

In considering the parties' positions on this issue, the Commissioner generally agrees with the Department, and modifies the Initial Decision, to the extent that it suggests that the Department could not identify areas of inefficiency, and have those identifications potentially sustained, without taking into consideration, collectively, the various criteria of *N.J.A.C.* 6A:10-3.1. However, the Commissioner does not agree with the Department that district-specific information has no relevance on appeal unless the Department's inefficiency determination was made on the basis of a district-specific criterion; indeed, given that the district bears the ultimate burden of proof in an appeal of this type, regardless of the basis for the Department's finding of inefficiency, district-specific information would appear to be the primary, perhaps even only, basis on which an attempt could reasonably be made to demonstrate that a district's expenditures were *not* inefficient or ineffective under the regulatory standard. However, in so holding, the Commissioner emphasizes that it is not enough in this context for a district to demonstrate that the structure(s), position(s) or service(s) under scrutiny are explicable under the circumstances and rooted in a plausible district need; rather, it must demonstrate both that they are *specifically* necessary and that they *cannot* be more effectively or efficiently provided than they presently are.[7]

[7] To the extent that the Initial Decision tends, in effect, to shift the burden of proof to the Department once the District has explained its circumstances, that approach is expressly rejected by the Commissioner. See July 23, 2003 Court Order, paragraph 5.

Within this general framework, then, the Commissioner makes the following determinations on the areas in dispute between the District and the Department.[8]

School Leadership Teams (SLTs)

The ALJ found that the five-team approach worked better for the District than the four-team plan proposed by the District in 2001 in order to reduce inefficiencies, but later abandoned as counterproductive; she further found that the savings to be effectuated by that plan had been accomplished in an alternative manner. On exception, in addition to the general objections discussed above, the Department notes that the District itself recognized that its SLT structure could be more efficient, and that the referenced savings occurred prior to development of the four-team plan in September 2001, with only about $450,000 of the plan's projected $2 million cost savings having materialized since that time. The Department also objects to the ALJ's summary dismissal of the Rosenfarb Report, noting that, to the extent that the Department's final determinations of inefficiency differed from the Report's, such differences were, as set forth in testimony and exhibits, based on the Department's specific knowledge of the District, and that the Report is not, as characterized by the ALJ, useless as a measure of inefficiency because it lacks district-specific analysis, but is instead directly responsive to the distinct regulatory criterion of comparison to other

[8] It is here noted that the District's Reply Exceptions on the subject of inefficiencies generally addressed the question of appropriate proofs and standards as set forth above. Where a more specific point was offered in relation to a particular inefficiency, it is included in the summations below.

districts. (Department's Exceptions at 16-20) In reply, the District urges adoption of the ALJ's analysis and recommendation.[9]

Upon review, the Commissioner is not persuaded by the evidence on record that the Department's reduction must be restored. To the contrary, the District is clearly inefficient in terms of comparison to other Abbott districts and has itself recognized that substantial economies needed to be undertaken in this area; to dismiss the criteria of *N.J.A.C.* 6A:10-3.1(c)1i and 6A:10-3.1(c)1ii out of hand, as the ALJ effectively did, is to nullify the clear intent of the controlling regulation. Moreover, even under a fact-specific analysis of the type sought by the District, there has been no showing that the District cannot structure and staff its SLTs in a more efficient manner while still meeting its stated objectives and addressing its stated concerns. Accordingly, the ALJ's recommendation is rejected and the Department's determination upheld.

Overtime

The ALJ found that the District justified its substantial blue-collar overtime expenditures based on historical spending patterns, the staffing required to address the District's unique custodial and maintenance needs, and the Department's failure to explain the basis for its determination. On exception, the Department notes that the basis for its determination was comparison to other districts, and that testimony clearly established the Department's calculation as an application of Jersey City's expenditure rate to the District's larger physical plant, with the difference being the amount of identified inefficiency. Additionally, it points to the District's contractual clauses providing for overtime in four-hour minimum increments and the undisputed fact

[9] See note 8 above.

that in 2002-03 some employees earned more in overtime than an equivalent full-time salary. (Department's Exceptions at 21-22) In reply, the District urges adoption of the ALJ's analysis and recommendation, noting that much of its overtime is weather-related or due to the number and condition of its buildings or the "huge" number of School Construction Corporation (SCC) projects. (District's Reply Exceptions at 11-12)[10]

Upon review, the Commissioner is unpersuaded that the Department's reduction must be restored. Again, the District is clearly inefficient in comparison to other Abbott districts and has itself recognized that economies should be attempted in the area under scrutiny, and, even under a more fact-specific analysis, there has been no showing that the District cannot address its custodial and maintenance needs in a more efficient and effective manner so as to reduce overtime expenditures; moreover, the District should not be provided with the means to avoid negotiation of changes in a clearly inefficient contractual provision. Accordingly, the ALJ's recommendation is rejected and the Department's determination upheld.

Office of Design and Construction

The ALJ recommended restoration of the Department's reduction, based on findings that the Office of Design and Construction (ODC) performed necessary services, that the District would incur greater costs by eliminating it, and that the Department failed to consider the staffing requirements of the District in making its determination. On exception, the Department notes that the basis for its determination was comparison to other large K-12 districts, which shows that the District has the highest per pupil expenditure in Operation and Maintenance of Plant, over $350 more

[10] See note 8 above.

than the next highest spending district, and comparison to other Abbott districts, which shows a similarly disproportionate amount of expenditure, due largely to the District's unique maintenance of a separate office solely responsible for design and construction of buildings. The Department also notes that the District is like all other Abbott districts in having buildings in various states of disrepair, and in having a Long-Range Facilities Maintenance Plan requiring interface with the SCC, which itself has no plans to provide additional staff to work with the District notwithstanding the District's plans to hire additional project managers. (Department's Exceptions at 22-25) In reply, the District urges adoption of the ALJ's analysis and recommendation, noting in particular how the Department's erroneous assessment of the ODC as overlapping with the functions performed by the SCC and duplicative of the functions performed by the Economic Development Authority (EDA) is, in fact, a staffing analysis, contrary to the Department's contention as to the distinctness of each regulatory criterion. (District's Reply at 10-11)[11]

Upon review, the Commissioner again finds that the District has explained the circumstances and needs to which the identified area of inefficiency responds, but has not demonstrated that these cannot be addressed in an alternative manner so as to bring the District's costs more into line with other districts; in this regard, the Commissioner finds insufficient as proof the ODC director's general, unsupported statement that, based on industry "soft" cost standards, it would cost more to eliminate the ODC than to maintain it. Accordingly, the ALJ's recommendation is rejected and the Department's determination upheld.

[11] See note 8 above.

Office of Development Planning

The ALJ recommended restoration of the Department's reduction, based on findings that the Office of Development Planning (ODP) performed necessary services and the Department failed to understand the function of the office. On exception, the Department again contends that the basis for its determination was a comparison to other districts, so that it was not required to consider district-specific information regarding staffing needs. The Department also reiterates that the District is like all other Abbott districts in having a Long-Range Facilities Maintenance Plan with requirements vis-à-vis the functions performed by the ODP, yet other Abbott districts do not incur expenditures at the District's level, and that one of the District's consultant firms handles many of the functions for which the ODP is purportedly responsible. (Department's Exceptions at 25-27) In reply, the District again urges adoption of the ALJ's analysis and recommendation, noting in particular how the Department's assessment of the ODP as overlapping with the functions performed by consultants or capable of performance by other District employees, is, in fact, a staffing analysis, contrary to the Department's contention as to the distinctness of each regulatory criterion. (District's Reply at 11)[12]

Upon review, the Commissioner again finds that the District has explained the circumstances and needs to which the identified area of inefficiency responds, but has not met its burden of demonstrating that these cannot be addressed in an alternative manner so as to bring the District's costs more into line with other districts. Accordingly, the ALJ's recommendation is rejected and the Department's determination upheld.

[12] See note 8 above.

Resource Teachers/Coordinators

The ALJ recommended restoration of the Department's reduction, based on findings that the sole basis for the Department's determination appears to have been the District's September 2001 cost savings plan and unfavorable comparison to Jersey City and Paterson and to other Abbott districts, and that the Resource Teachers/Coordinators did, in fact, constitute an effective use of funds, the District having achieved its planned savings through other means such as elimination of a number of facilitators and tutors. On exception, the Department reiterates its objection to consideration of district-specific factors when the basis for the inefficiency determination was a comparative analysis among Abbott districts pursuant to *N.J.A.C.* 6A:10-3.1(c)1i or cost savings and/or inefficiencies identified or proposed by the district pursuant to *N.J.A.C.* 6A:10-3.1(c)1iv, contends that the savings effectuated through elimination of other positions do not obviate the need to address the separately identified inefficiency herein, and notes that the responsibilities of Resource Teachers/Coordinators duplicate those of the District's Department Chairpersons. (Department's Exceptions at 27-30) In reply, the District urges adoption of the ALJ's analysis and recommendation.[13]

Upon review, the Commissioner determines to adopt the ALJ's recommendation. The Commissioner is persuaded that the District's evidence on record (Exhibit P-5, Tab 4) supports the representations made in testimony, and that, in light of his determination on Department Chairpersons below, that the District has demonstrated both the necessity and effectiveness of the Resource Teachers/Coordinator positions. Accordingly, $3,290,000 is hereby restored to the District's maintenance budget.

[13] See note 8 above.

Department Chairpersons

The ALJ recommended restoration of the Department's reduction[14] based on findings that the Department's comparison of the District to Paterson and Jersey City was invalid, that the positions were necessary, and that their elimination would not necessarily result in cost savings. On exception, the Department notes that the District is one of the few in the State with full-time non-teaching Department Chairpersons and points to the substantial overlap between the responsibilities of these positions and those of the Resource Teachers/Coordinators; it also contends that restoring this reduction would be, in effect, rewarding the District for an inefficiency in its collective bargaining agreement that the District itself recognizes. The Department further notes that, contrary to the ALJ's statement, funding for salary and benefits of reclassified Department Chairpersons *was* taken into account, and was not included in the District's inefficiency reduction. (Department's Exceptions at 30-33) In reply, the District urges adoption of the ALJ's analysis and recommendation.[15]

Upon review, the Commissioner finds that the District has once again explained the circumstances addressed by the identified area of inefficiency, but has not demonstrated the necessity for these positions, particularly in light of restoration of the Resource Teachers/Coordinators above, or shown that it cannot address its needs in a more efficient and effective manner. Accordingly, the ALJ's recommendation is rejected and the Department's determination upheld.

[14] The Department alleged, based on its August 27, 2003 determination letter (Exhibit J-1), that the ALJ ordered restoration of $3,024,000 when the Department's actual reduction was only $3,000,000. However, Exhibit R-1, which sets out in summary form the calculations leading to the Department's final determination of supplemental aid as announced in J-1, shows the ALJ to be correct in her statement of the actual number used.

[15] See note 8 above.

Food Service Deficit

The ALJ recommended restoration of the Department's reduction based on a finding that there is no way the District can further reduce its food service staffing without seriously impinging on the service itself as well as other required services. On exception, the Department again contends that the basis for its determination was a comparison to other districts, so that it is inappropriate to consider district-specific information regarding staffing needs. The Department further argues that an Office of Legislative Services (OLS) audit conducted in December 2000 identified high labor costs and staffing as the cause of the District's unusually high food services costs, and that, while the District may have allowed staff to decrease through attrition and may have negotiated a tiered wage level for new employees, it has done nothing to hire such employees at the new lower wage levels or terminate current employees who continue to receive the level of salary and benefits previously identified as the source of the District's problem. Additionally, the Department observes, the District has privatized food service operations in 30 schools, so that while its work force may have shrunk through attrition, the number of schools requiring staffing has *also* been substantially reduced; thus, the District has done nothing to address the high staff *ratio* identified in the OLS audit. (Department's Exceptions at 33-35) In reply, the District urges adoption of the ALJ's analysis and recommendation.[16]

Upon review, the Commissioner again finds that the District has explained the circumstances underlying the identified area of inefficiency, but he is not persuaded based on the present record that the District cannot address its food service needs in a

[16] See note 8 above.

more efficient and effective manner. Accordingly, the ALJ's recommendation is rejected and the Department's determination upheld.

Consultants

The ALJ recommended restoration of the Department's reduction[17] based on findings that the services provided by the identified consultants were necessary and could not be provided more efficiently by District employees, if at all. On exception, the Department repeats its objection to consideration of district-specific factors when the basis for its inefficiency determination was a comparative analysis among Abbott districts pursuant to *N.J.A.C.* 6A:10-3.1(c)1i. The Department also contends that every district in the State has to implement a payroll system, but the District appears to be the only one retaining consultants to do so, and, furthermore, employs a staff of 17 individuals in addition to multiple consultants; that every district in the State has to prepare budgets and maintain accounting records, but other districts do not incur ongoing consultant expenses for training and recording; and that condoning the District's retention of a third-party administrator for prescription drug, vision and temporary disability benefit plans as required by certain collective bargaining agreements, notwithstanding that the District could perform the necessary tasks itself, effectively rewards the District for inefficient labor agreements and provides no incentive to eliminate the pertinent

[17] The Department alleged, based on its August 27, 2003 determination letter (Exhibit J-1), that the ALJ ordered restoration of $1,057,000 when the Department's actual reduction was only $1,000,000. However, Exhibit R-1, which sets out in summary form the calculations leading to the Department's final determination of supplemental aid as announced in J-1, shows the ALJ to be correct in her statement of the number actually used.

provisions during negotiations. (Department's Exceptions at 35-38) In reply, the District urges adoption of the ALJ's analysis and recommendation.[18]

Upon review, the Commissioner finds that the District has once again explained the circumstances and needs to which the identified area of inefficiency responds, but has not demonstrated that these cannot be addressed in an alternative manner so as to bring the District's costs more into line with other districts; in this regard, the Commissioner particularly concurs with the Department that the District should not be provided with the means to avoid negotiation of changes in a clearly inefficient contractual provision. Accordingly, the ALJ's recommendation is rejected and the Department's determination upheld.

Drivers

The ALJ recommended sustaining of the Department's reduction of $78,000 for two full-time drivers for the State District Superintendent. On this point, the Commissioner concurs with the ALJ's analysis, conclusion and recommendation, to which neither the Department nor the District took exception.

SUMMARY

Accordingly, the Initial Decision of the OAL is adopted with respect to its recommendations as to OAL jurisdiction over challenges to the validity of the controlling regulation, use of 4.884% as the District's rate of salary increase, allowable amounts for health/pension benefits and legal fees, addition of funds for completion of the Belmont Runyon school consistent with a prior Department agreement, replacement of Title 1

[18] See note 8 above.

funds, restoration of funds for Resource Teachers/Coordinator positions and reduction of funds for salaries of full-time drivers, but modified or rejected in all other respects for the reasons set forth above. The Department is directed to conduct forthwith the required analysis of the District's workers' compensation needs and to make thereafter such adjustments to the District's budget and supplemental aid its results may warrant.

IT IS SO ORDERED.[19]

COMMISSIONER OF EDUCATION

Date of Decision: October 28, 2003

Date of Mailing: N/A

[19] Pursuant to *P.L.* 2003, *c.* 122, "*Abbott*" determinations are final agency actions appealable directly to the Appellate Division of the New Jersey Superior Court.

597-03

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning "Abbott" District appealed the Department's determination of its 2003-04 preliminary "maintenance budget" and supplemental aid, alleging that the Department's review and calculations were not in accordance with the July 23, 2003 Order of the Supreme Court. The District also challenged the Department's reduction of a nonrecurrent expense pursuant to a painting contract, and reductions, as part of its review of noninstructional expenditures for ineffectiveness or inefficiency, of proposed costs for a Fiscal Monitor position and a cooperative bid purchase contract.

The ALJ determined that OAL does not have jurisdiction to determine the validity of *N.J.A.C.* 6A:10-1.2, and that such regulation governed this matter. She also adopted the "interpretation" of maintenance budget espoused by the Honorable Richard McGill in *Board of Education of the Town of Harrison v. New Jersey State Department of Education*, and determined that the burden of proof was on the Department to establish the basis for proposed reductions in the District's budget. The ALJ: 1) concluded that the Department improperly excluded $3,427,560 in encumbrances from the District's budget; 2) rejected the Department's $9,252,814 increase in the District's salary accounts as not reflective of necessary new positions; 3) ordered an increase in the Department's health benefit calculation to reflect additional "necessary" positions and granted the District's requested increase of $638,756 for special education tuition; 4) agreed that the Department properly determined that cost overruns associated with the PaintSmart contract were an excludable nonrecurring cost; and 5) agreed that the position of Fiscal Monitor and costs of a cooperative bid program were properly excludable as "inefficient."

The Commissioner adopted in part, rejected in part and modified in part the Initial Decision. He first clarified the applicable burden of proof and the proper "interpretation" of the maintenance standard. He then: 1) reversed the ALJ with respect to encumbrances, the salary account and special education tuition costs; 2) modified the Initial Decision with respect to health benefits; and 3) adopted the determination of the ALJ as to the excludability of cost overruns under the PaintSmart contract and reductions of the Department, on the basis of inefficiency, for the Fiscal Monitor and the cooperative bid purchase contract.

October 28, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 5500-03

Agency Dkt. No. 204-6/03

STATE OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,

Petitioner,

v.

STATE OF NEW JERSEY, DEPARTMENT OF EDUCATION,

Respondent.

Richard E. Shapiro, Esq, for petitioner
Gregory Johnson, Esq., for petitioner

Allison Cosley Eck, Deputy Attorney General, for respondent
(Peter Harvey, Attorney General of New Jersey, attorney)

Record Closed: September 18, 2003 Decided: October 3, 2003

BEFORE **MUMTAZ BARI BROWN**, ALJ:

STATEMENT OF THE CASE

The State Operated School District of the City of Paterson, Passaic County, (Paterson or District), an urban special needs *"Abbott"* school district appeals from the

decision by the Department of Education (Department or DOE) regarding Paterson's application for supplemental aid for fiscal year (FY) 2003-2004[1]. DOE applied a maintenance budget standard, which allows the school district to implement FY 2003-2004 programs, positions, and services that were approved for FY 2002-2003.

On June 9, 2003, the Commissioner of the Department of Education (Commissioner) transmitted the matter to the Office of Administrative Law (OAL) as a contested case. Hearings were held on September 3, 4, and 8, 2003. The parties were given a schedule for filing post-hearing briefs. DOE timely filed its brief on September 15, 2003. For good cause, I twice granted Paterson's request for extensions of time to file briefs. Paterson failed to submit its post-hearing brief on the scheduled date. Therefore, on September 18, 2003, I denied Paterson's request for an additional extension of time and the record closed.

Subsequent to the close of the record, on September 19, 2003 by facsimile transmittal, Paterson sought to include into the record data from the United States Department of Labor. On September 20, 2003, DOE objected to OAL taking judicial notice of an item after the record has closed. On September 21, 2003, Paterson replied to DOE's objection. Further, Paterson renewed its "request to file a post-hearing brief out of time".

On September 24, 2003, after considering the position of the parties and based on the whole of the record, I denied Paterson's requests to supplement the record with additional data and to file a post-hearing brief.

In accordance with a request from DOE, due to the overwhelming number of *Abbott* decisions it received, I have filed this Initial Decision on October 3, 2003.

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[1] *Abbott district* means one of the 28 urban districts identified in the appendix to *Abbott v. Burke,* 119 *N.J.* 287 (1990). *N.J.S.A.* 18A:7F-3; *see also N.J.A.C.* 6A:10-1.1 *et seq.*

FACTS

Based on the relevant evidence I **FIND** the following as **FACT**:

1. On March 24, 2003, DOE moved before the New Jersey State Supreme Court for an order to modify the decision in *Abbott v. Burke,* 153 *N.J.* 480 (1998)(*Abbott V*). Essentially, DOE sought to limit the supplemental aid to an amount sufficient to support programs, positions and services in the Districts' approved budgets for 2002-2003.

2. On July 23, 2003, the Court granted DOE's motion to relax the *Abbott V* remedies as applied to the 2003-2004 budget process. The Order states in part:

> (1) The DOE's application to extend the relaxation of remedies granted in *Abbott V* is granted as follows: The DOE shall have the authority to treat the 2003-2004 school fiscal year as a maintenance year for purposes of calculating Additional *Abbott v. Burke State Aid* for the *Abbott* districts. During 2003-2004, K-12 programs provided for in the 2002-2003 school year will be continued, subject to conditions set forth in this Order.
>
> (2) The Statewide aggregate amount of Additional *Abbott v. Burke* State Aid shall be presumptively calculated as the total amount of Additional *Abbott v. Burke* State Aid approved for the *Abbott* districts for Fiscal Year 2002-2003, subject to adjustment as required for a maintenance budget. A maintenance budget shall mean that a district will be funded at a level such that the district can implement current approved programs, services, and positions and therefore includes documented increases in non-discretionary expenditures. Examples of non-discretionary expenditures are increases in contracted salaries, health benefits, and special education tuition. Maintenance does not include the restoration of programs, positions, or services that were reduced in 2002-2003, or new programs, positions, or services, except in respect of Paragraph 2c of the Court's Order of June 24, 2003 (pertaining to those elementary schools without a whole school reform developer in place in 2002-2003 and permitting whole school reform contracts in certain circumstances), irrespective of the timing for the promulgation of regulations governing that provision.
>
> (3) For purposes of calculating Additional *Abbott v. Burke* State Aid and in furtherance of its pre-existing duty to implement administrative controls, the DOE shall promulgate an emergency regulation establishing the standard for evaluating the effectiveness and efficiency of the districts' non-instructional programs. (Non-instructional programs are defined as office/administrative expenditures and programs, positions,

> services and/or expenditures that are not school based or directly serving students.) Insofar as any *Abbott* district has not been informed of its total amount of last year's approved Additional *Abbott v. Burke* State Aid, the DOE shall provide written notice of that amount within two weeks of the date of this Order. The DOE's application of the effective and efficient standard in its review of a district's maintenance school budget may result in a reduction to a district's presumptive amount of Additional *Abbott v. Burke* State Aid.
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> (3) Within 30 days of the issuance of this Order, the DOE shall provide in a Notice to each district preliminary maintenance budget figures for the 2003-2004 school year consisting of the 2002-2003 approved budget and an estimate of the supplemental funding that will be needed to support that currently approved budget. If the DOE deletes an expenditure from a district's 2002-2003 budget related to the district's non-instructional programs and based on the effective and efficient standard, the DOE must include in the written notice to the district the expenditure deleted along with a specific statement explaining why the program or part thereof is no longer effective and efficient.
>
> (5) *Abbott* districts may appeal any reductions to their maintenance budgets by the DOE's application of the effective and efficient standard, which appeals shall be heard by the [OAL]. In those appeals, the DOE shall bear the burden of moving forward to establish the basis for any proposed reductions to the district's maintenance budget based on the effective and efficient standard set forth in the DOE's emergency regulations. If that initial burden is met, the district shall bear the burden of demonstrating that any budgetary reductions are not justified under that standard.
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> ***
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> (6) To the extent that monies are deleted by the DOE in the districts' non-instructional programs based on the effective and efficient standard, those monies shall be made available to the districts as follows: an *Abbott* district may apply for and the State may award such aid for demonstrably needed programs or services. The allocation of such available funds shall not be viewed as inconsistent with this Court's approval of use of a maintenance budget for Fiscal Year 2003-2004.

3. On August 22, 2003, DOE promulgated emergency regulations, which defined "maintenance budget" as the standard for evaluating the Districts' programs. The regulation states:

> "Maintenance budget" means, for the 2003-2004 school year, a budget funded at a level such that the district can implement 2002-2003 approved and provided programs, services, and positions and includes documented increases in non-discretionary expenditures and adjustments for actual 2002-2003 expenditures. Examples of non-discretionary expenditures are increases in contracted salaries, health benefits, and special education tuition. Maintenance does not include the restoration of programs, positions, or services that were provided in previous years or new programs, positions, or services unless necessary

> to meet paragraph 2c of the Supreme Court's order of June 24, 2003 in *Abbott v. Burke.* Maintenance also does not include non-recurring 2002-2003 expenditures.
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> [*N.J.A.C.* 6A:10-1.2]

4. On August 27, 2003, DOE issued a notice of preliminary maintenance budget for 2003-2004 for Paterson in the amount of $388,549,971. Further, DOE determined Paterson's estimated need for discretionary Additional *Abbott v. Burke Aid* is $15,993,270. The notice states in part:

> This amount reflects the instructional and non-instructural programs approved and provided in the 2002-2003 school year and includes increases to the 2002-2003 budget to reflect non-discretionary costs and adjustments to the 2002-2003 budget based on actual 2002-2003 expenditures.
>
> Your district's preliminary maintenance number excludes $3,427,560 in 2002-2003 encumbrances that appear to be 2003-2004 expenditures based on the opinion of an independent accounting firm retained by the State.
>
> In addition, the Department has reviewed the expenditures in your 2002-2003 budget related to your district's non-instructional programs in light of the effective and efficient standard established by the Commissioner in emergency regulations. Listed below are the expenditures reduced or deleted and a statement explaining why the reduction or deletion was made:
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> | | |
> |---|---|
> | $ 95,000 | salary and benefits for the position of Fiscal Monitor to be inefficient. |
> | $ 390,000 | overtime payments in FY03 for maintenance and custodial staff as inefficient. |
> | $ 93,000 | cooperative bid purchase program as inefficient. |
>
> [R-10]

ISSUES

The issues are as follows:

(1) Whether DOE properly calculated the District's maintenance budget of $388,549,971 for school year 2003-2004;

(2) Whether DOE properly excluded $3,427,560 from the 2002-2003 maintenance budget because the funding was for 2003-2004 expenditures;

(3) Whether DOE properly reduced or deleted funding of $95,000 for the salary and benefits of a Fiscal Monitor position as inefficient;

(4) Whether DOE properly reduced or deleted funding of $390,000 for overtime for maintenance and custodial staff as inefficient;

(5) Whether DOE properly reduced or deleted funding $93,000 for the cooperative bid purchase as inefficient; and

(6) Whether DOE properly determined the District's estimated need for discretionary Additional Abbott v. Burke State Aid to be $15,993,270.

The Department shall bear the burden of moving forward to establish the basis for any proposed reductions to the District's maintenance budget based on the standard set forth in the DOE's emergency regulations. If the initial burden is met, the District shall bear the burden of demonstrating that any budgetary reductions are not justified under that standard. (Order, July 23, 2003, at p.7).

DISCUSION AND CONCLUSIONS

The Court placed the burden of moving forward on DOE to establish the basis for any proposed reductions to the District's maintenance budget. Thus, DOE must present persuasive evidence that "$3,427,560 in 2002-2003 encumbrances are 2003-2004 expenditures". In addition, DOE must demonstrate it properly reduced or deleted expenditures under the effective and efficient standard promulgated in the emergency regulations. *N.J.A.C.* 6A:10.

The Department presented three witnesses: Benjamin D. Rarick, the Director and Budget Manager for the State-Operated School Districts of Paterson, Jersey City

and Newark; Douglas Triplett, accountant; and Glenn Forney, Acting Director for Fiscal Improvement, Department of Education.

Paterson presented seven witnesses: Edwin Duroy, District Superintendent; Elizabeth Shick, CPA; Anthony Campisi, Assistant Director, Whole School Reform; Paulette Waite, Director Special Service, Out-of-District; JoAnn Cardillo, Vice Principal, Academy Program; Dennis J. Mulvihill, Assistant Business Administrator; and Elaine Shafer, Director of Personnel.

Whether DOE properly calculated the Districts maintenance budget for school year 2003-2004.

The Department contends it correctly determined Paterson's 2003-2004 maintenance budget and *Additional Abbott v. Burke State Aid* award under *N.J.A.C.* 6A:10-3.1. The regulation "specifically provides that a district's budget shall only contain those programs, positions and services approved and provided in 2002-2003." (Respondent's Brief at p.8.) Moreover, the regulation requires all non-instructional expenditures, which are included in the maintenance budget, be effective and efficient. *N.J.A.C.*6A:10-3.1(c). *Ibid.* Thus, DOE reviewed Paterson's approved budget for 2002-2003, made adjustments for actual expenditures, allowed increases in non-discretionary cost centers, and deducted costs related to non-recurring and ineffective and inefficient expenditures. *Ibid.*

Challenges to DOE's definition of the maintenance standard were addressed by Hon. John R. Tassini, ALJ, in *Board of Education of the City of Asbury Park v. New Jersey Department of Education,* OAL Dkt. No. EDU 4095-03, (September 4, 2003) and Hon. Joseph F. Martone, ALJ, in *Board of Education of the Township of Neptune v. New Jersey Department of Education,* OAL Dkt. No. EDU 4096-03 (September 10, 2003). Although Paterson's counsel, who also represented the State-Operated School Districts of Asbury Park and Neptune, did not brief the issue here, the Asbury Park and Neptune school districts contend that DOE's emergency regulation is inconsistent with the Court's Order of July 23, 2003, and should be disregarded. DOE argues the "maintenance budget" definition cited in *N.J.A.C.* 6A:10-1.2 is consistent with the court's

order. Further, the contentions essentially challenge the regulation and therefore, must be decided by the Appellate Division. ALJs Tassini and Martone agreed with DOE. The ALJs concluded that the school districts were challenging the validity of a regulation, which must be brought before the Appellate Division, not the OAL. (*R.* 2:2-3(a)(2). *Ibid.* I agree.

I **CONCLUDE** that any challenge to the emergency regulation promulgated by the Commissioner of the Department of Education must be brought before the Appellate Division, not the OAL. (*R.* 2:2-3(a)(2). Consequently, I **CONCLUDE** that the regulation is the applicable standard in this case.

The remaining issues concern expenditures in FY 2002-2003. The Hon. Richard McGill addressed the application of the maintenance standard in *Board of Education of the Town of Harrison v. New Jersey Department of Education,* OAL Dkt. No. EDU 5494-03, (September 24, 2003). Judge McGill summarized the proper interpretation of the definition of "maintenance budget" in the new regulation and the Supreme Court Order. As follows:

> The starting point is that the maintenance budget will include expenditures at a level such that the school district can implement current approved programs, services and positions in the 2002-03 budget. The base amount will be reduced by the costs of programs, positions and services that were not in fact provided during the 2002-03 school year. The base amount will be adjusted for documented increases in non-discretionary expenditures such as contracted salaries, health benefits and special education tuition. Finally, the base amount will be reduced by the costs of any non-instructional programs, which lack effectiveness and efficiency.

In this matter, DOE reduced the approved budget for the FY 2002-2003 by the amount of unspent funds. Judge McGill noted the flaw in this methodology allows DOE to limit the District's maintenance budget for FY 2003-2004 to funds approved and actually spent during FY 2002-2003. Judge McGill concluded there is no support for this standard in the language of the Supreme Court Order or in the definition of "maintenance budget" in the new regulation. Further, this quantitative approach provides no assurance that a school district will be able to implement its current approved programs, services, and positions. Judge McGill stated, "It follows that the quantitative methodology used by respondent in this proceeding is inconsistent with the

applicable verbal standards, and therefore, its utilization in this processing is "impermissible." I agree with the analysis enunciated by Judge McGill. Indeed, the Court's driving concern in the Abbott cases is insufficient funding to poor urban school districts. Thus, methodologies cloaked under regulations and employed to limit on *Additional Abbott v. Burke* State Aid must be closely scrutinized

Whether DOE properly excluded $3,427,560 from Paterson's 2002-2003 maintenance budget because the funding was for 2003-2004 expenditures.

Benjamin D. Rarick has been employed by the Department for six years and has held the position of budget manager for three years. Rarick applied the maintenance budget standard to evaluate the proposed budget for Paterson for FY 2003-2004. He testified that his goal was to maintain programs and curriculum, which existed in FY03. Thus, he developed Paterson's 2003-2004 maintenance budget based on the approved budget for FY 2002-2003, with adjustments for actual expenditures and allowances for increases in non-discretionary cost centers. Rarick deducted costs that he believed were non-recurring, ineffective and inefficient expenditures.

Encumbrances:

In its notice of preliminary maintenance budget for 2003-2004, DOE states, "Your district's preliminary maintenance number excludes $3,427,560 in 2002-2003 encumbrances that appear to be 2003-2004 expenditures based on the opinion of an independent accounting firm retained by the State." (R-10). Rarick testified that he did not review the record of encumbrances or speak with Paterson administrators about the amount of encumbrances. Instead, he relied of the opinion of J.L. Ezyske & Co (Ezyske), the independent accounting firm hired by the State. In its report, Ezyske states in part:

> We have performed the procedures enumerated below for the Paterson Public Schools, which were agreed to by the State of New Jersey, solely to assist you and the New Jersey Department of Education in complying with State of New Jersey Supreme Court decision in *Abbott v. Burke,* dated July 23, 2003, in determining preliminary Additional Abbott v. Burke state aid awards for the year ended June 30, 2004....The sufficiency of these procedures is solely the responsibility of those parties specified in this report. Consequently, we make no representation regarding the sufficiency of the procedures

described below either for the purpose for which this report has been requested or for any other purpose.
We were not engaged to and did not conduct an examination, the objective of which would be the expression of an opinion on the accompanying schedules. Accordingly, we do not express such an opinion. Had we performed additional procedures, other matters might have come to our attention that would have been reported to you.

J.L. Ezyske & Co.
August 15, 2003

[R-1]

Rarick further testified that his communications with Ezyske were limited to telephone discussions concerning the budgets for the Paterson and other State-Operated School Districts. Moreover, Rarick did not know whether Ezyske spoke with Paterson administrators about their District's encumbrances or other budget items.

DOE presented Douglass Triplett, Ezyske's manager of accounting. Triplett and Rarick agreed that encumbrances are an accounting tool, which permits the District to reserve funding for purchase orders that have been issued, but the goods or services have not yet been received. Triplett further testified that he reviewed the documents presented by DOE and prepared an accounting report, R-1. The report's foreword states, "The 'Secretary Report' as was given to our office did not have any breakdown between what was a true account payable and what was an outstanding encumbrance. We analyzed the detail encumbrance run to differentiate between true accounts payable and open encumbrances. As you know, accounts payable are reflected as expenditures but encumbrances are merely a reservation of fund balance and do not necessarily represent any additional spending by the district." R-1.

Triplett further testified that DOE directed him to exclude encumbrances from Paterson's maintenance budget. Triplett's analysis included review of booked line item accounts payable and recorded additional spending by line item. Under cross-examination, Triplett conceded that prior to the hearing he did not review the Department's Notice of preliminary maintenance budget for 2003-2004, which excluded $3,427,560 in encumbrances. He further conceded that he did not review any purchase orders. (R-10). Indeed, he accepted at face value the "bulk" number in surplus-encumbrances that was provided to him. "Mr. Triplette agreed that as of August 2003, Paterson had listed $3,427,560 in encumbrances." (Respondent's Brief at p.9.)

Elisabeth Schick, CPA, conducted an audit for Paterson. Schick, in agreement with Rarick and Triplett, testified that services provided to Paterson before June 30, 2003 should be reflected as an account payable. Subsequent to the notice of preliminary maintenance budget, R-10, Schick reexamined the Districts' contracts and purchase orders. She concluded that some of the encumbrances appeared to be accounts payable. (P-6). Accordingly, an adjustment to DOE's calculation of $3,427,560 in 2002-2003 encumbrances is necessary.

I have carefully considered DOE's statement that it "excluded $3,427,560 in 2002-2003 encumbrances that appear to be 2003-2004 expenditures, based on the opinion of an independent accounting firm [Ezyske] retained by the state." The evidence presented by DOE fails to support its statement. Indeed, Ezyske explicitly made known that it did not conduct an examination or offer an opinion on the budget information concerning the State-Operated School District of Paterson.

Based on the whole of the record, I **FIND** and **CONCLUDE** that DOE has not demonstrated the reasonableness for excluding "$3,427,560 in 2002-2003 encumbrances that appear to be 2003-2004 expenditures." As DOE notes, "The final adjustment to encumbrances will correct any misclassification or misunderstanding by the parties concerning the amount of encumbrances." (Respondent's Brief at p.8.) I agree. The final adjustment to encumbrances will correct any misclassification or misunderstanding at the time the CAFR is received from Paterson.[2] Therefore, I **CONCLUDE** that $3,427,560 should not be excluded from Paterson's maintenance budget.

The remaining items in dispute for non-discretionary expenditures are salaries, health benefits, vocational education, and special education.

Rarick accepted the District's rate of 4.9% for salary increases for contracted and non-contacted employees as shown in the salary contract between the District and the

[2] The Comprehensive Annual Financial Report (CAFR)

Paterson Education Association, (R-4). Based on the amount Paterson spent on salaries in 2002-2003, adjusted at 4.9% to reflect salary increases, Rarick calculated FY 2003-2004 expenditures for salary expenditures at $9,252,814. (R-2).

Under cross-examination Rarick acknowledged that he did not consider money accrued from vacancies in budgeted positions. Rather, he allowed for the actual expenditures. For example, if a ten-month budgeted position was filled by a regular teacher, who took a leave of absence from the position after three months, and the position became vacant for the remaining seven months of the school year school year, DOE will fund the regular teaching position based on the amount the District actually paid to the individual. Thus, for FY 2003-2003 Paterson will receive funds to cover three months of the regular teacher's salary. While Rarick conceded there could be "some gaps in situations where you have a teacher replacing a substitute", Rarick feels, "that such incidences should not represent a significant portion of the salary budget."

Rarick further believed that the expiration of Federal Grants, *e.g.* CLASS and PEP21 will not affect the salaries of teachers because the grants did not fund teacher salaries. DOE conceded that although the salary adjustment may not capture every employee, it represents a reasonable calculation based upon actual 2002-2003 spending that should closely approximate the salary costs incurred for school year 2003-3004.

Edward Duroy, State–Operated Superintendent, oversees the day-to-day operation of the District. Duroy testified that Federal grants, *e.g.* CLASS, were used to support services and curriculum that were approved in 2002-2003. For example, the grants helped to fund the salaries of persons who conducted after school programs, tutored and counseled students. The grants expired on June 30, 2003.

Duroy further testified that Paterson seeks to employ regular teachers for positions that were filled by substitute teachers. Duroy believes regular teachers provide students consistency in their educational program. Substitute teachers are temporary and do not provide consistency and continuity of instruction. Moreover,

additional teachers are necessary to meet the need of an increase in the student enrollment at Kennedy High School. Duroy further testified that grade K to 5 uses out dated math and social studies textbooks. Textbooks with current and accurate information are necessary to comply with the curriculum that was provided in 2002-2003.

Elaine Shafer, Director of Personnel and Anthony Campisi each testified that additional teachers are needed to continue approved programs. However, the record is unclear, perhaps due to the expedited nature of these proceedings, as to the number of individuals needed to fill approved positions. Additionally, although it is undisputed that some positions were funded by grants that expired in June 2003, the record is unclear on the number of individuals that are needed to continue the programs that were approved and actually provided in FY 2002-2003. The salary adjustment should reflect this number.

I **FIND** and **CONCLUDE** that DOE has not established its burden that the increase in expenditures for salaries in the amount of $9,252,814 "represents a reasonable calculation based upon actual 2003-2003 spending that should closely approximate the salary costs incurred in the 2003-2004 school year."

Further, I **FIND** and **CONCLUDE** that the District has demonstrated that additional positions are required to continue the programs that were approved and actually provided in FY 2002-2003. Accordingly, this item is part of the maintenance budget, not a new expense. Additionally, I **FIND** and **CONCLUDE** that the District has demonstrated the reasonableness of replacing substitute teachers with regular teachers in programs that were approved and actually provided in FY 2002-2003. The salary adjustment should reflect the costs of these items.

Based on the whole of the record I **CONCLUDE** the salary adjustment of $9,252,814, as calculated by DOE, should not be approved. Instead, the adjustment should reflect positions necessary to continue the programs that were approved and actually provided in FY 2002-2003 and the costs of replacing substitute teachers with

regular teachers in programs that were approved and actually provided in FY 2002-2003. Accordingly, the District is directed to present to the Commissioner of Education the number of positions necessary to continue the programs that were approved and actually provided in FY 2002-2003 and the costs of replacing substitute teachers with regular teachers in programs that were approved and actually provided in FY 2002-2003.

With regard to health benefits, DOE claimed it allowed an increase in health benefits in the amount of $4,551,008 or 14.5%. The State Health Benefits Plan (SHBP) operates on a calendar year, and the District operates on a fiscal year. Thus, the amount of $4,551,008 recognizes the rate change in January. DOE argues that basing the projected increase in health benefit costs on actual spending in 2003-2003 is reasonable.

I agree. The costs of health care benefits should correspond to the actual number of employees who must be covered. I therefore **CONCLUDE** that DOE's increase in health benefits in the amount of $4,551,008 or 14.5% should be adjusted to reflect the number of positions necessary to continue the programs that were approved and actually provided in FY 2002-2003 and the costs of replacing substitute teachers with regular teachers in programs that were approved and actually provided in FY 2002-2003.

County Vocational Schools Tuition:

The District does not receive State funding to pay tuition for vocational school students. Paterson is obligated for this item. Campisi testified that 27,562 pupils attend vocational school. Rarick testified that DOE granted Paterson's request for vocational school tuition increase of $2,655,026 for school year 2003-2004. (R-2). "Rarick verified that amount of tuition by speaking with the County Superintendent and Dennis Mulvihill, Assistant Business Administrator." Consequently, it appears that the parties agree on the increase for this item.

Accordingly, I **FIND** and **CONCLUDE** DOE properly determined the vocational school tuition increase of $2,655,026.

Special Education

Paterson's 2003-2004 budget application requests an increase for special education tuition of $638,756. The Department determined that no additional special education funding was required in the 2002-2003 school year.

Rarick testified that because Paterson is receiving approximately $1 million in increased IDEA funds for the 2003-2004 school year, "the IDEA funding will more than cover Paterson's increased needs." (Respondent's Brief pp.11-12). With regard to specific special education positions, the parties acknowledged that the District had difficulty in finding employees to fill the vacancies. Consequently, "the Department is unwilling to fund unfilled special education positions, especially where the District has historically been unable to fill them". *Ibid* Rarick noted, however, that Paterson can make a request for supplemental funding for those additional special education costs pursuant to N.J.A.C. 6A:10-3.1(f) "should IEP's result in the need for additional teachers, and the teachers and/or specialists are actually hired." *Ibid.* The Department submits "since Paterson will be receiving IDEA revenues in excess of its projected increase in special education expenditures for 2003-2004". No additional funding for special education was required in FY 2002-2003. *Ibid.*

Paulette Waite, Director of Special Services, is responsible for costs related to for out-of-district placement and home instruction. Although there is no prohibition to use IDEA funding for out-of-district placement, the impact on Paterson would be drastic. Waite testified that currently, IDEA grants are used to supplement direct services to special education students such as teachers, supplies and materials. The funds are not used to pay tuition for out-of-district placement. Consequently, supplemental aid is required to ensure that special education students continue to receive free and appropriate public education and related services. Under federal and state law, New Jersey is obligated to provide eligible handicapped children with a free and appropriate

public education, which may include an out of district placement. *Lascari v. Board of Education of Ramapo-Indian Hills Regional School District,* 116 *N.J.* 30 (1989).

I **CONCLUDE** that Paterson has justified under the effective and efficient standard set forth in the DOE's emergency regulations, an increase for special education tuition of $638,756.

Non-recurring expenditures:

DOE determined that the contract between Paterson and Paintsmart resulted in excessive costs of $294,781 and thus, constituted an excludable non-recurring expenditure from FY 2002-2003. Rarick testified that the Paintsmart contract was a time and material bid, which is used only for emergency purposes. Rarick concluded that Paterson would have saved $294,781 in costs on this project had the District requested bids on a square foot cost rather than the time and material method.

Duroy testified that a time and material bids have previously been used and approved by the District. The Maintenance Department, the Business Department and the Legal Department reviewed and which approved Paintsmart bid within sixty days after it was submitted. There is one year remaining on the contract. Duroy conceded, however, that the time and material bid for painting was not the most cost effective and that he would not use that method in the future.

Based on the evidence presented, I **CONCLUDE** that the Department properly determined that the cost overruns associated with the Paintsmart painting contract for FY 2002-2003 constituted an excludable non-recurring cost.

Ineffective and Inefficient:

DOE reduced Paterson's 2003-2004 maintenance budget by amounts deemed to be ineffective or inefficient. DOE disallowed $95,000 for a fiscal monitor. The fiscal monitor's primary responsibility is to oversee the receipt and expenditure of grant

monies. P-1. Rarick determined that the cost for the position was ineffective because that during the four years, in which Paterson employed the fiscal monitor, the amount of federal and state money returned each year has averaged $500,000; it has not decreased or "decreased by only a small amount." The amount of federal and state grant money returned for FY 1999 to 2002 are as follows: 1999- $581,374; 2000- $448,571; 2001, $409,470; and 2002- $310,908. During this period, the District paid the fiscal monitor $380,000 or $95,000 each year.

I am persuaded by DOE's argument that that the fiscal monitor is not cost effective or responsible for any significant decrease in the grant money returned. Therefore, I **CONCLUDE** that the determination by DOE that the position of Fiscal Monitor is inefficient be upheld. Accordingly, I **CONCLUDE** that the salary of $95,000 and related benefits should be eliminated from the maintenance budget.

DOE identified an increase in maintenance overtime costs in the amount of $390,000. The parties have agreed to re-classify this item as a non-recurring expense, and Paterson will withdraw its appeal of this item. (Department's Brief at p.6).

The Department determined expenditures in the amount of $93,000 for a cooperative bid purchase contract to be inefficient. DOE argues that Paterson does not use the services of the cooperative bid program. In 2002-2003, the District purchased $450,000 worth of materials and supplies through the bid cooperative. Thus, $93,600 represents 20% of the cost of the goods purchased. A greater volume of goods or services provided would reduce the percentage cost of the yearly fee. Although Paterson concedes that the program is inefficient, it contends that it is obligated to continue the program for one more year. Contrary to Paterson's contentions, the Department is not requiring Paterson to breach its contractual obligations. Rather, the Department is not approving an inefficient and ineffective program or service. Therefore, the Department's determination to reduce the maintenance budget by $93,600 for the cooperative bid should be upheld.

Paterson presented no evidence to rebut DOE's argument. Therefore, I **CONCLUDE** that the Department properly determined that the expenditures in the amount of $93,000 for a cooperative bid purchase contract to be inefficient.

ORDER

It is **ORDERED** that DOE restore $3,427,560 in 2002-2003 encumbrances until the CAFR is received from Paterson.

It is **ORDERED** that DOE adjust the salary and health benefits increases to reflect positions necessary to continue the programs that were approved and actually provided in FY 2002-2003 and the costs of replacing substitute teachers with regular teachers in programs that were approved and actually provided in FY 2002-2003. It is further **ORDERED** that the District to present to the Commissioner of Education the number of positions necessary to continue the programs that were approved and actually provided in FY 2002-2003 and the costs of replacing substitute teachers with regular teachers in programs that were approved and actually provided in FY 2002-2003.

It is **ORDERED** that the District's request calculation of DOE for vocational school education in the amount of $2,655,026 be upheld

It is **ORDERED** that the District's request for an increase for special education of $638,756 be **GRANTED**.

It is further **ORDERED** that, in all other respects, DOE's determination of Paterson's maintenance budget for FY 2003-2004 is upheld.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within the time allowed under the existing orders of the New Jersey Supreme Court and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Notwithstanding the provisions of any rule to the contrary, exceptions to Initial Decisions of the Office of Administrative Law in *Abbott* District budget appeal matters shall be filed within five (5) days of the date of mailing of the Initial Decision, and reply exceptions shall be filed within two (2) days of receipt of exceptions. File written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 3, 2003
DATE

MUMTAZ BARI-BROWN, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

October 3, 2003
DATE

E-mailed Initial Decision to the parties on:

October 3, 2003
DATE

APPENDIX

Witnesses:

Presented by Petitioner, The State-Operated School District of Paterson

Edwin Duroy
Elizabeth Shick
Anthony Campisi
Paulette Waite
JoAnn Cardillo
Dennis J. Mulvihill
Elaine Shafer

Presented by respondent, The Department of Education

Benjamin D. Rarick
Douglas Triplett
Glenn Forney

Exhibits:

Petitioner

P-1 Fiscal Monitor – Job Description

P-2 Memorandum regarding the return of federal and state grant money, dated September 2, 2003

P-3 Action Form – Paterson Contract

P-4 District Budget

P-5 Document from the Department of Education

P-6 Documents regarding General Funding

P-7 Allocation Notice, dated April 5, 2002

P-8 Allocation Notice, dated April 17, 2002

P-9 Action Report – Paterson School District

P-10 Budget Report – 2003

P-11 Budget Report – 2004

P-12 Action Form

P-13 Revised Health Benefits – 2003-2004

P-14 Memorandum – K-5 Math Bi-Lingual Textbooks

Respondent

R-1 Department of Education Budget Report – Paterson School District

R-2 Maintenance Work Sheet

R-3 Salary Information

R-4 Salary Workshop

R-5 Renewal Form of SHBP

R-6 Budget Analysis of Special Education

R-7 IDEA and Title I Revenues Verification

R-8 Worksheet on Utilities

R-9 Spread Sheet List (Consultants)

R-10 Notice of Preliminary Maintenance Budget, dated August 27, 2003

R-11 Schedule of Grant Refunds – FY 2000-2002

R-12 Schedule of Overtime – FY 2001-2002 vs. 2002-2003

OAL DKT. NO. EDU 5500-03
AGENCY DKT. NO. 204-6/03

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

The record of this local "Abbott" District's appeal of the Department's decision on its supplemental funding request for the 2003-04 school year, and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions of Paterson and those of the Department, along with both parties' reply exceptions were duly submitted in accordance with the schedule established in response to the Court's order for expedition and were considered by the Commissioner in reaching this decision.

Upon careful and independent review of the record, which it is noted included transcripts of the proceedings conducted at the OAL,[1] the Commissioner determines to adopt in part, reject in part and modify in part the Initial Decision of the OAL as detailed below.

Preliminarily, the Commissioner is compelled to correct a number of foundational errors which have inextricably colored the Administrative Law Judge's (ALJ) findings, leading to a number of inaccurate conclusions here. First of these is the ALJ's mistaken recitation of the "burden of proof" in this matter. The Supreme Court's Order provides that the Department

[1] Hearing in this matter was conducted on September 3, September 4 and September 8, 2003.

"shall bear the [initial] burden of moving forward to establish the basis for any proposed reductions to the [Abbott] district's maintenance budget *based on the effective and efficient standard* set forth in the DOE's emergency regulations."****Abbott v. Burke*, M-976 September Term 2002, at 7. (emphasis supplied) However, as indicated in the Department's preliminary maintenance decision letter dated August 27, 2003 (Exhibit R-10), only two adjustments, currently involved in this matter, *i.e.*, $95,000 related to the salary and benefits for the position of Fiscal Monitor and $93,600 for a cooperative bid purchase program contract, were made for reasons of inefficiency. Therefore, pursuant to *N.J.A.C.* 6A:24-9.6(c), with respect to the remaining adjustments made to the District's maintenance budget herein, the District bears the burden of proving that the Department's calculations were unreasonable.

Next, the Commissioner observes that the ALJ correctly determined that *N.J.A.C.* 6A:10-1.2, the regulation duly promulgated to implement the Court's July 23, 2003 Order, must control in the instant proceeding, and that the OAL does not have jurisdiction to determine, directly or indirectly, its validity, as such determination is solely within the jurisdictional purview of the Appellate Division or the Supreme Court. R. 2:2-3(a); *see, also, Pascucci v. Vagott*, 71 *N.J.* 40, 51-52 (1976); *Wendling v. N.J. Racing Com'n*, 279 *N.J. Super.* 477, 485 (App. Div. 1995). Notwithstanding the ALJ's correct understanding of these issues, she errs in citing to and adopting that portion of the decision of the Honorable Richard McGill in *Board of Education of the Town of Harrison, Hudson County v. New Jersey State Department of Education*, OAL Dkt. No. EDU 5494-03, Agency Dkt. No. 195-6/03, decided by the Commissioner October 20, 2003, wherein he summarizes, what *he viewed* as "the proper interpretation of the definition of 'maintenance budget'" in the new regulation and the Supreme

Court Order. (Slip Opinion at 9) It is noted that the Commissioner's October 20, 2003 decision in *Harrison, supra*, specifically modified ALJ McGill's definition thusly:

> The ALJ next undertakes to address the issue of whether the Department's quantitative method of implementing its regulatory definition of "maintenance budget" is inconsistent with the literal language contained in the regulation and in the Supreme Court's Order of July 23, 2003. The ALJ concludes that the Department's methodology has, in effect, inappropriately substituted the phrase "funds approved and actually spent during the 2002-2003 school year" for the Supreme Court language authorizing funding for "current approved" programs, services and positions and for the regulatory language "approved and provided." The Commissioner observes that while it may be technically correct that merely looking at dollar amounts paid out prior to June 30, 2003 will not necessarily reflect actual costs of programs, services and positions provided, *i.e.*, payment for items actually provided prior to June 30 may not actually have been made by June 30, it is also true that the budgeted amount, likewise, does not necessarily reflect actual costs of programs, *etc.*, provided. Therefore, the ALJ's abrupt conclusion that the budgeted amounts for lines 11 and 15 must be reinstated does not follow from his analysis. Those services, programs and positions, which were provided and which are reflected on lines 11 and 15, were provided at an actual cost which was less than the budgeted cost. The Commissioner concludes that a methodology which begins by estimating the 2003-2004 cost of providing the same programs, services and positions by looking at the actual cost of providing these for 2002-2003 and then adds the projected costs of reasonable, nondiscretionary expenditures and adjustments is a reasonable method for estimating future costs which cannot otherwise be determined with any degree of precision. (*Harrison* Slip Opinion at 18-19)

The Commissioner, therefore, found the Department's implementation methodology fully consistent with the verbal standards set forth in the regulation and the Court's Order, and modified ALJ McGill's interpretation of "maintenance budget" to so reflect, emphasizing that should the Department's utilized methodology prove to be insufficient because of unforeseen circumstances arising during the budget year, *N.J.A.C.* 6A:10-3.1(g) provides a mechanism for addressing the need for additional supplemental funding.

Consequently, the Commissioner finds and determines that the interpretation of the definition of "maintenance budget" which he has articulated above is applicable herein.

With the underlying foundational precepts governing review of this matter thus clarified, the Commissioner turns to examination and evaluation of the substantive issues in controversy here.

NONDISCRETIONARY EXPENSES

Encumbrances

The Commissioner does not concur with the ALJ's finding that the Department erred in deducting $3,427,560 in encumbered funds from the District's maintenance budget, as it is evident that the ALJ's analysis and conclusion in this regard reflects her previously discussed misconception with regard to the parties' respective burdens of proof in this matter. In considering this issue, the Commissioner first finds that a clear appreciation of the differentiation between the terms "encumbrances" and "accounts payable" is beneficial here. In the context of close out procedures for the 2002-03 budget year, an encumbrance is an accounting tool that permits a school district to set aside funds for purchase orders that were issued during the 2002-03 school year for goods or services that were *not* received as of June 30, 2003. Unpaid purchase orders reserved as encumbrances on the June 30 general fund balance sheet, therefore, reflect liabilities to be honored in the next fiscal year for goods and services not received by June 30. An account payable, on the other hand, is an expenditure which was incurred in the 2002-03 school year for goods and services received and/or provided by June 30, 2003. Therefore, the Commissioner clarifies that, to the extent that Paterson's encumbrances represent charges for goods and services *provided* by June 30, 2003, *i.e.*, they have become accounts payable, these are properly chargeable to the District's 2002-03 budget and appropriately

included in its "maintenance budget.'" Those of its encumbrances representing goods and services not received by that date are properly excluded from the 2003-04 maintenance budget calculations.

This said, the Department's exceptions assert that, subsequent to the District's provision of the number $3,427,560 as its encumbrances figure to the outside auditor employed by the Department, such auditor contacted the District seeking a breakdown of these "encumbrances" as to whether they were "true" encumbrances or accounts payable. Respondent further reports "the evidence indicates that at the time the Department issued its August 27, 2003 maintenance budget determination, Paterson had identified $3,427,560 as encumbrances, even after Mr. Triplett [the Department's employed auditor] requested a further breakdown. ***Thus, prior to the August 27, 2003 maintenance budget determination from the Department, Paterson did not provide any information to the Department that would illustrate that the Department's determination was in error or unreasonable." (Department's Exceptions at 5) Respondent argues that only after the issuance of the Department's August 27, 2003 letter did Paterson *begin* reclassifying its encumbrances. (*Ibid.)*

The District's reply exceptions contend that, notwithstanding when the updated information with respect to its encumbrances was provided, the Department has a legal obligation to accept its supplemental documentation and to cure any deficiencies in the District's budget that were based on the Department's consideration of outdated and inaccurate information. (District's Reply Exceptions at 3, 4)

Upon consideration of the arguments advanced by the parties on this issue, the Commissioner is compelled to conclude that petitioner has not met *its* burden of demonstrating that the Department's deduction of $3,427,560 in encumbered funds from the District's

maintenance budget was improper. In so determining, the Commissioner recognizes that the Supreme Court's Order directed the Department to provide the districts with their preliminary maintenance budget figures for the 2003-04 school year by August 27, 2003. In its fulfillment of that directive, the Department, utilizing the most recent calculations provided by the District, made the requisite projections in its August 27, 2003 budget letter. Although the Commissioner recognizes the Supreme Court's encouragement to accept supplemental documentation from districts, the Court's holding cannot be construed to require acceptance of data without benefit of appropriate fiscal review, particularly where the District's Comprehensive Annual Financial Report (CAFR) will be submitted in a week or two from the date of this decision and there will then be finality in the very data in question.

While recognizing that it is entirely possible that adjustments in this area are necessary, in light of the District's burden in this regard and based on the proofs brought to the record, the Commissioner is unable to definitively determine here which of the District's encumbrances have become accounts payable by virtue of the receipt of the encumbered goods or services on or before June 30, 2003 so as to be considered 2002-03 expenditures. He, therefore, concludes that the District's encumbrances were properly excluded by the Department as a budget expense for 2002-03, and he directs that any required adjustments be made, based on updated information, in the course of the District's CAFR review scheduled to begin in November.

Salaries

In consideration of the Initial Decision's recommendation with respect to increases for salaries, the Commissioner disagrees with the ALJ's rejection of actual spending from 2002-03 as an appropriate approximation of salaries needed by the District for 2003-04 and

her determination that positions necessary to continue programs that were filled by substitutes for a portion of the year are required to be funded at the equivalency of a full-time, regular teacher's salary. Such conclusion was not only the result of her, once again, inappropriately shifting the applicable burden of proof but is also wholly inconsistent with the Court's directive and the maintenance standard which required the Department to consider only *actual* expenditures stemming from goods and services provided in 2002-03 in establishing a maintenance budget.

In this connection, it is first noted that the ALJ bases her conclusion in this area on her finding that the Department "has not established its burden that the increase in expenditures for salaries in the amount of $9,252,814 'represents a reasonable calculation based upon the actual 200[2]-2003 spending that should closely approximate the salary costs incurred in the 2003-2004 school year.'" (Initial Decision at 13) However, as previously established, pursuant to *N.J.A.C.* 6A:24-9(c), *the District bears the burden of proving that the Department's calculations here were unreasonable or otherwise improper*, a burden the Commissioner finds, on this record, it has failed to satisfy.

The ALJ next undertakes application of the previously rejected "interpretation" of maintenance budget which, as pointed out by the Department's exceptions, leads to a somewhat absurd result:

> The crux of [the ALJ's] findings with regard to maintenance may be characterized as a belief that even if the funds were approved in the 2002-2003 school year but were not needed by the school district in the 2002-2003 school year because a program, service or position was provided for with less money than was budgeted, that the school district should still get the benefit of that savings and be allowed to keep that unspent money in its maintenance budget for the 2003-2004 school year. It is hard to conceive that the Supreme Court envisioned the Department awarding aid in a maintenance year to school districts which is in excess of the amount of money

> that they were required to spend in the prior year with the noted cost adjustments. (Department's Exceptions at 2)

The ALJ's interpretation also fails to recognize that there will, inevitably, be leaves of absences, retirements and resignations in the 2003-04 school year which will have implications on the employment status of the District's employees, causing fluctuations in its salary account.

To the extent that the Initial Decision suggests, based on a "maintenance" analysis, the necessity of "new positions" to continue the provision of services approved and provided in 2002-03 or salaries for positions which the District asserts were partially funded by federal grants which expired on June 30, 2003, the Commissioner concludes that the District has failed to sustain its burden of establishing that the Department's refusal to fund these positions in its calculation of a "maintenance budget" was improper. Not only does the record lack specificity with respect to an actual "need" for such positions, it further fails to establish the number of positions or the dollar amount involved in this regard. Moreover, the District has not advanced a proffer that it will not be receiving other grant moneys or that funding of these salaries cannot be aided by some other source.

In contrast, and fully consonant with his prior determination with respect to the proper interpretation of "maintenance budget," the Commissioner underscores that the Department's overall charge in this matter was to determine the level of 2003-04 funding that would enable the District to continue in a "maintenance" mode, that is, to implement in 2003-04 the programs, services and positions provided in 2002-03. While it is true that dollar amounts actually paid out for staffing prior to June 30, 2003 will not perfectly predict the cost of providing comparable staffing in the next year, it is *equally* true that originally budgeted amounts and other similar projections are no less imprecise. Thus, in the Commissioner's view, a methodology which preliminarily establishes the 2003-04 cost of providing positions at

"maintenance" levels by determining, as nearly as possible without benefit of audit, the actual approved cost of providing them in 2002-03 and then allowing for reasonable, nondiscretionary adjustments, is a uniform, fair and rational method for estimating future expenditures which cannot otherwise be determined with any degree of precision. In this connection, the Commissioner is not persuaded that this method does not take into account vacancies, retirements, and positions filled for only part of the year, since variances of these types occur every year and a preliminary district-wide salary budget is appropriately based on the assumption that staffing is a flexible and continuous process, with ebbs and flows that, absent specific evidence to the contrary, generally permit the projection of one year's experience onto the next.

Consequently, the Commissioner finds and determines that, in contrast to the approach espoused by the ALJ, the Department's calculation of the District's maintenance budget of $9,252,814 in this expense category was fully appropriate and wholly consistent with the directives and intendment of both the Court's order and the governing regulation. It is, again, emphasized that to the extent that results of the application of the District's "maintenance budget" in this area may be imperfect, *N.J.A.C.* 6A:10-3.1(g) provides a mechanism to obtain additional supplemental funding where unanticipated expenditures or unforeseen circumstances warrant.

Health Benefits

The Commissioner agrees with the ALJ's finding that "[t]he costs of health care benefits should correspond to the actual number of employees who must be covered." (Initial Decision at 14) The record reflects that the Department calculated an increase in health benefits of $4,551,008, a 14.5% increase, basing such projected increase on actual spending during the 2002-03 school year. This calculation is entirely appropriate, being consistent with the

regulatory mandate as well as the Court's order. The Commissioner specifically rejects the ALJ's conclusion that this number needs to be adjusted upward to reflect additional positions or the cost of replacing substitute teachers with regular teachers, as such adjustment, as was discussed above, antithetical to the concept of "maintenance budget."

County Vocational School Tuition

The Commissioner concurs with the ALJ, and notes the parties' agreement, that the Department properly calculated an increase of $2,655,026 in this area.

Special Education Tuition

Preliminarily, it is observed that the ALJ erroneously evaluated the Department's calculation of the District's special education maintenance budget under the "effective and efficient" standard, thereby improperly shifting the burden of proof in this area to the Department. Rather, the burden here is on the District to demonstrate, by a preponderance of the credible evidence, that the Department's calculation of its budget for this category of expenses was improper.

With the applicable burden thus clarified, the Department's exceptions point out:

> Paterson's 2002-2003 revised budget for special education tuition is $16,531,446 (P-11, R-6). ($30,854,387 total minus $13,318,328 in actual spending on regular instruction). Paterson's request for special education costs for the 2003-2004 school year is $17,170,202. (P-4). ($33,645,524 total minus $16,475,322 in regular instruction). Thus, based on Paterson's 2003-2004 budget submission, Paterson's request for special education costs is $638,756. (Department's Exceptions at 13)

While the District argues that having to channel some of its $1 million in increased IDEA funds in 2003-04 special education tuition costs would have a "drastic" impact on the District (Initial

Decision at 15), it makes no such demonstration on the record. Rather, given that the District is receiving $1 million in increased IDEA funds, while its projected increase in special education tuition costs is only $638,756, it is readily apparent that reallocation of a portion of the increased IDEA moneys to cover increased tuition costs, leaves the District with almost $400,000 of these increased funds to cover in-district services. Also particularly instructive here is the Department's exception observation that:

> Paterson actually spent $607,871 less than it budgeted last year (P-10, comparing expended at 6/30/03 of $16,531,446 with what was budgeted of $17,139,317). Therefore, given that the district spent close to $600,000 less than it budgeted, is receiving $1 million in IDEA which is [$361,244] more than the district's budgeted increase in special education, the Department's determination to require the district to utilize IDEA funding for special education cost and not provide any additional funding other than the amount the district spent last year, should be upheld.
>
> (Department's Exceptions at 14, 15)

It is noted that the District's reply exceptions object to such a reallocation of IDEA moneys, contending that the Department has overlooked a "critical fact" and a "critical legal point" in this regard. Overlooked factually, it argues, is that "[t]he District's IDEA application seeks funding for special education services to comply with the requirements in student IEPs not for special education tuition." (District's Reply Exceptions at 6) As to the overlooked legal point, it claims entitlement, pursuant to the Supreme Court's order, to established increases in special education tuition and maintains that "[i]t is unreasonable and contrary to law for the Respondent to suggest that the District should take needed funding for special education services to fulfill IEPs in order to reduce the Respondent's legal obligation under the Supreme Court's order to provide the District with needed funding for special education tuition costs." (*Ibid.*) The Commissioner disagrees. The record reflects that the District's 2003-04 IDEA application is not yet finalized and that amendment during the course of the school year is possible. Further, since use of these

moneys for special education tuition is not prohibited; and since the District has not established the necessity of the additional funds it requests; and, concomitantly, it has not established that the Department's calculation of its maintenance budget in this area was unreasonable or otherwise improper, it has not sustained its burden here. The Commissioner, therefore, rejects the ALJ's grant of $638,756 in additional funding for special education to the District.

CPI Adjustment

The District's exceptions object to the ALJ's refusal to take judicial notice of its official federal government documentation of the "proper CPI adjustment for Paterson." (District's Exceptions at 8) It argues that *N.J.A.C.* 1:1-15.2(a) allows for judicial notice to be taken of matters under *N.J.R.E.*[2] 201 "that are judicially noticeable - published statistics of the federal government that 'are capable of immediate determination by resort to sources whose accuracy cannot reasonably be questioned,'" and that the "ALJ erred in refusing to follow the mandate of *N.J.R.E.* 201(d)." (District's Exceptions at 8, 9)

Initially, it is noted that the ALJ had no obligation to grant the District's request, as *N.J.A.C.* 1:1-15.2(a), dealing with the granting of judicial notice, is discretionary rather than mandatory in this regard. Nonetheless, the Commissioner observes that the District was attempting to have the ALJ judicially notice documentation from the United States Department of Labor evidencing: 1) that the CPI for New York-Northern New Jersey is 3% and 2) that Paterson is included in the New York-Northern New Jersey area.

Irrespective of the content of the District's proffered document, *N.J.S.A.* 18A:7F specifically defines CPI as:

> the average annual increase, expressed as a decimal, in the consumer price index for the New York City and Philadelphia

[2] The District here is referring to the New Jersey Rules of Evidence.

> areas during the fiscal year preceding the prebudget year as reported by the United States Department of Labor.

Thus, even if the ALJ had chosen to acquiesce to the District's request that judicial notice be taken of its documentation, such materials would have been of no import as the Commissioner finds that the Department properly calculated the District's 2.11 CPI rate pursuant to statute.

NONRECURRING EXPENSE

PaintSmart Contract

Upon full review of the record and the parties' exception arguments in this regard, the Commissioner is in agreement with the ALJ's conclusion that the Department correctly determined that cost overruns, in the amount of $294,781, with respect to PaintSmart painting contract for 2002-03 were properly excludable from the District's maintenance budget as a non-recurring cost. In so determining the Commissioner notes that the District, on this record, has wholly failed to sustain its burden of establishing that this exclusion was in any manner improper.[3]

INEFFICIENCIES

Fiscal Monitor

The Commissioner agrees with the ALJ's determination that the position of Fiscal Monitor is inefficient, necessitating the removal of the salary of $95,000 and related benefits of this position from the District's maintenance budget. On exception, the District charges that the ALJ based her conclusion in this regard on "erroneous" factual findings. (District's Exceptions at 15) In this connection, it proffers: 1) the reduction in returned grant money each year from 1999 to 2002 exceeded the costs of the monitor's salary (District's Exceptions at 15, 16); and

[3] The within record does not contain a copy of any current contract with PaintSmart. Rather, the only documentation in this record with respect to PaintSmart is Exhibit P-12, a Bid Summary and Contract Award Recommendation and a District "Action Form" indicating that the Board had adopted a recommended *one year* contract with PaintSmart, effective July 1, 2001 to June 30, 2002.

2) the Department failed to consider all of the "numerous functions performed by the fiscal monitor" over and above those related to monitoring grants. (*Id.* at 16, 17)[4]

In reaching his conclusion here, the Commissioner finds that the Department has met its burden of advancing a *prima facie* case for the reduction of the budget item relating to the Fiscal Monitor's position, while the District's self-serving, conclusory statements are not sufficient to sustain the shifted burden of demonstrating that this budgetary reduction is not justified under the effective and efficient standard.

Cooperative Bid Purchase Contract

The Commissioner concurs with the ALJ that the Department properly reduced the District's maintenance budget by $93,600 for its ineffective use of its cooperative bid purchase contract under the inefficient standard. Noting that the District, itself, concedes that the program is inefficient (Initial Decision at 17), it, nonetheless, claims entitlement to funding because: 1) it claims the Department did not fulfill the specific criterion required by *N.J.A.C.* 6A:10-3.1(c) in order to satisfy its burden of establishing that this agreement is inefficient; and 2) it is contractually obligated to fulfill this contract for another year. (District's Exceptions at 19-21)

In reply, the Department advances that "the district does not use the cooperative bid program effectively and realize any cost savings***." (Department's Reply Exceptions at 12) The Department urges that, in reaching its determination on this issue, it did satisfy the test for ineffectiveness or inefficiency required by N.J.A.C. 6A:10-3.1, pointing out that, pursuant to *N.J.A.C.* 6A:10-3.1(c)(1)(i),

[4] Although it is noted that the majority of the "numerous" functions of the Fiscal Monitor, listed by the District in its exceptions, are identified in this individual's job description as "Performance Responsibilities" of his underlying "Job Goal" which is to "[m]onitor and insure compliance of expenditures related to funded programs and projects as established by local, state, and federal agencies" (Exhibit P-1), it additionally cites to testimony of Superintendent Duroy with respect to additional duties which he has, from time to time, assigned to this position.

> the Department can base its determination of an inefficient or ineffective program, position or service by reviewing the historical spending patterns of the district. Mr. Rarick testified that the district entered into a cooperative bid contract but did not use it.***Thus, he properly looked at the historical spending patterns in the district in compliance with *N.J.A.C.* 6A:10-3.1(c). Further, it is implicit that a district spending money on an unused and unnecessary program will not compare favorably to other school districts. (Department's Reply Exceptions at 12, 13)

Upon review, the Commissioner determines that the Department has sustained its burden of establishing a *prima facie* case for the reduction of this budget item. The District, on the other hand, has not sustained the shifted burden of demonstrating that this budgetary reduction is not justified under the effective and efficient standard. To the contrary, the District, concededly, recognizes that this program is inefficient. That the District may have incurred a contractual obligation in this regard,[5] cannot provide a concomitant requirement that the Department provide state aid, particularly in these difficult budgetary times, to an ineffective program. Furthermore, it is noted, the District has brought no demonstration to the record of its inability to fund this obligation, if it exists, from other sources. The Commissioner, therefore, sustains the Department's reduction of $93,600 from the District's maintenance budget.

Finally, the Commissioner notes and accepts the ALJ's Order that, except as specifically noted in the text of the Initial Decision (now modified), the Department's determination of Paterson's budget in all other respects is upheld.

Accordingly, the Initial Decision of the OAL is adopted in part, rejected in part

[5] The record does not contain a copy of the District's cooperative bid purchase contract.

and modified in part as set forth above, and the instant Petition of Appeal is hereby dismissed.[6]

IT IS SO ORDERED.[7]

COMMISSIONER OF EDUCATION

Date of Decision: 10/28/03

Date of Mailing: N/A

[6] The Commissioner so determines, based upon the proofs brought to *this* record, while acknowledging that the presentation of such evidence may have been disadvantaged by both a Court Order to expedite proceedings and the unavailability of the Comprehensive Annual Financial Report (CAFR) until November 2003. In any event, beyond his determination herein, the Commissioner underscores the availability of a mechanism for Abbott districts to address needs, arising during the year due to unanticipated expenditures or unforeseen circumstances, for additional resources to implement Department-approved programs and services. *N.J.A.C.* 6A:10-3.1(g).

[7] Pursuant to *P.L.* 2003, *c.* 122, "Abbott" determinations are final agency actions appealable directly to the Appellate Division of the New Jersey Superior Court.

598-03

598-03

T.C., on behalf of minor child, M.D.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EGG HARBOR, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

October 14, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 4695-02
AGENCY DKT. NO. 167-6/02

T.C. o/b/o M.D.C.
Petitioner,
v.
EGG HARBOR TOWNSHIP BOARD OF EDUCATION
Respondent.

Gary P. Levin, Esquire for petitioner

Bret Wiltsey, Esquire for respondent (Parker, McCay & Criscuolo, attorneys)

Record Closed: August 25, 2003 Decided: August 28, 2003

BEFORE **W. TODD MILLER,** ALJ:

This matter was transmitted by the Department of Education to the Office of Administrative Law on July 23, 2002, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a settlement agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement dated August 18, 2003.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

8-28-03
DATE

W. TODD MILLER, ALJ

Receipt Acknowledged:

9-2-03
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 3 2003

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

File No. 12414-0030
Law Offices
PARKER, McCAY & CRISCUOLO, P.A.
Three Greentree Centre, Suite 401
Route 73 & Greentree Road
P. O. Box 974
Marlton, NJ 08053
(856) 596-8900
Attorneys for Defendant, Egg Harbor Township Board of Education

Michael D. Collins, a minor, Individually by and through his Guardian Ad Litem, Therese Collins, Plaintiff(s), vs. Egg Harbor Township Board of Education, Ralph Ridolfino, Kimberly A. Gruccio, Lynn Rosenkranz, Karen Yacovelli, Sharon Beloff, and Ann Forshaw, Defendant(s).	OFFICE OF ADMINISTRATIVE LAW ATLANTIC COUNTY DOCKET NO. EDUOS 04695-02S CIVIL ACTION

SETTLEMENT AGREEMENT

This Settlement Agreement is by and among Michael D. Collins, by and through his guardian Ad Litem, Therese Collins, ("Plaintiff") with an address at 411 Fourth Avenue, Egg Harbor Township, NJ 08232 and the Egg Harbor Township Board of Education, with an address at 202 Naples Avenue, West Atlantic City, NJ 08232 and all other named defendants all of whom work at Egg Harbor Township High School, (Collectively "Defendants") with an address at 24 High School Drive, Egg Harbor Township, New Jersey 08234.

WITNESSETH

WHEREAS, the parties have disputes which are the subject of actions entitled Michael

D. Collins, a minor, by and through his parent and guardian ad litem, Therese Collins v. Egg Harbor Township Board of Education, Ralph Ridolfino, Kimberly A. Gruccio, Karen Yacovelli, Sharon Beloff and Ann Forshaw, Office of Administrative Law, Commissioner of Education, Atlantic County, Docket No. EDUOS 04695-02S; and

WHEREAS, the above identified parties have agreed to resolve their disputes in accordance with the terms of this Settlement Agreement in the manner set forth below; and

NOW, THEREFORE, in consideration of the promises and covenants contained herein, the parties agree as follows:

1. Defendants agree to remove from plaintiff's permanent records any reference to a failed drug test, drug use or any other notation that in any way references the drug test and discipline that occurred in response that is the subject of this litigation. Defendants will take such action on or before October 1, 2003.

2. **NONDISCLOSURE**. As additional consideration for the Promises and covenants represented in this Settlement Agreement, it is further understood and agreed that neither the parties identified in this Settlement Agreement nor any agents, servants, attorneys or representatives of the parties shall, in any way, and to the extent allowed by law, at any time disclose for any reason or purpose whatsoever to any other person or entity either the fact of this settlement, the facts underlying the claims leading to this settlement, or the terms of the consideration, compensation or settlement reached by the parties.

3. All claims and counterclaims of whatever nature or kind, asserted or which could have been asserted by any party in an action entitled Michael D. Collins, a minor, by and through his parent and guardian ad litem, Therese Collins v. Egg Harbor Township Board of Education, Ralph Ridolfino, Kimberly A. Gruccio, Karen Yacovelli, Sharon Beloff and Ann

Forshaw, Office of Administrative Law, Commissioner of Education, Atlantic County, Docket No. EDUOS 04695-02S shall be dismissed with prejudice and without costs by way of Stipulations of Dismissal in the forms annexed hereto, subject to compliance with the terms of this Settlement Agreement.

4. The above identified parties agree that the Court in the above referenced action shall retain jurisdiction for the purpose of enforcement of this Settlement Agreement and shall enter a Judgment, in the event of default, as provided hereinafter.

5. Subject to compliance with the terms of this Settlement Agreement, the Plaintiff, with the advice of independent counsel and his guardian ad litem, hereby expressly releases defendants from any and all claims, counterclaims, actions and all other theories of liability asserted or which could have been asserted now or in the future in the above referenced action and Defendants release the Plaintiff from any and all claims asserted or which could have been asserted in the above referenced action.

6. Plaintiff is represented by counsel of his choice, has reviewed this Agreement with his counsel and agrees to same. The matter Michael D. Collins, a minor, by and through his parent and guardian ad litem, Therese Collins v. Egg Harbor Township Board of Education, Ralph Ridolfino, Kimberly A. Gruccio, Karen Yacovelli, Sharon Beloff and Ann Forshaw, (EDUOS 04695-02S) is "**SETTLED WITH PREJUDICE**." Thus, the parents of M.C. waive any and all claims, actions or allegations raised or that could have been raised whether known or unknown concerning their child M.C., M.C.'s education, his attendance, interaction, enrollment with the District or in any manner referring or relating to the District, its personnel or the Egg Harbor Township Board of Education.

IN WITNESS WHEREOF, the parties hereto have set their hands and seals.

WITNESS:

7-18-03

DATED: _____

BY: _____
Michael D. Collins

WITNESS:

DATED: 7-15-03

BY: _____
Therese Collins

ATTEST:

, Board Secretary

DATED: 8/18/03

Egg Harbor Township Board of Education

BY: _____
Dr. Phillip W. Heery, Superintendent

OAL DKT. NO. EDU 4695-02
AGENCY DKT. NO. 167-6/02

T.C., on behalf of minor child, M.D.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EGG HARBOR, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Settlement Agreement and Stipulation of Dismissal, and Initial Decision issued by the Office of Administrative Law (OAL), pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the Settlement Agreement, as clarified below, as the final decision in this matter. Initially, the Commissioner observes that Item #1 of the settlement sets forth terms that were to be effectuated prior to approval of the settlement terms by the Commissioner pursuant to *N.J.A.C.* 1:1-19.1. The Administrative Law Judge and the parties are cautioned against effectuating terms of a settlement agreement in controverted matters that have been duly transmitted to the OAL prior to its submission to, and approval by, the Commissioner.

Secondly, with respect to Item #2 of the settlement, the Commissioner points out that, although the parties may agree between themselves to keep the specific terms of a settlement agreement confidential, in the absence of a motion to seal the record for good cause shown, Commissioner's decisions and the underlying documents are a matter of public record.

Finally, turning to Item #4 of the settlement wherein "the parties agree that the Court***shall retain jurisdiction for the purpose of enforcement of this Settlement Agreement***," the Commissioner clarifies that the OAL is not a "Court" within the judicial branch, but rather an executive branch agency charged with the responsibility, *inter alia*, of conducting *administrative hearings* of controverted matters for the state agencies. Litigants do not apply directly to the OAL for a hearing, but, rather, state agencies transmit contested cases to the OAL where the OAL conducts hearings, prepares initial decisions and transmits the matters back to the agencies for review. Upon the filing of an initial decision with the transmitting agency, such as has occurred herein, pursuant to *N.J.A.C.* 1:1-18.1(g), the OAL relinquishes jurisdiction over the case. Moreover, as a general rule, applications for enforcement of Commissioner's decisions, including approved settlement agreements, are taken to Superior Court.[1] In that the OAL cannot be bound by the provision agreed to by the parties in Item #4 of the within Settlement Agreement, Item #4 is, therefore, a nullity.

Accordingly, the Settlement Agreement, as clarified, is adopted as the final decision and the matter is dismissed, with prejudice, subject to compliance with the terms of the settlement.[2]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 10|14|03
Date of Mailing: 10|14|03

[1] An exception would be in matters where there is a school law issue which requires the Commissioner's education expertise in the examination of factual circumstances.

[2]Although neither the file nor the Settlement Agreement contains a copy of the Board's resolution approving the proposed settlement and designating the Superintendent of Schools to sign the agreement on its behalf, the Stipulation of Dismissal, which incorporates the Settlement Agreement, is signed by the Board's attorney, who is the Board's authorized representative in litigation.

503-03

503-03

COMMISSIONER OF EDUCATION DECISION SYNOPSIS

George Osborne v. Board of Education of the Township of Lakewood, Ocean County; Meir Grunhut, Board President; Norman Bellinger, Board Vice President; Chet Galdo, Harvey Kranz, Sara Lichtenstein, Irene Miccio, Abraham Ostreicher, Neal Price and Leonard Thomas, Members of the Board; and Dr. Ernest J. Cannava, Superintendent of the Lakewood School District

Petitioning taxpayer sought ruling that the Lakewood Board's busing policy, which provides for courtesy busing services for public and nonpublic school students, was unlawfully discriminatory and designed to segregate students based upon race, religion and gender. Respondents asserted that the Board's busing policy and its implementation was neutral with respect to race, religion and gender.

Initially, the ALJ concluded that petitioner, who was a voting Board member in 1995 when the busing policy was revised, filed his petition more than seven years after he was on notice of the existence of the policy and how it was being implemented. Thus, the petition was untimely filed and the ALJ concluded that the 90-day limitation should not be waived. The ALJ also concluded that laches and estoppel precluded petitioner's claims and that petitioner, who was neither a student nor the parent of a student in the District, did not have standing to challenge the Board's busing policy under the New Jersey Constitution and State Law. Moreover, the ALJ determined that petitioner failed to state a claim upon which relief could be granted; he failed to meet his burden of proving discrimination. The ALJ found that the Board chose to provide transportation to all children within its school district within reasonable limitations as to distance. Petitioner as taxpayer did not have standing to pursue any of his claims under the U.S. Constitution or Federal Laws with the exception that as taxpayer he brought a claim which attacked government expenditures on First Amendment Establishment Clause grounds. Petitioner, however, could not show that the Board's application of its busing policy violated the Establishment Clause of the First Amendment of the U.S. Constitution since the Board offered busing on the same terms to all school children in its District without regard to religion. Respondents' motion for summary decision was granted.

Following careful and independent review of the record, the Initial Decision and the parties' exceptions, the Commissioner modified the findings and determination in the Initial Decision. Initially, the Commissioner declined to apply the filing limitation of the 90-day period set forth at *N.J.A.C.* 6A:3-1.3(d) or to apply laches since respondents did not raise untimely filing or laches as affirmative defenses in this matter and, if the allegations of discrimination and violations of Federal and State laws were true, they would constitute a continuing violation. The Commissioner agreed that petitioner did not establish that he had standing to pursue his claims under the U.S. Constitution or Federal laws except for petitioner's claim that Lakewood's busing policy, as applied, violated the Establishment Clause of the First Amendment of the Constitution. The Commissioner also found that petitioner had standing with respect to his New Jersey Constitutional claims; petitioner presented convincing arguments that, as a resident and taxpayer, he was directly affected by the District's courtesy busing policy. Notwithstanding the finding that petitioner had standing to pursue his claim under the Establishment Clause of the First Amendment to the Constitution and his New Jersey Constitutional claims, the Commissioner found that petitioner did not meet his burden of presenting specific facts to demonstrate that the busing policy was applied in a discriminatory manner nor did he allege that the courtesy busing was not provided to all students residing in the District, without regard to whether they attend public, private or parochial schools. Thus, petitioner failed to demonstrate that Lakewood's Busing Policy No. 3541.31 and its implementation were contrary to law. Summary decision was, therefore, granted to respondents and the petition was dismissed.

August 26, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

GRANTING RESPONDENT'S

MOTION FOR SUMMARY

DECISION

OAL DKT. NO. EDU 6438-02

AGENCY DKT. NO. 241-8/02

GEORGE S. OSBORNE,

Petitioner,

v.

TOWNSHIP OF LAKEWOOD BOARD OF EDUCATION, OCEAN COUNTY, MEIR GRUNHUT, PRESIDENT, NORMAN BELLINGER, VICE PRESIDENT, CHET GALDO, MEMBER, HARVEY KRANZ, MEMBER, SARA LICHTENSTEIN, MEMBER, IRENE MICCIO, MEMBER, ABRAHAM OSTREICHER, MEMBER, NEAL PRICE, MEMBER, AND LEONARD THOMAS, MEMBER, THE LAKEWOOD SCHOOL DISTRICT AND DR. ERNEST J. CANNAVA, SUPERINTENDENT OF THE LAKEWOOD SCHOOL DISTRICT,

Respondents.

George S. Osborne, petitioner, *pro se*

Michael I. Inzelbuch, Esq., for respondents

Mordechai Biser, Esq., Associate General Counsel, admitted *pro hac vice*, appearing for Lakewood School District, on Amicus curiae brief
Attorney of record: **Ronald D. Coleman**, Esq.

Record Closed: May 12, 2003 Decided: May 16, 2003

BEFORE **STEVEN C. REBACK**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In or about late August of 2002, the petitioner, George S. Osborne, requested that the Commissioner of Education issue a declaratory ruling and answer filed in the above-entitled matter before it arrived at the Office of Administrative Law. Upon receiving Mr. Osborne's request and the response of respondents (hereinafter "Lakewood"), which in my view consisted of a motion for summary decision, the Office of the Commissioner, on or about September 5, 2002, transmitted the matter to the Office of Administrative Law as a contested case, pursuant to *N.J.S.A.* 52: 14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

In his transmission letter of September 5, the Commissioner indicates the following:

> Upon review of the petition for declaratory ruling and answer filed in the matter entitled *George S. Osborne v. Board of Education of the Township of Lakewood, Ocean County*, wherein petitioner challenges the bus routes established by the board, I decline to consider the matter as one for declaratory judgment, pursuant to my authority under *N.J.A.C.* 6A:3-2.1(a). However, *to the extent petitioner raises issues that are within my jurisdiction*, this matter will be considered a contested case, pursuant to *N.J.A.C.* 6A:3-1.3 *et seq.* and is being transmitted to the Office of Administrative Law (OAL) for further proceedings.
>
> [Emphasis in original; citations omitted.]

On December 23, 2002, an in-person prehearing conference was conducted on the record (at the request of Mr. Inzelbuch) at the Office of Administrative Law in Mercerville, New Jersey. On that same date, I issued a three-page letter memorializing what occurred during the course of the conference. The audiotape is in the file. During the course of the conversation (and referred to in my letter of December 23), Lakewood had brought a motion for summary decision, and it appeared that part of that motion was addressed to the question of what issue or issues factually or legally are justicable before this forum. Because of the discussions, I advised Mr. Osborne that he could supplement his response to the brief (originally filed with the Commissioner)

opposing summary decision, and I also gave Lakewood the opportunity to reply, if it felt appropriate and within a reasonable time. Much of the discussion then centered upon the setting of a discovery schedule, which in fact was done and was memorialized in my letter. So as to maintain management over the proceedings, I scheduled another conference to be conducted in early April 2003 in person at OAL, Mercerville, New Jersey, commencing at 10:00 a.m. I concluded the letter by indicating:

> Finally, it should be noted that I made an effort to explain to Mr. Osborne, an articulate and intelligent non-lawyer, that as a *pro se* litigant, the Administrative Law Judge has a special obligation to assist him in proceeding with this matter, and I advised him that, should he have questions, to telephone my chambers and that I would do my best to answer them – *ex parte* if I can – or if need be, I would convene a telephone conference in which Mr. Inzelbuch would also participate.

On December 27, 2002, some four days after the in-person conference was conducted, my office received an informal letter motion submitted by Mr. Osborne asking that I be disqualified from hearing the matter. On January 10, 2003, my chambers issued a four-page ruling and order which denied Mr. Osborne's motion. I end the letter by advising that should Mr. Osborne choose to seek interlocutory review of the denial of his motion for my disqualification, that review should be taken to the Director of the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-14.10. Pursuant to that regulation, it is provided at subdivision B that any interlocutory review request must be made not later than five working days from the receipt of the written order or oral ruling, whichever is first rendered.

By letter to counsel and Mr. Osborne of January 24, 2003, I advised that the Acting Director of the Office of Administrative Law had not received any request for interlocutory review in respect to the denial of Mr. Osborne's motion for my disqualification. Since the five-day period had lapsed under regulation, I advised the parties that as of the issuance of this letter (the one issued on January 24), the matter shall proceed substantatively. I then set forth a motion schedule in which the parties were given the opportunity to respond and supplement their earlier submissions.

During this early stage of these proceedings, several other issues presented themselves. I had received a letter from a Reverend Jimmy Wilcox in early November 2002 in which he request the opportunity to appear as a nonlawyer representative on behalf of George S. Osborne in these proceedings. In my letter to Reverend Wilcox, I noted that since the matter was not a special education case, it was not governed by the special rules providing for nonlawyer representation, as set forth at *N.J.A.C.* 1:6A-5.1. Thus, the only legal basis under which a nonlawyer individual may appear as a representative for another in matters before OAL are set forth at *N.J.A.C.* 1:6A-5.4(a). Since none of the requirements were met by Mr. Wilcox, I indicated to him that "I must unfortunately deny your request to appear on behalf of Mr. Osborne." I then sought to reassure him that Mr. Osborne would not be at sea when I indicated in closing the letter, "As you may or may not know, when a *pro se* litigant appears in any proceeding, the judge has an affirmative obligation to assist him as well as he can, but not, of course, act as his attorney." And I also pointed out that in addition to my finding Mr. Osborne appeared fully competent to represent himself as a layperson; he also, of course, retained the opportunity to have counsel represent him.

On December 10, 2002, my office received a letter from a Mordechai Biser, Esq., dated December 4, 2002. Mr. Biser is Associate General Counsel to Agudath Israel of America, a national grassroots Orthodox Jewish organization with chapters throughout the United States. Mr. Biser requested the opportunity to submit an *amicus curiae* presentation in the case. By letter of December 19, 2002, addressed to Messrs. Inzelbuch, Osborne and Biser, I issued a ruling of three pages which granted Mr. Biser's request to submit an *amicus curiae* brief in the matter. I imposed the following qualifications on such submission:

> The *amicus curiae* brief could not in any way provide me with recommended findings of fact, but may be limited exclusively to legal argument. Mr. Biser's involvement in the case would be exclusively the submission of a brief. He was neither going to be treated as an intervenor nor a participant under *N.J.A.C.* 1:1-16.1 through 1:1-16.6. He was not permitted to sit at the counsel table or to engage in any *in camera* conversation throughout these proceedings.

I noted that he was welcome to attend the proceedings, as is anyone within a public forum. I also noted in the letter that after reviewing the New Jersey Lawyer's Diary, I came to the conclusion

Because the parties never actually ceased submitting further correspondence in the matter, I determined on my own initiative that the record in these proceedings would closed on May 12, 2003.

THE FACTS

Some of what I shall set forth has already been described in general fashion. Nevertheless, it is appropriate for purposes of addressing Lakewood's motion. This matter originated on or about July 30, 2002, with the filing of a Verified Petition by George S. Osborne, in the capacity of a taxpayer in the respondent school district, seeking declaratory judgment with the Commissioner of Education. The petition is concerned with how public funds are distributed by the respondent, Lakewood Board of Education, with respect to busing arrangements, in particular the courtesy busing of non-public school students. Osborne has alleged that Lakewood's financing of such busing arrangements is unlawfully discriminatory and designed to segregate students based upon race, religion and gender and in violation of the United States Constitution, particularly the Equal Protection and Due Process Clauses of the 14th Amendment and the Establishment Clause of the 1st Amendment, Federal Statutes, the New Jersey Constitution and the New Jersey Law Against Discrimination ("LAD").[1] Lakewood filed an answer on or about August 20, 2002, which denied the allegations of unconstitutional busing because, respondent asserted, it had implemented a busing policy that was neutral with respect to race, religion and gender, and set forth a variety of legitimate factors underlying the application of the policy.

On September 5, 2002, the Commissioner of Education issued a letter to both Osborne and Lakewood, in which he declined to consider the matter as one for declaratory judgment, but on or about September 12, 2002, transmitted the case to the Office of Administrative Law as a contested case for determination of the issues that are within the Commissioner's jurisdiction. Lakewood filed their current motion for summary decision on January 23, 2003. Osborne filed his response in opposition to the motion on February 13, 2003.

[1] It is not clear from his verified petition whether the petitioner asserts other constitutional claims (i.e. the petitioner mentions infringement on the right to travel in his motion papers and counsel for the respondent briefly addresses the petitioner's lack of standing), however these will be disposed of in the same fashion as the other federal constitutional claims, with the exception of his claim under the establishment clause.

On June 25, 1975, Lakewood adopted Local Policy 3541.31, which was revised on June 12, 1995, which provides that all school children are entitled to transportation between their homes and schools subject to clearly defined riding limits.[2] The petitioner served as a member of the respondent, Lakewood Board of Education, from 1994 to 1997. This local school district policy has allowed many non-public school students to receive free busing to their school of choice. A large segment of these non-public school students attend Orthodox Jewish parochial schools. Many of those schools either have boys only or girls only in attendance. The bus routes that go to and from the boys only schools are ridden by boys only and the bus routes that go to and from the girls only schools are occupied by girls only.

DISCUSSION

The rules governing practice at the Office of Administrative Law provide that a motion for summary decision may be granted if there is no genuine issue of material fact and the moving party is entitled to prevail as a matter of law. The determination should be based on the papers presented as well as any affidavits, which may have been filed with the application. In order for the adverse, i.e., the non-moving party, to prevail in such an application, responding affidavits must be submitted showing that there is indeed a genuine issue of fact, which can only be determined in an evidentiary proceeding. *N.J.A.C.* 1:1-12.5(b).

The courts have further elaborated upon the issue of granting summary decision. The court, in *Brill v. Guardian Life Ins Co of America*, 142 *N.J.* 520, 541 (1995), encouraged trial judges to evaluate and analyze competent evidential materials presented with the application and to consider whether when they are viewed in the light most favorable to the non-moving they are sufficient to permit resolution of the alleged dispute in favor of the non- moving party. *Id.* at 540. Moreover, once the moving party has presented evidence in support of its application, the burden is on the non-moving party to set forth specific facts showing that there is a genuine issue for trial. *Id.* at 529.

[2] "Students living in the Lakewood school district shall be entitled to transportation between their homes and schools in accordance with the following riding limits as measured portal to portal: kindergarten through grade 6, a distance of one-mile or more; grades 7 through 8, one and one-half miles or more; and grades 9 through 12, two miles or more." Lakewood Bd. of Ed. Local Policy 3541.31.

The verified petition was not timely filed pursuant to the 90-day rule at* N.J.A.C. *6A:3-1.3(d)

The threshold issue that has emerged in this matter deals with whether Osborne's claim was timely filed pursuant to *N.J.A.C.* 6A:3-1.3(d).[3] *N.J.A.C.* 6A:3-1.3(d) governs the filing of an action arising under the school laws and states in part that:

> The petitioner shall file a petition no later that the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing.
>
> [*N.J.A.C.* 6A:3-1.3(d).]

In *Kaprow v. Bd. of Ed. of Berkeley Township*, 131 *N.J.* 572 (1993), the New Jersey Supreme Court held that the Commissioner and the State Board of Education have the authority to establish a time limitation for the resolution of disputes arising under the school laws and addressed the public policy reasons behind the 90-day rule:

> The limitation period provides a measure of repose, an essential element in the proper and efficient administration of the school laws. It stabilizes the relationship between the teachers and the administration. ... The limitation period gives school districts the security of knowing that administrative decisions regarding the operation of the school cannot be challenged after ninety days. ... *N.J.A.C.* 6:24-1.2(c) represents a fair and reasonably-necessary requirement for the proper and efficient resolution of disputes under the school laws."
>
> [*Id.* at 582.]

The public policy, which favors providing school districts with a measure of repose must be weighed against the right of the petitioner, to be notified that the school board has taken a position adverse to it:

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[3] N.J.A.C. 6:24-1.2(c) was recodified as N.J.A.C. 6A:3-1.3(d), effective April 3, 2000. The language of N.J.A.C. 6A:3-1.3(d), except for an addition not relevant here, is identical to N.J.A.C. 6:24-1.2(c). Therefore cases interpreting N.J.A.C. 6:24-1.2(c) will apply to N.J.A.C. 6A:3-1.3(d). These regulations are used interchangeably throughout this section of the memorandum.

> Adequate notice must be sufficient to inform an individual of some fact that he or she has a right to know and that the communicating party has a duty to communicate. Moreover, adequate notice under the regulation must be sufficient to further the purpose of the ninety-day limitations period. ... [T]he notice requirement should effectuate concerns for individual justice by not triggering the limitations period until [the petitioner has been alerted to the existence of facts that would be adverse to it]. At the same time, it should further considerations of repose by establishing an objective event to trigger the limitations period in order "to enable the proper and efficient administration of the affairs of government." *Borough of Park Ridge v. Salimone*, 21 *N.J.* 28, 48 (1956).
>
> [*Id.* at 587.]

Adequate notice under *N.J.A.C.* 6A:3-1.3(d) should accommodate the dual purposes of the limitations period:

> [T]he first is to stimulate litigants to pursue a right of action within a reasonable time so that the opposing party may have a fair opportunity to defend, thus preventing the litigation of stale claims. ... The second purpose is "'to penalize dilatoriness and serve as a measure of repose'" by giving security and stability to human affairs.
>
> [*Kaprow*, *supra*, 131 *N.J.* at 587 (internal citations omitted).]

In *Kaprow*, a secretary of the respondent board of education notified the petitioner that someone else was given her job. The Court held that such informal notice satisfied the "notice of a final order, ruling or other action" by the respondent, as required by *N.J.A.C.* 6:24-1.2(c). *Id.* at 588.

The ninety-day requirement has been strictly followed and applied almost without exception. Specifically, in *Dreher v. Jersey City Bd. of Ed.*, OAL Dkt. EDU 2777-87 (December 18, 1987), *adopted* Comm'r. (February 2, 1988), *aff'd.* State Bd. of Ed. (July 8, 1988), a petition filed just two days after the ninety-day period was dismissed. *Ibid.* Other cases have also strictly applied the ninety-day rule. In *Eisenburg v. Bd. of Ed. of the Borough of Fort Lee*, EDU 9451-01, Final Decision, (October 3, 2002)<http://lawlibrary.Rutgers.edu/oal/search.html>, the Commissioner held that the petitioners informal appearance before the respondent board of

Gladden v. Public Employees' Retirement Sys., 171 *N.J. Super.* 363, 370-71 (App. Div. 1979); *Allstate Ins. Co. v. Howard Sav. Institution*, 127 *N.J. Super.* 479, 489 (Ch. Div. 1974).

The State Supreme Court addressed the doctrine of laches in an education context in *Lavin v. Bd. of Ed. of the City of Hackensack*, 90 *N.J.* 145 (1982). *Lavin* involved a petitioner's claim for employment credit as a teacher based on her prior military service. Because she asserted her claim nine years after her employment began, the Board of Education argued that laches barred her claim. The Supreme Court agreed and quoted the following from *Atlantic City v. Civil Serv. Comm'n.*, 3 *N.J. Super.* 57, 60 (App. Div. 1949):

> Laches in a general sense is the neglect, for an unreasonable and unexplained length of time, under circumstances permitting diligence, to do what in law should have been done. More specifically, it is inexcusable delay in asserting a right.
>
> 'Long lapse of time, if unexplained, may create or justify a presumption against the existence or validity of plaintiff's right and in favor of the adverse right of defendant; or a presumption that if, plaintiff was ever possessed of a right, it has been abandoned or waived, or has been in some manner satisfied; or that plaintiff has assented to, or acquiesced in, the adverse right of defendant; or a presumption that the evidence of the transaction in issue has been lost or become obscured, or that conditions have changed since the right accrued; or a presumption that the adverse party would be prejudiced by the enforcement of plaintiff's claim.'
>
> [*Lavin*, *supra*, 90 *N.J.* at 151-52 (citations omitted)]

See also Windsor Card Shops, Inc. v. Hallmark Cards, Inc., 957 *F. Supp.* 562, 568 (D.N.J. 1997)(also citing *Atlantic City*, *supra*, and stating that laches, "similar to a statute of limitations, bars claims that were neglected for an unreasonable and unexplained length of time"). A court should consider and weigh the length of the delay, reasons for the delay, and changing conditions of either or both parties. *Id.* at 152. The length of the delay alone or combined with the other elements may result in laches. *Ibid.* "It is because the central issue is whether it is inequitable to permit the claim to be enforced that generally the change in conditions or relations of the parties coupled with the passage of time becomes the primary determinant." *Ibid.*

In the matter *sub judice*, the lengthy passage of time in conjunction with the petitioner's sophistication in such matters, justify a finding barring the petitioner from claiming that the local policy or that its application is improper. It is clear that from the petitioner's membership on the respondent board of education and from the fact that this policy was addressed during his term, that nothing short of willful blindness on the part of the petitioner could account for any lack of knowledge about the policy and its application. It is also clear that over seven years had passed from the date that the respondent school board, along with the petitioner as a member, addressed the policy and revised it. Knowledge and delay are prerequisites to the application of the doctrine of laches. *C.R. v. J.G.*, 306 *N.J. Super.* 214, 239 (Ch. Div. 1997). The petitioner seeks to question a policy that was implemented over twenty-three years ago (or, at the very least, over seven years since the revision) and that policy's application. This policy appears to have been consistently applied over that time period. The petitioner knew, at the very latest, in June 1995, of the existence of the policy and how it was applied in the school district. Yet he waited until July 30, 2002, to file a verified petition challenging the policy and its application. Osborne provides no explanation as to why he chose to file recently rather than seven or twenty-three years ago. It would be unfair to allow him at this point to pursue such claims after such an unreasonable and unexplained delay in filing the petition. Therefore, I **CONCLUDE** that laches precludes petitioner's claims.

In so far as the petitioner facially challenges the constitutionality of Lakewood's busing policy for students, the Commissioner and OAL lack the jurisdiction to entertain the constitutional arguments; however, jurisdiction exists to the extent that the petitioner's constitutional claims can be considered challenges to the constitutionality to Lakewood's policy as applied

"Normally in administrative proceedings, petitioners can attack the constitutionality of rules as applied, but they may not mount facial attacks." 37 *New Jersey Practice, Administrative Law and Practice*, § 3.8, at 107 (Steven L. Lefelt, Anthony Miragliotta & Patricia Prunty) (2d ed. 2000). "Pure legal questions are exclusively reserved for the courts. Accordingly, an agency has no power to determine constitutionality of a statute on its face." *Ibid.* The Commissioner of Education and ALJs do not have the authority to strike down statutes, rules, etc. *Ibid.* Thus, there is no jurisdiction for the ALJ to consider a facial constitutional challenge. However, "[i]n as applied challenges, the question involves whether an agency is applying its rule in such a way as to violate an individual's constitutional rights. Usually challenges to rules for being

unconstitutionally applied raise the need for both fact finding and agency expertise." *Ibid.* To the extent that the petitioner claims that Lakewood's Policy 3541.31 is unconstitutional, the Commissioner and ALJ do not have jurisdiction. In so far that the petitioner's constitutional challenges do not constitute a facial challenge and claim that Policy 3541.31 has been unconstitutionally applied, the Commissioner and ALJ have jurisdiction to consider these claims.

The petitioner has no standing to pursue any of his claims under the U.S. Constitution or Federal Laws, with the exception of his claims under the Establishment Clause of the 1st Amendment of the U.S. Constitution

The issue of standing must be addressed even if the parties have not raised it. *U.S. v. Hayes*, 515 *U.S.* 737, 742, 115 *S.Ct.* 2431, 2435, 132 *L.Ed.*2d 635 (1995).

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact"--an invasion of a legally protected interest which is (a) concrete and particularized, ... and (b) "actual or imminent, not 'conjectural' or 'hypothetical,' ... Second, there must be a causal connection between the injury and the conduct complained of-- the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." ... Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."
>
> [*Lujan v. Defenders of Wildlife*, 504 *U.S.* 555, 560-61, 112 *S.Ct.* 2130, 2136, 119 *L.Ed.*2d 351 (1992)(Internal citations omitted).]

The petitioner, who seeks jurisdiction, bears the burden of establishing these elements. *Ibid.* "At the pleading stage, general factual allegations of injury resulting from the [respondent's] conduct may suffice..." *Lujan*, 504 *U.S.* at 561, 112 *S.Ct.* at 2137. "In response to a summary judgment motion, however, the [petitioner] can no longer rest on ... 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts.' ... *Ibid.*

Generally people have no standing as "citizens" or "taxpayers" to claim that government expenditures violate federal law or the U.S. Constitution. *Lujan*, 504 *U.S.* at 573-76, 112 *S.Ct.* at

2143-44. However, there is a clear exception to this general rule, where such standing exists when a taxpayer brings a claim, which attacks government expenditures on First Amendment Establishment Clause grounds. *See Flast v. Cohen*, 392 *U.S.* 83, 88 *S.Ct.* 1942, 20 *L.Ed.*2d 947 (1968). The petitioner in this matter asserts all of his claims as a taxpayer; however in this status he does not have standing to challenge Lakewood's busing policy under any of his federal claims, with the exception of the claim that the policy as applied violates the Establishment Clause of the First Amendment of the U.S. Constitution.

Osborne does not have standing to pursue his claims against Lakewood under state law. Furthermore, the petitioner fails to state a claim upon which relief can be granted with respect to his New Jersey Constitutional claims and LAD claim.

Standing is a jurisdictional concept that requires that a litigant "have sufficient interest in the subject of the litigation so that a genuine clash between opposing viewpoints will be presented. *U.K. and G.K., o/b/o Minor D.K. v. Bd. of Ed. of the City of Clifton*, 82 *N.J.A.R.*2d (EDU) 71, 73 (*citing Kenwood v. Montclair Bd. of Ed.*, OAL Dkt. EDU 8858-81 (April 23, 1982), *adopted*, Comm'r. (June 23, 1982), *aff'd.* St. Bd. (September 8, 1982)). New Jersey courts have taken a very liberal approach toward standing, in order to allow easy access to the legal system. *Id.* at 73 (*citing Crescent Park Tenants Ass'n. v. Realty Equities Corp.*, 58 *N.J.* 98 (1971)). The approach to standing has been even more generous within the State administrative system, where even those with a mere "tangential interest" have been afforded the opportunity to challenge administrative decisions. *Id.* at 73 (*citing* 37 *New Jersey Practice, Administrative Law and Practice*, § 7.4, at 360-62 (Steven L. Lefelt, Anthony Miragliotta & Patricia Prunty) (2d ed. 2000)).

However, there are limitations to this rule. For instance, "mere intermeddlers" or "mere interlopers or strangers to the dispute" do not have standing. *Ibid.* Hence, generally there are two prerequisites to standing. "First, petitioner must demonstrate a sufficient stake in the outcome of the proceeding; and second, his position must be truly adverse to the opposing party." *Id.* at 73 (*citing Home Builders League of South Jersey, Inc. v. Berlin Twp.*, 81 *N.J.* 127, 132 (1979)).

Although taxpayer status has been recognized to confer standing upon plaintiffs in some cases, the Commissioner "has consistently refused to hear cases brought by individuals who would not be affected by the outcome in a direct and meaningful way." *D.K.*, *supra*, 93 *N.J.A.R.*2d (EDU) at 73 (*citing Kenwood*, *supra*, OAL Dkt. EDU 8858-81 (concerned citizen seeking to rewrite school attendance policy); *Lobis v. Maple Shade Bd. of Ed.*, OAL Dkt. EDU 3630-79 (June 11, 1980), *adopted* Comm'r. (August 11, 1980), *aff'd.* State Bd. (November 5, 1980)(parent whose son no longer attended school in the district complaining about the quality of education received by remaining students); *Delaney v. Woodbridge Bd. of Ed.*, OAL Dkt. EDU 382-78 (December 12, 1979), *adopted* Comm'r. (June 11, 1980)(Taxpayer questioning propriety of filling job vacancies); *Ricardelli v. Newark Bd. of Ed.*, OAL Dkt. EDU 1894-79 (September 26, 1979), *adopted* Comm'r. (November 16, 1979)(taxpayer challenging legality of school board's decision to transfer personnel); *accord G.G. v. New Providence Bd. of Ed.*, 1975 *S.L.D.* 502 (parent of high school graduate challenging attendance policy)).

One example where standing was held to be lacking is *D.K.*, *supra*. The matter was brought by the parents of D.K., a student who was injured by another student while at school. The parents appealed the disciplinary actions taken by the Board's against the offending student. The issue before the OAL was whether the parents had standing to challenge the appropriateness of disciplinary actions taken against another student. The ALJ held that the parents lacked standing because, among other reasons, they had not sought an additional benefit for themselves or their child and so their interests would not be "substantially, specifically and directly affected" by the outcome of the matter. *D.K.*, *supra*, 93 *N.J.A.R.*2d (EDU) at 73.

In the instant matter Osborne contends that his status as a resident taxpayer alone provides him with standing to pursue his claims. However, he is not affected in a direct and meaningful way by Lakewood's decision to adopt and implement courtesy busing to its students. He is neither a student nor the parent of student in the school district. Therefore, I **CONCLUDE** Osborne does not have standing to challenge Lakewood's busing policy under the New Jersey Constitution and state law.

The New Jersey Law Against Discrimination ("LAD") and Article I, § 1 and § 5 of the New Jersey Constitution extend protections to individuals on the basis of several enumerated categories. To state a claim under the LAD or these constitutional provisions, a petitioner must

claim discrimination on the basis of one of these protected classes. *J.P. v. Bd. of Ed. of South Brunswick*, (EDU 4969-01), Initial Decision, (December 17, 2002) <http://lawlibrary.Rutgers.edu/oal/search.html>. The petitioner alleges discrimination on the basis of race, gender and religion under the foregoing provisions. However, even with the presence of such allegations, "[m]ere inequality or difference in treatment does not suffice to support a charge of unconstitutional discrimination." *Kenny v. Byrne*, 144 *N.J. Super.* 243, 257 (App. Div. 1976), *affirmed* 75 *N.J.* 458 (1978). A "classification must be upheld under any reasonable set of facts unless there is a showing of invidious discrimination." *Ibid.* There is the presumption of constitutionality and Petitioners have "the burden of showing that it is arbitrary and without reasonable basis to support it." *Ibid.* Thus, even though the petitioner claims discrimination on the basis of three protected classifications, he has not met his burden. The petitioner does no more than present a variety of statistics indicating the racial and religious percentages in the population of the school district and the public schools. Even if Osborne's statistics are taken as true and accurate, they along with everything else in the record set forth no evidence of such invidious discrimination. Thus, I **CONCLUDE** Osborne fails to state a claim upon which relief can be granted under the LAD, Article I, § 1 of the New Jersey Constitution[5], or Article I, § 5 of the New Jersey Constitution[6].

The petitioner cannot show that the respondent's application of its busing policy violates the Establishment Clause of the 1st Amendment of the U.S. Constitution.

The Establishment Clause of the 1st Amendment of the U.S. Constitution bans any "law respecting an establishment of religion." In *Flast v. Cohen*, 392 *U.S.* 83, 88 *S.Ct.* 1942, 20 *L.Ed.*2d 947 (1968), the U.S. Supreme Court held that a taxpayer has standing to challenge a statute or rule under the Establishment Clause. However, the Court has routinely allowed governments to utilize tax dollars for aid programs as long as such provisions have a secular

[5] "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness." Article I, § 1 of the New Jersey Constitution. "It has long been required that Article I, Paragraph 1 of the New Jersey Constitution requires, just as the Fourteenth Amendment to the United States Constitution, equal protection." H.A.B. as guardian ad litem for S.T.B. v. Manalapan-Englishtown Regional School District, 92 N.J.A.R.2d 640, 642.

[6] "No person shall be denied the enjoyment of any civil or military right, nor shall be discriminated against in the exercise of any civil military right, nor shall be segregated in the militia or in the public schools, because of religious principals, race, color, ancestry or national origin." Article I, § 5 of the New Jersey Constitution.

purpose and do not have the primary effect of advancing or inhibiting religion. In *Lemon v. Kurtzman*, 403 *U.S.* 603, 91 *S.Ct.* 2105, 29 *L.Ed.*2d 745 (1971), the Court "considered whether a statute (1) has a secular purpose, (2) has a primary effect of advancing or inhibiting religion, or (3) creates an excessive entanglement between government and religion." *Mitchell v. Helms*, 530 *U.S.* 793, 807, 120 *S.Ct.* 2530, 2540, 147 *L.Ed.*2d 660 (2000). But, in *Agostini v. Felton*, 521 *U.S.* 203, 117 *S.Ct.* 1997, 138 *L.Ed.*2d 391 (1997), the Court "modified *Lemon* for purposes of evaluating aid to school and examined only the first and second factors... [The Court] recast *Lemon*'s entanglement inquiry as simply one criterion relevant to determining a statute's effect [] and also acknowledged that [the] cases had pared somewhat the factors that could justify a finding of excessive entanglement." *Mitchell*, 521 *U.S.* at 807-08, 117 *S.Ct.* at 2540.

"[T]he question whether governmental aid to religious schools results in governmental indoctrination is ultimately a question whether any religious indoctrination that occurs in those schools could be reasonably attributed to governmental action." *Mitchell*, 521 *U.S.* at 809, 117 *S.Ct.* at 2541. Many cases have determined that the use of governmental aid for religious indoctrination could not be attributed to the state and therefore not a violation of the establishment clause. *See Mitchell*, *supra* (upholding the lending of educational materials and equipment to public and private, including parochial, schools); *Everson v. Bd. of Ed. of Ewing Twp.*, 330 *U.S.* 1, 67 *S.Ct.* 504, 91 *L.Ed.* 711 (1947)(upholding a New Jersey statute and its application, which mandated the provision of transportation to public and private, including parochial, school children); *Agostini*, *supra* (allowing public school teachers to provide remedial education to disadvantaged children in parochial schools); *Zobrest v. Catalina Foothills School District*, 509 *U.S.* 1, 113 *S.Ct.* 2462, 125 *L.Ed.*2d 1 (1993)(finding that providing the services of an interpreter to a deaf child in a parochial school does not violate the establishment clause); *Witters v. Washington*, 474 *U.S.* 481, 106 *S.Ct.* 748, 88 *L.Ed.*2d 846 (1986)(held that First Amendment did not preclude state from extending assistance under state vocational rehabilitation assistance program to blind person who chose to study at Christian college to become pastor, missionary, or youth director); *Bd. of Ed. of Central School Dist. No. 1 v. Allen*, 392 *U.S.* 236, 88 *S.Ct.* 1923, 20 *L.Ed.*2d 1060 (1968)(held that statute authorizing the loan of textbooks to students attending parochial schools was not a 'law respecting an establishment of religion, or prohibiting the free exercise thereof' in conflict with First and Fourteenth Amendments to Federal Constitution).

"In distinguishing between indoctrination that is attributable to the State and indoctrination that is not, [the courts] have consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion." *Mitchell*, 530 *U.S.* at 809, 120 *S.Ct.* at 2541.

> [I]f the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose, then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose. The government, in crafting such an aid program, has had to conclude that a given level of aid is necessary to further that purpose among secular recipients and has provided no more than that same level to religious recipients.
>
> [Mitchell, 530 *U.S.* at 810, 120 *S.Ct.* at 2541.]

To assure neutrality, courts will consider whether any aid goes to parochial schools because of the genuinely independent and private choices of a child's parents. *Ibid.* "[I]f numerous private choices, rather than the single choice of a government, determine the distribution of aid pursuant to neutral eligibility criteria, then a government cannot, or at least cannot easily, grant special favors that might lead to a religious establishment. Private choice also helps guarantee neutrality by mitigating the preference for pre-existing recipients that is arguably inherent in any governmental aid program, and that could lead to a program inadvertently favoring one religion or favoring religious private schools in general over nonreligious ones." *Ibid.* "[T]he proportion of aid benefiting students at religious schools pursuant to a neutral program involving private choices [is] irrelevant to the constitutional inquiry." *Mitchell*, 530 *U.S.* at 812, 120 *S.Ct.* at 2542 (citing *Agostini*, *supra*, 521 *U.S.* at 229, 117 *S.Ct.* at 2013 (refusing "to conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid")).

It is well settled that if a board of education chooses to provide transportation to all children within its school district within reasonable limitations as to distance there would be no violation of the Establishment Clause. The New Jersey Constitution permits the legislature to "... within reasonable limitations as to the distance to be prescribed, provide for the transportation of children within the ages of five and eighteen years inclusive to and from ***any***

school." New Jersey Constitution, Article VIII, § 4, ¶ 3 (emphasis added). Thus, the Legislature has made it mandatory for school districts to provide transportation for all students to and from their schools that meet certain distance requirements under *N.J.S.A.* 18A:39-1.[7] Also, pursuant to *N.J.S.A.* 18A:39-1.1, the Legislature has given the local boards of education the discretion as to whether or not to provide transportation for pupils not covered by *N.J.S.A.* 18A:39-1. *N.J.S.A.* 18A:39-1.1 states:

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[7] 18A:39-1. Transportation of pupils

Whenever in any district there are elementary school pupils who live more than two miles from their public school of attendance or secondary school pupils who live more than 2 1/2 miles from their public school of attendance, the district shall provide transportation to and from school for these pupils. When any school district provides any transportation for public school pupils to and from school pursuant to this section, transportation shall be supplied to school pupils residing in such school district in going to and from any remote school other than a public school, not operated for profit in whole or in part, located within the State not more than 20 miles from the residence of the pupil; except that if the district is located in a county of the third class with a population of not less than 80,000 and not more than 120,000 transportation shall be provided to a nonpublic school located outside the State not more than 20 miles from the residence of the pupil, if there is no appropriate nonpublic school within the State located closer to the residence of the pupil; provided the per pupil cost of the lowest bid received does not exceed $675 for the 1992-93 school year or the amount determined for subsequent years pursuant to section 2 of P.L.1981, c. 57 (C. 18A:39-1a), and if such bid shall exceed that cost then the parent, guardian or other person having legal custody of the pupil shall be eligible to receive $675 for the 1992-93 school year or the amount determined pursuant to section 2 of P.L.1981, c. 57 (C. 18A:39-1a) for subsequent years toward the cost of his transportation to a qualified school other than a public school, regardless of whether such transportation is along established public school routes. It shall be the obligation of the parent, guardian or other person having legal custody of the pupil attending a remote school, other than a public school, not operating for profit in whole or in part, to register said pupil with the office of the secretary of the board of education at the time and in the manner specified by rules and regulations of the State board in order to be eligible for the transportation provided by this section. If the registration of any such pupil is not completed by September 1 of the school year and if it is necessary for the board of education to enter into a contract establishing a new route in order to provide such transportation, then the board shall not be required to provide it, but in lieu thereof the parent, guardian or other person having legal custody of the pupil shall be eligible to receive $675 or the amount determined pursuant to section 2 of P.L.1981, c. 57 (18A:39-1a), or an amount computed by multiplying 1/180 times the number of school days remaining in the school year at the time of registration, times $675 for the 1992-93 school year or the amount determined pursuant to section 2 of P.L.1981, c. 57 (C. 18A:39-1a) for subsequent years, whichever is the smaller amount. Whenever any regional school district provides any transportation for pupils attending schools other than public schools pursuant to this section, said regional district shall assume responsibility for the transportation of all such pupils, and the cost of such transportation for pupils below the grade level for which the regional district was organized shall be prorated by the regional district among the constituent districts on a per pupil basis, after approval of such costs by the county superintendent. This section shall not require school districts to provide any transportation for pupils attending a school other than a public school, where the only transportation presently provided by said district is for school children transported pursuant to chapter 46 of Title 18A of the New Jersey Statutes or for pupils transported to a vocational, technical or other public school offering a specialized program. Any transportation to a school, other than a public school, shall be pursuant to the same rules and regulations promulgated by the State board as governs transportation to any public school.

The board of education may make rules and contracts for the pupil transportation provided pursuant to this section.

Nothing in this section shall be so construed as to prohibit a board of education from making contracts for the transportation of pupils to a school in an adjoining district, when such pupils are transferred to the district by order of the county superintendent, or when any pupils shall attend school in a district other than that in which they shall reside by virtue of an agreement made by the respective boards of education.

Nothing herein contained shall limit or diminish in any way any of the provisions for transportation for children pursuant to chapter 46 of this Title.

> In addition to the provision of transportation for pupils pursuant to N.J.S. 18A:39-1 and N.J.S. 18A:46-23, the board of education of any district may provide, by contract or otherwise, in accordance with law, and the rules and regulations of the State board, for the transportation of other pupils to and from school.
>
> Districts shall not receive State transportation aid pursuant to section 25 of P.L. 1996, c. 138 (C. 18A:7F-25) for the transportation of pupils pursuant to this section.
>
> [*N.J.S.A.* 18A:39-1.1.]

The New Jersey Supreme Court has held that the Legislature has not violated the Establishment Clause by extending to a private school student, the right to transportation on the same basis on which transportation would have been available if he attended public school in his district because it is "a measure to aid the student rather than the school he attends; its purpose and primary effect are not to advance religion." *West Morris Regional Bd. of Ed v. Sills*, 58 *N.J.* 464, 472, *cert. denied* 404 *U.S.* 986, 92 *S.Ct.* 450, 30 *L.Ed.*2d 370 (1971).

Lakewood, in its busing policy, provides for the transportation of any child to and from his or her school who resides beyond a specified distance from the school, which is less than the distance for which State law mandates such transportation. This policy applies to any child regardless of whether the child attends public school or private school, which includes parochial schools. Lakewood offers that the policy was instituted for the children's safety and that the policy itself is neutral with respect to race, gender, religion or the type of school a child attends. Lakewood suggests that its implementation of the policy was based upon a host of legitimate issues, such as varying school calendars, schedules and locations. For instance, the existence of an all boys or all girls bus route arises from the fact that the schools that these routes run to and from are attended respectively by boys only and girls only and the bus routes are set up so that each route will pick up children to go directly to their school and likewise drop them off only from that school. The petitioner presents no evidence to show that Lakewood's assertions are just a pretext for some non-secular purpose. He merely presents statistics in what seems like an attempt to somehow show that the children who attend Orthodox Jewish parochial schools disproportionately benefit from Lakewood's school transportation program. Even taking his statistics as true and accurate and even if the Orthodox Jewish children were disproportionately benefiting from the policy, petitioner can not show that Lakewood has violated the establishment

clause, as such factors are irrelevant to the constitutional analysis, simply because these children attend the parochial schools as the result of the private choices of their parents or guardians. Lakewood offers busing on the same terms to all school children in its district, without regard to religion. Such neutrality is present in the policy, as it provides no more to a parochial school student than is provided to a public school student. The petitioner has not presented any evidence, other than his naked assertions, that tend to show that the busing policy as implemented does not have a secular purpose or that it has a primary effect of advancing or inhibiting religion. Therefore, even if the facts and inference therefrom are construed most favorably to the petitioner, I **CONCLUDE** the petitioner cannot show that the respondent's application of its busing policy violates the Establishment Clause of the 1st Amendment of the U.S. Constitution.

In addition, I have dismissed as inherently irrelevant to these proceedings the various arguments made by Mr. Osborne that Lakewood's motion somehow was technically defective. Pursuant to *N.J.A.C.* 1:1-12.1(2), no technical reforms of motion are required. In a motion, a party shall state the grounds upon which the motion is made, the relief or order being sought and the date when the matter shall be submitted to the judge for disposition.

The motion submitted by Lakewood, although awkwardly presented in various submissions, is in full compliance with OAL procedures. In addition, with Mr. Inzelbuch's response to my letter, he set forth chapter and verse exactly what it was he was seeking and why. Penultimately, it should be noted that I have not set forth an exhibit list. The reason is simple. The numbers of submissions and their disarray makes it practically impossible to determine what was and was not meant to be utilized as part of the motion. I reviewed every document submitted in the case and all of those documents remain in the file for further review by the agency head. I cannot, however, rationally set forth in numerical, chronological order what those exhibits are and whether they are or not germane to the issues *sub judice*.

Accordingly, and based upon the foregoing, respondents' motion for summary decision is **GRANTED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

5/16/03
DATE

STEVEN C. REBACK, ALJ

Receipt Acknowledged:

May 20, 2003
DATE

M. Kathleen Duncan (for)
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 21 2003
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cmo

WITNESSES

For Petitioner:

For Respondent:

EXHIBITS

As noted at Page 24 of this decision, I could not reasonably list them, the exhibits;
They remain in the file.

OAL DKT. NO. EDU 6438-02
AGENCY DKT. NO. 241-8/02

GEORGE OSBORNE,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD, OCEAN COUNTY; MEIR GRUNHUT, BOARD PRESIDENT; NORMAN BELLINGER, BOARD VICE PRESIDENT; CHET GALDO, HARVEY KRANZ, SARA LICHTENSTEIN, IRENE MICCIO, ABRAHAM OSTREICHER, NEAL PRICE AND LEONARD THOMAS, MEMBERS OF THE BOARD; AND DR. ERNEST J. CANNAVA, SUPERINTENDENT OF THE LAKEWOOD SCHOOL DISTRICT,	:	COMMISSIONER OF EDUCATION
RESPONDENTS.	:	DECISION

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions[1] and respondents' reply exceptions were submitted in accordance with *N.J.A.C.* 1:1-18.4 and were duly considered by the Commissioner in reaching his determination.

[1]Pursuant to *N.J.A.C.* 1:1-18.4, the parties were permitted to file written exceptions with the Commissioner within 13 days from the date the Initial Decision was mailed. In the instant matter, the Initial Decision was mailed to the parties on May 21, 2003. The parties' exceptions in this matter were therefore due on or before June 3, 2003. Petitioner timely filed exceptions on May 28, 2003 and subsequently submitted "Supplemental Exceptions." Although these "Supplemental Exceptions" were dated and mailed on June 2, 2003, they were not received until June 5, 2003. Since exceptions are considered filed upon receipt (*see N.J.A.C.* 6A:3-1.2), petitioner's "Supplemental Exceptions" were untimely filed and were therefore not considered in making this determination.

Initially, petitioner asserts that the Initial Decision must be rejected in its entirety because it does not contain the elements set forth at *N.J.A.C.* 1:1-18.3. (Petitioner's Exceptions at 2) Specifically, petitioner asserts that:

> 1. The written Initial Decision does not contain an appropriate caption as required by law;
> 2. The written Initial Decision does not contain an appearance of the parties and their representatives as required by law;
> 3. The written Initial Decision does not contain a statement of the issue(s) as required by law;
> 4. The written Initial Decision does not contain a factual finding as required by law;
> 5. The written Initial Decision does not contain a conclusion of law as required by law;
> 6. The written Initial Decision does not contain a disposition as required by law;
> 7. The written Initial Decision does not contain a list of exhibits admitted into evidence as required by law.[2] (*Ibid.*)

Petitioner also takes issue with the ALJ's concluding, without the benefit of discovery or the holding of a plenary hearing, that petitioner does not have standing to pursue any of his claims under the U.S. Constitution or Federal Laws, with the exception of his claims under the Establishment Clause of the First Amendment of the U.S. Constitution. (*Id.* at 3) *Citing, inter alia, Flast v. Cohen*, 392 *U.S.* 83 (1968), *Crescent Park Tenants Ass'n v. Realty*

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[2]It is unclear as to why petitioner objects to the form of the Initial Decision in that the Initial Decision contains an appropriate caption (Initial Decision at 1), clearly lists the appearance of the parties and their representatives (*ibid.*) and contains a disposition of the matter (*id.* at 23). Moreover, as petitioner himself points out, *N.J.A.C.* 1:1-18.3 states that the necessary elements may be combined and need not be separately discussed. (Petitioner's Exceptions at 2) Such is the case in the Administrative Law Judge's (ALJ) statement of the issues (Initial Decision at 7), factual findings (*ibid.*) and conclusions of law (*id.* at 8-23). With respect to the list of exhibits, the ALJ provides the following explanation:

> Penultimately, it should be noted that I have not set forth an exhibit list. The reason is simple. The numbers of submissions and their disarray makes it practically impossible to determine what was and was not meant to be utilized as part of the motion. I reviewed every document submitted in the case and all of those documents remain in the file for further review by the agency head. I cannot, however, rationally set forth in numerical, chronological order what those exhibits are and whether they are or are not germaine to the issues *sub judice*. (*Id.* at 23)

Equity Corp. of N.Y., 58 *N.J.* 98 (1971) and *Silverman v. Board of Ed., Tp. of Millburn*, 134 *N.J. Super.* 253, 257-258 (Law Div. 1975), *aff'd* o.b. 136 *N.J. Super.* 435 (App. Div. 1975), petitioner argues that he has standing to pursue his constitutional claims because there is no bar to taxpayers challenging allegedly unconstitutional federal taxing and spending programs because taxpayers have a personal stake in the outcome. (*Id.* at 4) Petitioner, therefore, contends that there is no reason why the State's liberal approach to standing should not apply to taxpayer suits challenging quasi-legislative actions of a board of education. (*Ibid.*) Petitioner additionally maintains that, since the ALJ determined that he had standing to pursue his Establishment Clause claims, it was erroneous for the ALJ to dismiss those claims without a hearing on the merits. (*Id.* at 8)

Moreover, petitioner avers that material facts in this matter are in dispute with respect to whether state and federal monies are being spent in violation of constitutional protection against the abuse of legislative power so as to preclude this matter from being decided on a summary basis. (*Ibid.*) Petitioner asserts that:

> Specifically, there exists a "genuine issue of material fact" as to whether federal and state taxpayers' money is being used under Lakewood's "courtesy busing" policies programs to:
>
> 1. foster and promote religion in ways that violate state, federal, and school laws, and discriminate against public school students
>
> 2. foster and promote religion in ways that violate state, federal, and school laws, and [segregate] public school students from private students, and boys and girls in violation of state, federal, and school, and
>
> 3. foster excessive government entanglement[.]
>
> (*Ibid.*)

Providing numerous citations with respect to the standards for the granting of summary judgment, *i.e.*, evidential materials must be viewed in the light most favorable to the non-moving party; discovery and a full hearing on the merits of a case should not be prevented simply because the ALJ favors one of several views of evidence; the non-moving party must present enough evidence to demonstrate that a dispute is genuine, *etc.*, petitioner concludes that the grant of summary judgment to respondents "should be reversed" because "there exists a 'genuine issue of material fact'" and respondents are not entitled to summary judgment as a matter of law. (*Id.* at 4-9)

Turning to the issue as to whether the petition in this matter was timely filed, petitioner asserts that he was severely prejudiced by the ALJ's abuse of discretion in concluding that the petition was untimely filed pursuant to *N.J.A.C.* 6A:3-1.3(d). (*Id.* at 9) Petitioner points out that the record is silent on the issue of the timeliness of the filing of the petition and he is now forced to respond to an issue never raised by respondents. (*Id.* at 9 and 12) *Citing Kaprow v. Bd. of Ed. of Berkeley Townsh*ip, 131 *N.J.* 572 (1993), *Borough of Park Ridge v. Salimone*, 21 *N.J.* 28 (1956) and *North Plainfield Ed. Ass'n v. Bd. of Ed. of North Plainfield Borough*, 96 *N.J.* 587 (1984), petitioner contends that he "was obligated to file his claims with the [Department of Education] within 90 days of the date on which he first became aware that he had a 'cause of action' against the board, and not when Local Policy No. 3541.31 was revised on June 12, 1995." (*Id.* at 11)

Moreover, petitioner claims that respondents were put on notice on June 7, 2002 by way of petitioner's signature on a petition calling for the termination of nonpublic school student transportation contacts and a letter of July 17, 2002 to the former Board president. (*Ibid.*) Since petitioner filed his petition on August 2, 2002, petitioner argues, both dates are well

within the 90-day rule specified in *N.J.A.C.* 6A:3-1.3(d). (*Ibid.*) Petitioner further argues that, as stated in *Lopez v. Swyer*, 62 *N.J.* 267, 272 (1973), the discovery rule "shields a plaintiff from the accrual of his cause of action 'until the injured party discovers, or by an exercise of reasonable diligence and intelligence should have discovered that he may have a basis for an actionable claim'" and that "although an injured party may be aware he suffered an injury, 'the injured party may not know it is attributable to the fault or neglect of another.'" (*Id.* at 12) The ALJ erred, petitioner claims, in dismissing his complaint on the erroneous assumption that petitioner "should have known that a 'facially neutral' local courtesy busing policy was discriminatory" by virtue of his service on the Lakewood School Board. (*Ibid.*) Petitioner therefore concludes that the 90-day rule should be waived and the Initial Decision rejected under the doctrine of fundamental fairness and abuse of discretion. (*Ibid.*)

Petitioner also excepts to the ALJ's raising the defense of laches, an issue which respondents failed to raise themselves, and then erroneously concluding that the petition was barred by laches. (*Id.* at 13) *Citing Dorchester Manor v. New Milford Bor.*, 287 *N.J. Super.* 163, 172 (Law Div. 1994), petitioner argues, *inter alia*, that "[I]n order for laches to apply, the party asserting the doctrine must have 'a justifiable reason to believe that the alleged rights are meritless or have been abandoned.'" (*Id.* at 14) Petitioner asserts that, generally, a factual hearing is required in determining whether the application of laches or estoppel is equitable. *Dorchester* at 173. (*Id.* at 15) Petitioner points to *Enfield v. FWL, Inc.*, 256 *N.J. Super.* 502, 520-521 (Ch. Div. 1991) in arguing that "the length of the delay in assertion of a party's rights is determined with reference to 'the date when alleged legal injury occurred'" and that "a party asserting laches must establish that the other party either knew or, with reasonable diligence and vigilance, could have known of such date of occurrence." (*Id.* at 14)

Clearly, petitioner submits, this means that the equitable defense of laches is to be asserted by a party to the action and respondent did not raise the defense of laches in their Answer to the petition or elsewhere in these proceedings. (*Id.* at 17) Therefore, petitioner reasons, in raising the issue of the timeliness of the petition and the defense of laches, the ALJ improperly abandoned his role as impartial judge and assumed the role of attorney for respondents. (*Ibid.*)

Additionally, petitioner argues, the nature of his complaint, which goes to policy considerations which affect the school tax burden on Lakewood property owners, should dictate hesitation by the Commissioner in applying laches or estoppel in the instant matter. (*Ibid.*) Rather, petitioner asserts that, in challenging the Board's spending habits, he has exercised express statutory rights and that the applicability of laches and estoppel should be determined based on policy considerations related to tax appeals where the right of appeal is constitutionally protected, quoting *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 *U.S.* 18, 36, 110 *S. Ct.* 2238, 110 *L.Ed.*2d 17, 35-36 (1990), which states that "[b]ecause exaction of a tax constitutes a deprivation of property, the State must provide procedural safeguards against unlawful exactions in order to satisfy the commands of the Due Process Clause." (*Id.* at 16-17)

Respondents' reply exceptions acknowledge that the 90-day requirement for the timely filing of relief from the Commissioner was never specifically raised, but notes that respondents did raise the factual issue that petitioner was a sitting member of the Board when the policy in question was revised. (Respondents' Exceptions at 1-2) In so acknowledging, respondents submit that there is no bar to the raising of this issue by the ALJ, noting that an ALJ in *K.C. and C.C. o/b/m J.C. v. Lakewood Board of Education* (OAL Docket No. EDS 739-03/Agency Reference No. 75-3/03), similarly raised said time bar on his own volition. (*Id.* at 2)

Despite protestation by petitioners in that matter, respondents aver, the Commissioner concurred with the ALJ's determination. (*Ibid.*)

Moreover, respondents argue that the application of the 90-day rule will not result in any legally based injustice. (*Ibid.*) Therefore, respondents assert, the strict application of the rule should be applied in that: 1) petitioner was a voting member of the Board when the policy in question was revised; 2) while petitioner's claims are couched in state and federal constitutional terms, none are novel; and 3) the OAL has no jurisdiction to confer much of the relief sought. (*Id.* at 2-3) With respect to petitioner's Establishment Clause claim, respondents state that they will rely on previously submitted legal memoranda. (*Id.* at 3)

BACKGROUND DISCUSSION

Initially, in reviewing the Petition of Appeal,[3] containing 96 enumerated items variously categorized under the headings of "Authority," "Parties," "Standing," "Statement of Facts," and "Counts" I through IV, it is noted that petitioner sets forth the context from which his claims arise by providing a description, from his perspective, of the alleged influence of the Orthodox Jewish population in Lakewood on policies and actions of the Lakewood Board, particularly in the creation and implementation of the school district's busing policy. In summary, petitioner avers that Lakewood has a population of over 60,000 persons, 50% of which are ultra Orthodox Jews and that the ultra Orthodox Jewish community's bloc voting controls the election process. (Petition of Appeal at 4 and 11) Petitioner also states that "[i]f, the ultra Orthodox Jewish community where [sic] to sneeze, the township committee, and the board of

[3] This petition was originally filed as a Verified Petition for Declaratory Judgment. On September 5, 2002, the Commissioner declined to consider this matter as one for declaratory judgment, pursuant to his authority under *N.J.A.C.* 6A:3-2.1(a), and transferred this matter to the OAL for further proceedings.

education would catch a cold. The board is more than 'excessively' entangled with religion. It is joined at the hip with it." (*Id.* at 11) Thus, petitioner claims, the public school district and the sectarian nonpublic schools are "woven together as one fabric with one common goal, and that is to ensure that members of the ultra Orthodox Jewish community are transported to their 'pervasively' sectarian schools in a segregated and separate manner." (*Id.* at 15) Petitioner also claims that "[w]hat the district calls courtesy busing for nonpublic school students has become a private taxi service for the transportation of Orthodox Jewish children." (*Ibid.*) Additionally, petitioner asserts that the courtesy busing of over 6,000 children[4] via routes that: 1) segregate public and nonpublic school students and 2) segregate Orthodox Jewish students by sex violates the federal and state constitutions, the Civil Rights Act, the Law Against Discrimination, and creates an undue burden on the taxpayers of the district.[5] (*Id.* at 5, 9 and 16-18)

Moreover, the following is a *summary* of specific claims asserted by petitioner in the Petition of Appeal. Petitioner seeks a decision that:

> 1. Remedies the distribution of public monies that are being used by the district to finance unlawful discriminatory segregated busing policies that have the "effect" of advancing religion. These unlawful discriminatory busing policies deny public school students free exercise and enjoyment of the right to travel free of discrimination upon intrastate highways, in violation of the Equal Protection and Due Process Clause of the Fourteenth Amendment of the United States Constitution. (Petition of Appeal at 1)

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[4]Respondents contend that the Board transports 4,231 nonpublic school students with non-mandated transportation, and that, of these 4,231 students, 3,805 are Orthodox Jewish students, representing 64% of the total number of students that are transported daily via the school district's courtesy busing services, but that regardless of the numerical discrepancy, "the District's busing policies are neutral in nature and apply equally to all students regardless of race, religion, gender or school of attendance." (Answer at 9 and 11)

[5]Petitioner presents calculations indicating that the Lakewood School District spends in excess of 4 million dollars yearly to transport its students and that over 2 million dollars of these transportation costs are for courtesy busing services. (Petition of Appeal at 5) Although respondents in their Answer state that they leave petitioner to his proofs with respect to these costs, it is noted that respondents' Exhibit F confirms that these costs are accurately represented. (Answer at 8-11 and Exhibit F)

2. Finds that the Lakewood School District has disbursed federal funds under the Elementary and Secondary Education Act of 1965 to finance instruction and the purchase of educational materials for use in religious and "pervasively" sectarian schools, in violation of the Establishment and Free Exercise clause of the First Amendment. (*Ibid.*)

3. Finds that respondents have created unlawful discriminatory segregated routes that are designed solely for the transportation of "pervasively" sectarian Orthodox Jewish parochial school students. (*Id.* at 19)

4. Finds that respondents have adopted, implemented and maintained student transportation policies that discriminate against similarly situated pubic school students and have failed to revise transportation policies to ensure that similarly situated public school students are not discriminated against. (*Ibid.*)

5. Finds that respondents have failed to desegregate and have failed to eliminate segregation in the transportation of all public and nonpublic school students. (*Ibid.*)

6. Finds that respondents have failed to assure that the district transportation policies are in full compliance with the Constitutional, Federal, and State antidiscriminatory provisions and have failed to require plans providing for the transportation of public and nonpublic students in an integrated setting. (*Ibid.*)

7. Finds that respondents have failed to require the development and implementation of concentrated and aggressive outreach and recruitment efforts to improve and maximize integrated travel for all pupils. (*Ibid.*)

Petitioner's constitutional claims are as follows:

1. Respondents have created unlawful discriminatory and segregated routes designed solely for the transportation of Orthodox Jewish parochial school students in violation of the Equal Protection and Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. (*Id.* at 17)

2. Respondents have designed bus routes solely for the purpose of transporting parochial nonpublic school students in a manner that is different from that of public school students, *i.e.*, Orthodox Jewish students are transported to their parochial

schools in a segregated manner so as to not come into contact with public school students and Orthodox Jewish boys and girls are transported to their respective schools on separate buses. These acts of respondents violate the Establishment Clause of the First Amendment to the U.S. Constitution. (*Ibid.*)

3. The discriminatory, segregated routes designed solely for the transportation of Orthodox Jewish parochial nonpublic school students violates Section 201(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000a (a) (1964 ed.) and Section 207 (b) of the Civil Rights Act of 1964 ("Title VI"), 42 U.S.C. 2000a-6 (b) (1964 ed.) The Board is also in violation of Section 601 of Title VI of the Civil Rights Act of 1964 ("Title VI"), 42 U.S.C. § 2000d, "prohibits any recipient of federal financial assistance from discriminating on the basis of race color, or national origin in any federally funded program. (*Id.* at 18)

4. The discriminatory, segregated routes designed solely for the transportation of Orthodox Jewish parochial nonpublic school students violates Article I.1 and 5 of the New Jersey Constitution which provides in part: "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin."[6] (*Ibid.*)

5. The discriminatory, segregated routes designed solely for the transportation of Orthodox Jewish parochial nonpublic school students violates the New Jersey Law Against Discrimination, Title 10:1-5, which provides, in part: "The remedies provided

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[6]Notwithstanding petitioner's "quote" from Article I.1 and 5 of the New Jersey Constitution, the Commissioner observes that the language contained in these sections is as follows:

Article I.1

All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.

Article I.5

No person shall be denied the enjoyment of any civil or military right, nor be discriminated against in the exercise of any civil or military right, nor be segregated in the militia or in the public schools, because of religious principles, race, color, ancestry or national origin.

> in this title shall be the exclusive means of enforcing the rights based on this title, but nothing in this title shall preclude any individual or any State or local agency from asserting any right based on any other Federal or State law not inconsistent with this title, including any statute or ordinance requiring nondiscrimination in public establishments or accommodations, or from pursuing any remedy, civil or criminal, which may be available for the vindication or enforcement of such right." (*Ibid.*)

Additionally, referring to his petition, petitioner states in his exceptions that:

> The complaint alleged that Lakewood's "courtesy busing" policies and programs were carried-out in a manner that violates the New Jersey Law Against Discrimination, Title10:1-5; Article I.1 and 5 of the New Jersey Constitution; The [Establishment] Clause of the First Amendment to the United States Constitution; The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution; Section 601 of Title VI of the Civil Rights Act of 1964 ("Title VI"), 42 U.S.C. § 2000d, "prohibits any recipient of federal financial assistance from discriminating on the basis of race, color, or national origin in any federally funded program."[7] (Petitioner's Exceptions at 3)

Additionally, petitioner states that he "seeks to invalidate the Lakewood Board of Education Local Policy 3541.31, and all district state-sponsored, NON-MANDATED, public school 'courtesy busing' transportation policies, practices, and programs***." (Petitioner's February 10, 2003 Memorandum of Law in Opposition to Respondents' Motion for Summary Judgment at 26) Thus, the *primary* focus of petitioner's claims is directed toward the Board's busing policy and its implementation.

Respondents answer petitioner's claims by stating that the transportation service provided to all children residing in Lakewood "is *not* discriminatory, does *not* advance religion in an impermissible manner, nor is same in violation of Federal or State law." (Answer at 1,

[7]It is noted that petitioner makes no mention in his exceptions of his claim that the Lakewood School District has disbursed federal funds under the Elementary and Secondary Education Act of 1965 to finance instruction and the purchase of educational materials for use in religious and sectarian schools.

emphasis in text) Respondents further claim that, with the adoption of Local Policy No. 3542.31 on June 25, 1975, and revised on June 12, 1995 providing all school children transportation between their homes and schools within clearly defined riding limits, the Board has been directly busing children, whether public, nonpublic, religious or nonreligious to their school of attendance for nearly thirty (30) years. (Motion for Summary Judgment at 3) Moreover, respondents claim that children are bused upon public policy concerning the safety of children and other neutral factors, such as school calendars and school schedules. *(Id.* at 3-4) While acknowledging that boys and girls are transported in separate buses to those Orthodox Jewish parochial schools that are same sex schools, respondents point out that "[s]everal parochial schools, including, but not limited to, Holy Family, Calvary Academy, and the Bezalel Yeshiva (an Orthodox Jewish day school), have bus routes wherein boys and girls are transported together***." (*Id.* at 6)

With respect to petitioner's allegation that the Lakewood School District has disbursed federal funds under the Elementary and Secondary Education Act of 1965 to finance instruction and the purchase of educational materials for use in religious and sectarian schools in violation of the Establishment and Free Exercise clause of the First Amendment, respondents deny the allegations "based on a Corrective Action Plan filed by the Lakewood Board of Education and accepted by the State Department of Education." (Answer at 1-2) Additionally, respondents point out that "[t]he Lakewood Board of Education has a responsibility to fulfill 'child find' requirements as delineated in Section 613 (a)(3) of the Individuals with Disabilities Education Act ("*IDEA*") including religious school children, 20 U.S.C. § 1412(a)(10)(A)(ii) and 34 CFR § 300.451; equitable participation under "IDEA" Part B, *N.J.A.C.* 6A:14-6.1; Chapter 192 services such as Child Study Team Examination and Classification Services, the provision of

textbooks, Chapter 226 services such as Nursing and Transportation Services." (Certificate of Counsel in Support of Respondents' Motion for Summary Judgment at 6)

COMMISSIONER'S DECISION

TIMELINESS OF THE FILING OF THE PETITION AND APPLICATION OF LACHES

Initially, the Commissioner finds that consideration of the timeliness of the filing of the petition and the application of laches by the ALJ was inappropriate in this matter as these were not affirmative defenses raised by respondents.[8] In so concluding, it is noted that the Supreme Court in *Zaccardi v. Becker*, 88 *N.J.* 245, 256 (1982), found that:

> At the outset we note that statutes of limitations are not self-executing. Such statutes are based on the goals of achieving security and stability in human affairs and ensuring that cases are not tried on the basis of stale evidence. *Galligan v. Westfield Centre Service*, 82 *N.J.* 188, 191-92 (1980); *Tevis v. Tevis*, 79 *N.J.* 422, 430 (1979); *Kaczmarek v. N.J. Turnpike Authority*, 77 *N.J.* 329, 337-38 (1978). Because they are based on these specific policies, *they must be raised as affirmative defenses*, subject to judicial modification in appropriate circumstances. Mechanistic application of such statutes could unnecessarily sacrifice individual justice in particular circumstances. (emphasis added)

Moreover, assuming, *arguendo,* for purposes of this discussion, that Lakewood's busing policy and its implementation are discriminatory and contrary to Federal and State laws as petitioner claims, each act in designing and implementing the discriminatory and unlawful busing policy would constitute a pattern of discrimination and a continuing violation of law and, thus, the statute of limitations would begin only when the wrongful action ceases. As set forth by the Appellate Court in *Bollinger v. Bell Atlantic,* 330 *N.J. Super.* 300, 306 (App. Div. 2000):

[8] The Commissioner observes that the record is devoid of any claim by respondents that they have suffered prejudice or that they are unable to present a defense because petitioner did not assert his claims in a timely manner.

> For causes of action arising under anti-discrimination laws, however, a judicially created doctrine known as the continuing violation theory has developed as an equitable exception to the statute of limitations. (citations omitted)
>
> New Jersey recognizes the existence of a similar "continuing tort doctrine," which is unrestricted to discrimination claims and provides that when an individual experiences a "continual, cumulative pattern of tortious conduct" the limitations period begins only when the wrongful action ceases. *Wilson v. Wal-Mart Stores* 158 *N.J.* 263, 272, 729 A.2d 1006 (1999).***
>
> Two types of continuing violations are recognized in the federal context: (1) "systemic violations," which originate in a discriminatory policy or practice that continues into the limitations period, and (2) "serial violations," which consist of a various number of discriminatory acts, all emanating from the same discriminatory animus, where each act nonetheless constitutes a separate actionable wrong. *Thomas v. Eastman Kodak Co.*, 183 *F.*3d 38, 53 (1st Cir.1999), *cert denied*, ____U.S.___, 120 *S. Ct.* 1174, 145 *L.Ed.*2d 1082 (2000); *accord Bullington v. United Air Lines, Inc., supra,* 186 *F.*3d at 1311.

Additionally, the Supreme Court in *Wilson, supra,* at 273 observed that "***a significant number of courts recognize that the cumulative effect of a series of discriminatory or harassing events represents a single cause of action for tolling purposes and that the statute of limitations period does not commence until the date of the final act of harassment." *See also Terry v. Mercer County Bd. of Chosen Freeholders,* 173 *N.J. Super.* 249 (App. Div. 1980).

Accordingly, in that respondents did not raise untimely filing or laches as affirmative defenses in this matter, and given the probability that petitioner's allegations of discrimination and violations of Federal and State laws, if found to be true, would constitute a continuing violation, the Commissioner declines to apply the filing limitation of the 90-day

period set forth at *N.J.A.C.* 6A:3-1.3(d) or to apply laches in this matter.[9]

SUMMARY DECISION

After an exhaustive review of the papers filed in this matter, the Commissioner has determined that grant of summary decision to respondents is appropriate in this instance. Pursuant to *N.J.A.C.* 1:1-12.5(b) and *Contini v. Bd. of Educ. of Newark*, 286 *N.J. Super.* 106, 121-122 (App. Div. 1995) (*citing Brill v. Guardian Life Ins. Co.*, 142 *N.J.* 520 (1995)), summary decision may be granted in an administrative proceeding if there is no genuine issue of material fact in dispute and the moving party is entitled to prevail as a matter of law. In this regard, notwithstanding petitioner's assertion to the contrary, there are no "material facts" in dispute in this matter. *Black's Law Dictionary, seventh edition,* at 610-611, defines "fact" as "[a]n actual or alleged event or circumstance, as distinguished from its legal effect, consequence, or interpretation" and a "material fact" as "[a] fact that is significant or essential to the issue or matter at hand." Thus, all the issues characterized by petitioner as "genuine issues of material fact" set forth in petitioner's exceptions, *i.e.*, whether federal and state taxpayers' money is being used under Lakewood's courtesy busing policy to foster and promote religion, discriminate against public school students, segregate public and private school students and segregate boys and girls in violation of state, federal and school laws are issues calling for a legal conclusion

[9] Notwithstanding this conclusion, the Commissioner cannot ignore that petitioner failed to file a petition with respect to Lakewood's busing policy for seven years following its revision to its present form. The busing policy at issue is neither a new busing policy nor a new burden to petitioner as a taxpayer. The Board's Policy No. 3541.31, which provides courtesy busing services to all children residing in the school district within specified distance limitations, was adopted on June 25, 1975 and revised on June 12, 1995. Petitioner was a voting member of the Board seven years ago when Lakewood's busing policy in its present form was revised and implemented. There is nothing in the record to suggest that petitioner voted against the busing policy when it was revised or that he raised any concerns at the time of the revision. Moreover, there is also nothing in the record to suggest that petitioner raised any concerns with respect to the implementation of Lakewood's busing policy during the two years he served on the Board following the revision. Nor does petitioner assert that anything has changed with respect to the busing policy or its implementation in the five years since his service on the Board. Thus, it is reasonable to conclude that petitioner bears some responsibility for the formation and the implementation of the busing policy which he now claims is contrary to State and Federal laws.

with respect to the effect, consequence or interpretation of the school's busing policy as applied, not disputed "material facts" as presented by petitioner.[10] "It is well-established that where no disputed issues of material fact exist, an administrative agency need not hold an evidential hearing in a contested case." *Frank v. Ivy Club*, 120 *N.J.* 73, 98 (1990), *citing Cunningham v. Dept. of Civil Service*, 69 *N.J.* 13, 24-25 (1975). "Moreover, disputes as to the conclusions to be drawn from the facts, as opposed to the facts themselves, will not defeat a motion for summary judgment." *Contini v. Board of Education of Newark*, 96 *N.J.A.R.* 2d (EDU) 196, 215, *citing Lima & Sons, Inc. v. Borough of Ramsey*, 269 *N.J. Super.* 469, 478 (App. Div. 1994); *In the Matter of the Tenure Hearing of Andrew Phillips, School District of the Borough of Roselle, Union County*, Commissioner's Decision No. 129-97, decided March 20, 1997; and *In the Matter of the Tenure Hearing of Neal A. Ercolano, Board of Education of Branchburg Township, Somerset County*, Commissioner's Decision No. 140-00, decided May 1, 2000. Additionally, the Commissioner agrees that respondents are entitled to prevail as a matter of law for reasons provided in the Initial Decision and explicated below.

DISBURSEMENT OF FEDERAL FUNDS UNDER THE ELEMENTARY AND SECONDARY ACT OF 1965

Initially, the Commissioner notes that petitioner's claim that the Lakewood School District has disbursed federal funds to finance instruction and the purchase of educational materials for use in religious and sectarian schools stems from the ALJ's findings in the matter entitled *C.L. and B.L., on behalf of C.L. v. Lakewood Township Board of Education*, OAL Dkt. No. EDS 878-01, decided August 3, 2001. (Petition of Appeal at 11) As a result of the ALJ's

[10] It is noted that respondents do not dispute that some of its bus routes transport boys and girls separately to same sex Orthodox Jewish parochial schools, but points out that bus service provided to parochial schools also includes the transportation of boys and girls together to parochial schools, including an Orthodox Jewish day school. (Answer at 12)

determination in that matter, the Board filed a "Plan of Compliance" with the Department of Education on March 18, 2002, which was revised on April 11, 2002 and approved by the Department of Education on April 15, 2002. (Certification of Counsel in Support of Respondents' Motion for Summary Judgment, Exhibit A, Answer at 34 and Respondents' Exhibit B Attached to Answer) In that petitioner merely quotes verbatim from the ALJ's decision in that matter (Petition of Appeal at 11, Nos. 46, 47, 48 and Affidavit of George S. Osborne in Opposition to Respondents' Motion for Summary Judgment at 4-7), and does not present any facts or allegations beyond what was resolved in that case, nor does he allege that the Board's "Plan of Compliance" approved by the Department is not being followed, the Commissioner dismisses petitioner's claim with respect to this issue.[11] Accordingly, petitioner's remaining claims all relate to the Lakewood Board's courtesy busing policy and its implementation.

JURISDICTION AND STANDING

Initially, as fully set forth by the ALJ, the Commissioner emphasizes that, to the extent that petitioner is asserting a facial constitutional challenge to Lakewood's busing policy, the Commissioner lacks jurisdiction to consider his claims. (Initial Decision at 14-15) However, jurisdiction does exist to the extent that petitioner is asserting that Lakewood's Policy No. 3541.31 regarding the busing of students has been unconstitutionally applied by the Lakewood Board.[12] (*Ibid.*)

[11] It is noted that the ALJ did not address this issue in the Initial Decision. Neither did petitioner address this claim in his exceptions.

[12] The Commissioner notes that "[a]dministrative agencies have power to pass on constitutional issues only where relevant and necessary to the resolution of a question concededly within their jurisdiction." *Christian Bros. Inst. v. No. N.J. Interschol. League*, 86 *N.J.* 409, 416 (1981), *citing to Hunterdon Cent. High Sch. Bd. of Ed. v. Hunterdon Cent. High Sch. Teachers' Ass'n,* 174 *N.J. Super.* 468, 474-475 (App. Div. 1980), *aff'd* o.b., 86 *N.J.* 43 (1981).

With respect to the question of petitioner's standing to pursue his claims under the U.S. Constitution or Federal Laws, the Commissioner fully agrees that, with the exception of petitioner's claim that Lakewood's busing policy as applied violates the Establishment Clause of the First Amendment, petitioner has not established that he has standing to pursue his claims under the U.S. Constitution or Federal Laws. Notwithstanding petitioner's assertion that there is no bar to taxpayers challenging allegedly unconstitutional federal taxing and spending programs because taxpayers have a personal stake in the outcome (Petitioner's Exceptions at 4), as pointed out by the ALJ, in responding to a motion for summary judgment petitioner bears the burden of establishing specific facts showing that he has suffered an "injury in fact--an invasion of a legally protected interest"; and that, generally, people have no standing as taxpayers to claim that expenditures violate federal law or the U.S. Constitution, except when a taxpayer brings a claim that a policy as applied violates the Establishment Clause of the First Amendment of the Constitution. *Lujan, supra,* and *Flast, supra.* (Initial Decision at 15-16) In the instant matter, petitioner claims that he has standing to pursue his claims under the U.S. Constitution or Federal Laws *solely* on the basis that he is a resident taxpayer. In so doing, petitioner has presented no specific facts, only naked assertions, that he has, in fact, suffered an injury from which he is legally protected under the U.S. Constitution or Federal Laws. The Commissioner, therefore, finds that petitioner has standing only with respect to his claim that Lakewood's busing policy, as applied, violates the Establishment Clause of the First Amendment of the Constitution.

The Commissioner, however, disagrees with the ALJ's conclusion that petitioner does not have standing with respect to his New Jersey Constitutional claims. As noted by the ALJ, the New Jersey Courts and the State administrative system have adopted a very liberal approach to standing in order to provide easy access to the legal system. (Initial Decision at 16)

In *In the Matter of Camden County v. Board of Trustees of the Pub. Employees Retirement System (PERS) and William J. Simon*, 170 *N.J.* 439, 446-447 (2002), the Supreme Court observed that:

> Only "[a] substantial likelihood of some harm visited upon the plaintiff in the event of an unfavorable decision is needed for the purposes of standing." *New Jersey State Chamber of Commerce v. New Jersey Election Law Enforcement Comm'n*, 82 *N.J.* 57, 67, 411 *A.*2d 168 (1980) (citations omitted). Generally, a person who has suffered any economic detriment as a result of an administrative agency action can gain standing for judicial review of that action without proving any unique financial damages. See *Walker v. Borough of Stanhope*, 23 *N.J.* 657, 662-63, 130 *A.*2d 372 (1957) (noting numerous decisions of courts adopting broad approach to standing where residents and taxpayers sought to set aside wrongful official action).

Thus, while petitioner in this matter is neither a student nor the parent of a student in the school district, petitioner has presented convincing arguments that, as a resident and a taxpayer, he is directly affected by the annual expenditure of 2 million dollars for courtesy busing of students in the Lakewood School District. *See also West Village Civic Club, Inc. and Arthur Silverstein v. Board of Education of the Township of Manchester and Joel P. Oppenheim, Superintendent of Schools, Ocean County*, decided by the State Board, June 5, 1996, where petitioning resident taxpayers were found to have standing to challenge a superintendent's contract which guaranteed an additional annual expense which had not been included in the superintendent's previous contract. Accordingly, the Commissioner concludes that petitioner has demonstrated a sufficient stake in the outcome of the proceedings to confer standing to pursue his New Jersey Constitutional claims.

Notwithstanding this conclusion, however, the Commissioner finds that petitioner has not met his burden of presenting specific facts to demonstrate that Lakewood's busing policy is being applied in a discriminatory manner in violation of Article I.1 and/or 5 of the New Jersey

Constitution, nor does he allege that the courtesy busing services being provided in accordance with Policy No. 3541.31 are not being provided to all students residing in Lakewood without regard to whether they attend public, private or parochial schools. Respondents aver that its bus routes are designed to transport students to their individual schools to account for varying school calendars, schedules and locations and acknowledge that, in some instances, boys and girls are transported separately because the students have chosen to attend boys only or girls only parochial schools. While it is true that this individual school transportation scheme also means that public and private students do not ride together because they attend different schools, petitioner has presented no evidence that Lakewood's busing program transporting students to their individual schools has been designed as a pretext for discrimination.

Turning to petitioner's claims of discrimination on the basis of race, gender and religion under the New Jersey Law Against Discrimination (LAD), even accepting all of petitioner's statements regarding the religious and racial statistics in Lakewood as true and considering the undisputed fact that boys and girls are being transported separately to their individual schools by the Lakewood School District, as well as other information in the record, petitioner has provided no evidence of invidious discrimination. As found in *Kenny, supra,* at 257, "[m]ere inequality or difference in treatment does not suffice to support a charge of unconstitutional discrimination." Moreover, "a classification must be upheld under any reasonable set of facts unless there is a showing of invidious discrimination." (*Ibid.*) Accordingly, the Commissioner concludes that petitioner has failed to establish a claim upon which relief can be granted under the LAD.[13]

[13] The Commissioner notes that petitioner did not except to the recommended dismissal of his claims under the LAD for failure to state a claim upon which relief can be granted as set forth in the Initial Decision.

ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT OF THE U.S. CONSTITUTION

As noted above, in that the U.S. Supreme Court has held that taxpayers have standing to challenge statutes or rules under the Establishment Clause of the First Amendment, the Commissioner finds that petitioner has standing to pursue his Establishment Clause claim.[14] *Flast, supra.*

In evaluating petitioner's Establishment Clause claim, the Commissioner points out that the Courts have consistently held that governments are permitted to use tax dollars to aid religious schools as long as the aid has a secular purpose and does not have the primary effect of advancing or inhibiting religion. *See Lemon, supra; Mitchell, supra,* and *Agostini, supra*; and Initial Decision at 19. With respect to the use of tax dollars to transport students to school, the New Jersey Legislature has made it mandatory that school districts provide transportation to *all* students, including private and parochial school students, to and from their schools within certain specified distance requirements[15] and, additionally, has provided school districts the discretion to provide non-mandated transportation, *i.e.* courtesy busing, to its students. *N.J.S.A.* 18A:39-1 *et seq.* Moreover, as noted by the ALJ in quoting *West Morris Regional Bd. of Ed., supra,* "[t]he New Jersey Supreme Court has held that the Legislature has not violated the Establishment Clause by extending to a private school student, the right to transportation on the same basis on which transportation would have been available if he attended public school in his district because it is 'a measure to aid the student rather than the school he attends; its purpose and primary effect are not to advance religion.'" (Initial Decision at 22)

[14] The Establishment Clause prohibits the making of any law respecting the establishment of any religion.

[15] Payment of aid in lieu thereof is permitted in certain specified circumstances.

In the instant matter, Lakewood's busing policy provides for the transportation of all resident students, including children in public, private and parochial schools, to and from his or her school within certain specified distances that are less than the distances mandated in *N.J.S.A.* 18A:39-1, as follows:

> The Lakewood Board of Education may, in addition to other factors, take into consideration in determining authorized bus routes, the existing unsafe conditions that pupils be subjected to if required to walk.
>
> Students living in the Lakewood school district shall be entitled to transportation between their homes and schools in accordance with the following riding limits as measured portal-to-portal: kindergarten through grade 6, a distance of one mile or more; grades 7 through 8, one and one-half miles or more; and grades 9 through 12, two miles or more.
>
> Students, upon approval of the Superintendent of Schools or his/her designee, with at least ten (10) days prior notice, shall be transported other than between their homes and schools, when on those special occasions the destination changes due to school-related activities, provided that there is no additional cost to the district. (Answer, Exhibit I, Board's Policy No. 3541.31)

Respondents assert that this policy was instituted for student safety and that its policy applies to all students within the school district without regard to race, gender, religion or the type of school the student attends. As noted above, respondents maintain that bus routes are designed to transport students separately to their individual schools to account for varying school calendars, schedules and locations. It is undisputed that, as a result of this scheduling decision, boys and girls are, in some instances, transported separately because the students have chosen to attend boys only or girls only parochial schools. It is also undisputed that all students in the school district, whether public, private, or parochial, are provided transportation services separately to their individual schools in the same manner.

Moreover, petitioner presents no facts to contravene Lakewood's explanation that its decision to provide courtesy busing services to its students is because of safety concerns, nor has petitioner offered facts that would support a conclusion that the implementation of Lakewood's busing policy is a pretext for some non-secular purpose or that the busing policy has the *primary* effect of advancing or inhibiting religion. Petitioner's arguments primarily focus on the expense of providing courtesy busing and the makeup of the population in Lakewood and his perception that the Orthodox Jewish children benefit disproportionately from Lakewood's busing policy due to the large Orthodox Jewish population. While this *may* be true, there is nothing in the record to suggest that Lakewood does not offer the same transportation services to all children in the school district, without regard to religion, so the mere fact that significant numbers of the children in Lakewood attend parochial schools as a result of parental choice does not establish that the busing policy at issue and its implementation has a non-secular purpose. Even construing the facts and the inferences therefrom in the light most favorable to petitioner, therefore, the Commissioner concludes that petitioner has not shown that respondents' application of its busing policy violates the Establishment Clause of the First Amendment of the U.S. Constitution.

Finally, the Commissioner recognizes petitioner's frustration that 4 million dollars (2 million dollars of which is spent for courtesy busing) is spent to bus children to and from school each year and acknowledges that this expenditure has an impact on the taxpayers in Lakewood. However, even if petitioner would prefer to eliminate the 2 million dollar expense to provide courtesy busing services for students or choose to spend this money in a different manner, *N.J.S.A.* 18A:39-1.1 provides boards of education with the authority (but not the obligation) to provide courtesy busing services. Thus, it is the Lakewood Board, as elected

representatives of the community, which is vested with the discretion to make the determination as to whether to provide non-mandated busing services.

Accordingly, in that petitioner has failed to demonstrate that Lakewood's Busing Policy No. 3541.31 and its implementation are contrary to law, respondents' motion for summary decision is granted and the petition in the instant matter is dismissed for the reasons set forth above.

IT IS SO ORDERED. [16]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: August 26, 2003

Date of Mailing: August 27, 2003

[16] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

600-03

IN THE MATTER OF THE TENURE	:	
HEARING OF DARIN MC DONALD,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
CAMDEN, CAMDEN COUNTY.	:	

October 14, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL Dkt. No. EDU 2800-03

Agency Ref. No. 53-2/03

CAMDEN CITY BOARD OF EDUCATION,

Petitioner,

v.

DARIN MCDONALD,

Respondent.

Karen A. Murray, Esq., for petitioner (Murray and Murray, attorneys)

Keith Waldman, Esq., for respondent (Selikoff and Cohen, PA, attorneys)

Record Closed: May 22, 2003 Decided: August 28, 2003

BEFORE **ANA C. VISCOMI**, ALJ:

Respondent has filed a letter brief in support of its motion to dismiss the tenure charges in lieu of filing an answer in accordance with *N.J.A.C.* 6A:3-1.4 and *N.J.A.C.* 6A:3-1.10. The basis for which respondent seeks to dismiss the tenure charges is respondent's contention that the

charges were not properly certified by the Camden Board of Education in accordance with *N.J.S.A.* 18A:6-11. Respondent's motion is hereby **DENIED** for reasons set forth below.

I **FIND** the following to be the facts with regard to the pending motion. A special Board of Education meeting was held on February 5, 2003. Seven of nine Board members were present. In accordance with the Tenure Employee Hearing Act, *N.J.S.A.* 18A:6-11, the Board deliberated the charges and voted on the issues of certification and suspension in closed session. Furthermore, in accordance with an established procedure, one Board member moved to certify the charges to the Commissioner of Education and another member seconded the motion. In the context of the closed session, the Board Secretary conducted a roll call and recorded the votes of all seven members present on an official voting sheet. All seven members present voted in favor of certifying the charges to the Commissioner.

Respondent asserts that the charges were not properly certified by the Board in that the resolution indicating the charges were certified by a recorded roll call vote of a majority of the members at the special meeting on February 5, 2003 does not indicate that such a vote was taken. Relying upon *N.J.A.C.* 18A:6-11, respondent asserts the charges must be dismissed as the Board's official minutes of that meeting contradict the claim in that no such vote is recorded. In addition, respondent asserts that as Camden is subject to the Municipal Rehabilitation and Recovery Act, *N.JS.A* 52:27BBB-63i., every official Board action must comport with the requirements of the Open Public Meetings Act, *N.J.S.A.* 10:4-6 *et seq.*

Respondent's rationale is rejected. The Tenure Employee Hearing Act at *N.J.S.A* 18A:6-11 requires that the considerations and actions of the Board as to any charge "shall not take place at a public meeting." The Open Public Meetings Act has not been frustrated as the Board complied with the procedural requirements at the special meeting held on February 5, 2003. Had the minutes of the meeting included the Board's deliberation and vote, the Board would have been in violation of the Tenure Employee Hearing Act. The regulations promulgated pursuant to the Tenure Employee Hearing Act at *N.J.A.C.* 6A:3-5.2(a) provides that:

> the certificate of determination which accompanies the written charges shall contain a certification by the district Board of Education secretary or the state district superintendent:
>
> 1. that the district board of education of the state district superintendent has determined that the charges and evidence in support of the charges are sufficient, if true in fact, to warrant dismissal or a reduction of salaries;
>
> 2. are the date, place and time of the meeting at which such determination was made and whether or not the employee was suspended and, if so, whether such suspension was with or without pay;
>
> 3. that such determination was made by a majority vote of the whole number of members of the district board of education or by the state district superintendent in accordance with *N.J.S.A.* 18A:7a-39; and
>
> 4. in the case of a charge of inefficiency, that the employee was given at least 90 days prior notice of the nature and particulars of the alleged inefficiency.

Petitioner complied with the statute and regulations. Section 9 of the Introductory Statement to the Open Public Meetings Act provides in pertinent part that

> Minutes must be promptly available to the public, except for the material covering meetings or portions of meetings closed to the public.

Based on the foregoing, respondent's motion to dismiss in lieu of filing answer is hereby **DENIED** and respondent is directed to file an answer to the petition and this matter shall be returned to the Commissioner for a determination on the sufficiency of the charges.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does

not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 28, 2003
DATE

Ana C. Viscomi
ANA C. VISCOMI, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

August 28, 2003
DATE

Mailed to Parties:

SEP 5 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/jck

OAL DKT. NO. EDU 2800-03
AGENCY DKT. NO. 53-2/03

IN THE MATTER OF THE TENURE	:	
HEARING OF DARIN MC DONALD,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
CAMDEN, CAMDEN COUNTY.	:	

The record and Initial Decision issued by the Office of Administrative Law (OAL) have been reviewed. The parties filed no exceptions to the Initial Decision.

Upon careful and independent review of the record in this matter, the Commissioner concurs with the determination of the Administrative Law Judge that the instant tenure charges are not appropriately dismissed on procedural grounds. *See In the Matter of the Tenure Hearing of Caricella Major, School District of the City of Orange,* 1991 *S.L.D.* 1143; *also see In the Matter of the Tenure Hearing of Thomas L. Puryear, School District of the City of Newark*, 1977 *S.L.D.* 934.

It is noted that prior to the issuance of the Commissioner's decision herein, respondent submitted an Answer to the underlying tenure charges in this matter. Subsequent to receipt of respondent's Answer, the Commissioner reviewed the tenure charges and deems them sufficient, if true, to warrant respondent's dismissal or reduction in salary.

Accordingly, the Initial Decision of the OAL is adopted. This matter is being transmitted to the OAL, pursuant to *N.J.S.A.* 18A:6-16 as amended by *P.L.* 1998, *c.* 42, for adjudication.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 10|14|03
Date of Mailing: 10|15|03

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

602-03

IN THE MATTER OF THE TENURE HEARING :

OF MARLENE L. KAMLER, NEW JERSEY : COMMISSIONER OF EDUCATION

STATE DEPARTMENT OF HUMAN SERVICES. : DECISION

October 17, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 00022-03S

AGENCY DKT. NO. 396-12/02

NEW JERSEY DEPARTMENT OF HUMAN SERVICES,

Petitioner,

v.

MARLENE L. KAMLER,

Respondent.

Steven L. Scher, Deputy Attorney General, for petitioner (Peter C. Harvey, Attorney General of New Jersey, attorney)

Nicole DeCrescenzo, Esq., for respondent (Weissman & Mintz, attorneys)

Record Closed: August 21, 2003 Decided: September 3, 2003

BEFORE **JEFF S. MASIN**, ACTING CHIEF ALJ:

This matter arises from filing of tenure charges by the New Jersey Department of Human Services ("petitioner"), against Marlene L. Kamler ("respondent") for excessive absenteeism. The case was transmitted to the Office of Administrative Law ("OAL") from the Department of Education on January 9, 2003, for a hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to –13.

The parties agreed to a settlement of all issues in dispute and have prepared a Settlement Agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

September 3, 2003
DATE

JEFF S. MASIN, ACTING CHIEF ALJ

Receipt Acknowledged:

9-4-03
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

SEP 5 2003

DATE

OFFICE OF ADMINISTRATIVE LAW

Attachment

mjm

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
2003 AUG 21 P 2:47

PETER C. HARVEY
ACTING ATTORNEY GENERAL OF NEW JERSEY
R.J. Hughes Justice Complex
P.O. Box 112
Trenton, New Jersey 08625
Attorneys for Respondent

By: Steven L. Scher
Deputy Attorney General
(609) 292-8555

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
OAL Docket No.: EDUTH 00022-03
Agency Ref. No.: 396-12/02

IMO Tenure Hearing for: Marlene Kamler	)	**SETTLEMENT AGREEMENT**

This matter was transmitted to the Office of the Administrative Law pursuant to N.J.S.A. 52:14B-1.18 and N.J.S.A. 52:14B-14F-1 to 15.

This Settlement is made between Marlene Kamler, employee (appellant), and the New Jersey Department of Human Services, Agency. The parties agree to settle this matter in accordance with the following terms:

1. The appellant Marlene Kamler will withdraw her appeal of the Certificate of Determination of Tenure Charges assessing a ten day suspension without pay.

2. The respondent shall reduce the suspension from ten days without pay to five days without pay. The Agency shall within a reasonable time, reimburse the appellant for 5 days back pay or $1,158.23.

3. Both parties agree to fully comply with the provisions of the Federal Family and Medical Leave Act ("FMLA"). The Agency acknowledges that the FMLA provides for intermittant leave.

4. The parties hereto stipulate that this agreement shall fully dispose of all issues in controversy between them with regard to this matter.

5. The personnel file for the appellant shall be amended to reflect the provisions of this settlement.

6. This settlement shall not constitute a precedent in any other matter involving another employee.

7. Nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. The disciplinary penalty cited in this agreement may be utilized in determining the appropriate penalty in future disciplinary actions.

8. This agreement will only become effective when it is approved by the Department of Education. Any disapproval by the Department shall operate to return the parties to the status quo pre-agreement

9. The parties waive the right to file exceptions and cross-exceptions.

Authorization has been given by the Department of Human Services to agree to this settlement; the parties have read this settlement agreement and freely and voluntarily agree to its provisions.

DATED: 7/31/03

, for Dept. of Human Services

DATED: 6/25/03

Marlene Kamler

DATED: 6/17/03

Appellant's Attorney

DATED:

PETER C. HARVEY
ACTING ATTORNEY GENERAL

By:
Steven L. Scher
Deputy Attorney General

OAL DKT. NO. EDU 00022-03
AGENCY DKT. NO. 396-12/02

IN THE MATTER OF THE TENURE HEARING :

OF MARLENE L. KAMLER, NEW JERSEY : COMMISSIONER OF EDUCATION

STATE DEPARTMENT OF HUMAN SERVICES. : DECISION

The record, Settlement Agreement and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms since they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick,* decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846. The matter is hereby dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 10|17|03

Date of Mailing: 10|17|03

603-03

LOUIS SORRENTINO, BRENDA SORRENTINO, MARIO SORRENTINO, ANNA SORRENTINO, AND BRAD SORRENTINO,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BRICK, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

October 20, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 0108-03

AGENCY DKT. NO. 4-1/01

LOUIS SORRENTINO, BRENDA SORRENTINO, MARIO SORRENTINO, ANNA SORRENTINO AND BRAD SORRENTINO,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF BRICK, OCEAN COUNTY,

Respondent.

Robert G. Daroci, Esq., for petitioners

Ben A. Montenegro, Esq., for respondent (Wilbert, Montenegro & Thompson, attorneys)

Record Closed: August 14, 2003 Decided: September 3, 2003

BEFORE **JOHN SCHUSTER III**, ALJ:

In this matter petitioners challenge the respondent's determination that petitioner, Brad Sorrentino, did not reside in the respondent's school district at the time he was attending the

respondent's high school. This matter was transmitted to the Office of Administrative Law (hereafter "OAL") on January 15, 2003, for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. It was scheduled for hearing at the OAL in Mercerville, New Jersey, on August 11, 2003. Prior to that date, the parties met and negotiated the matter.

The parties have agreed to a settlement and have prepared a Settlement and Stipulation of Dismissal (J-1) indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their representatives' signatures on said document.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this settlement agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

September 3, 2003
DATE

JOHN SCHUSTER III, ALJ

Receipt Acknowledged:

9-5-03
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 9 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

jh

DOCUMENTS IN EVIDENCE

Joint exhibits:

J-1 Settlement and Stipulation of Dismissal

WITNESS LIST

For petitioners:

None

For respondent:

None

8/14/03

FILED
STATE OF N.J.
OFFICE OF ADM'N LAW

2003 AUG 14 A 10:06

Wilbert, Montenegro & Thompson, P.C.
531 Burnt Tavern Road
P.O. Box 1049
Brick, NJ 08724
(732) 295-4500
Attorneys for Respondent, Brick Township Board of Education

LOUIS SORRENTINO and BRENDA SORRENTINO, h/w; MARIO SORRENTINO and ANNA SORRENTINO, h/w; and BRAD SORRENTINO

Petitioner,

v.

BRICK TOWNSHIP BOARD OF EDUCATION,

Respondent.

OFFICE OF ADMINISTRATIVE LAW

DOCKET NO. EDUOS-00108-03S

Civil Action

SETTLEMENT AND STIPULATION OF DISMISSAL WITH PREJUDICE

The matter in difference in the above entitled action having been amicably adjusted by and between the parties, it is hereby stipulated and agreed that the same be and it is hereby dismissed without costs against any party, with prejudice.

Dated: 8/7, 2003

By _____
Robert Daroci, Esq.
Attorney for Petitioners

WILBERT, MONTENEGRO & THOMPSON, P.C.

Dated: 8/11, 2003

By _____
BEN A. MONTENEGRO, ESQ.
Attorney for Respondent

40

LOUIS SORRENTINO, BRENDA SORRENTINO, MARIO SORRENTINO, ANNA SORRENTINO, AND BRAD SORRENTINO,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BRICK, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Stipulation of Dismissal with Prejudice, and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner notes the absence of the terms of the parties' settlement so as to permit his review, pursuant to *N.J.A.C.* 1:1-19.1. The Commissioner has, therefore, determined to consider the parties' Stipulation of Dismissal with Prejudice as the parties' withdrawal of the asserted claims and counterclaims in this matter, pursuant to *N.J.A.C.* 1:1-19.2.

Accordingly, the Commissioner approves the parties' withdrawal of their claims in the instant matter. Given this conclusion, this matter is no longer deemed to be a contested case before the Commissioner and the within matter is, therefore, dismissed, with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 10/20/03

Date of Mailing: 10/22/03

605-03

R.P., on behalf of minor child, J.J.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BEDMINSTER, SOMERSET COUNTY, AND BARKER BUS COMPANY,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioner challenged her daughter's record of suspensions and discipline.

The ALJ concluded that the Board demonstrated that there were no genuine issues of material fact requiring a hearing and that the Board was entitled to prevail as a matter of law. Some of the allegations were time barred (strip search and harassment by a bus driver) while other allegations failed since the Board proved it acted within its authority and its decisions were entitled to a presumption of correctness (dress code, assault and detention matters). The ALJ granted the Board's Motion for Summary Decision and dismissed the Petition of Appeal.

The Commissioner determined that to the extent he has jurisdiction to hear and decide this matter, he concurred with the findings and conclusions of the ALJ. He determined, however, that the evidence later placed on the record concerning J.J.B.'s classification for special education indicated that this matter was not properly before the Commissioner. The petition was dismissed.

October 27, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 738-03

AGENCY DKT. NO. 362-11/02

R. P., ON BEHALF OF MINOR CHILD, J. J. B.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF BEDMINSTER, SOMERSET COUNTY, AND BARKER BUS COMPANY,

Respondents.

R. P., petitioner, *pro se*

Paul H. Green, Esq., for respondent Board of Education (Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

No appearance has been entered by or on behalf of respondent Barker Bus Company

Record Closed: July 28, 2003 Decided: September 11, 2003

BEFORE **JOSEPH F. FIDLER,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner R.P. filed papers with the New Jersey Commissioner of Education on November 13 and 27, 2002, and January 8, 2003, that together were deemed to constitute a

verified Petition of Appeal. Respondent Board of Education of the Township of Bedminster filed an Answer to the Petition of Appeal on February 10, 2003. Respondent Barker Bus Company did not submit an Answer. On March 6, 2003, the matter was transmitted to the Office of Administrative Law for determination as a contested case, and a prehearing conference was held on June 13, 2003. Petitioner's core challenge concerns her daughter J.J.B.'s record of discipline and suspensions, and she alleges various incidents that she asserts demonstrate that respondents have conspired against J.J.B., have harassed her, and have punished her excessively.

Respondent Board of Education has moved for summary decision, pursuant to *N.J.A.C.* 1:1-12.5, asserting that there are no genuine issues of material fact and that it is entitled to prevail as a matter of law. Petitioner responded in opposition to the motion, and respondent Board thereafter filed a reply to petitioner's papers. On July 28, 2003, I determined that all of the papers on the motion for summary decision had been received, and the record closed on that date.

DISCUSSION

Petitioner's request for relief alleges that J.J.B. was given excessive punishment as compared to other children on one occasion during the 2001-02 school year and on two occasions in October 2002. Petitioner further alleges that Diane Schmidt, Interim Principal of the Bedminster School, improperly questioned J.J.B. about an assault allegedly committed by J.J.B. at the A&P, that at the end of the 2001-02 school year, J.J.B. was strip-searched by school personnel after a student had told them that J.J.B. was in possession of marijuana, and that several years ago, J.J.B. was verbally harassed by a bus driver of the Barker Bus Company, with which the Board had contracted for student transportation services.

In its moving papers, the Board set forth the following facts, supported by the affidavits of its employees, Interim Principal Diane Schmidt, and Andrew Rinko, Ed.D., Superintendent of Schools:

> During the 2002-03 school year, J.J.B. was a seventh grade student at the Bedminster School, a public school operated by the Board. On or about October 11, 2002, J.J.B. was issued a one day out-of-school suspension for being disrespectful towards authority figures. In late

> October of 2002, J.J.B. was issued a ten day out-of-school suspension after she hit a male student on the back of his head, causing the child to suffer a recurrence of a previous head injury. The decision to suspend J.J.B. for a period of ten days was made by the Interim Principal in consultation with the Superintendent of Schools and the school's child study team. Petitioner does not deny that J.J.B. engaged in the misconduct which resulted in her suspensions. *See* November 6, 2002 Petition.
>
> Prior to the October suspensions, J.J.B. had engaged in other misconduct earlier in the 2002-03 school year for which she had not been suspended. The suspensions of J.J.B. in October were based solely upon J.J.B.'s misconduct and were not excessive as compared to discipline received by other students of the Bedminster School.
>
> In November of 2002, J.J.B. and her mother moved out of the Bedminster Public School District. J.J.B. no longer attends school in the District. Upon transfer of a student to a school outside of the District, the Board forwards the student's academic records to the new school. The Board generally does not transmit the student's disciplinary records to the new school.

The Board contends on several grounds that it is entitled to prevail as a matter of law. First, it asserts that petitioner's claims are moot. Petitioner and her minor daughter moved out of the District on or about November 14, 2002, just after filing the petition in the present matter. Since there is no continuing relationship between J.J.B. and the Board, the Board's actions regarding J.J.B. are not capable of being repeated. The Board cites *Spivak v. Westwood Regional High School District*, 97 *N.J.A.R.2d* (EDU) 270, 272, for the proposition that an action is considered moot when it no longer presents a justiciable controversy because the issues involved have become academic. A case is moot when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy.

The Board also contends that most of petitioner's claims are time-barred, and therefore must be dismissed. Pursuant to *N.J.A.C.* 6A:3-1.3(d), a petition of appeal must be filed "no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing." Thus, petitioner's claims regarding a suspension occurring during the 2001-02 school year, a strip-search occurring during the 2001-02 school year, and harassment of

J.J.B. by a bus driver several years ago are time-barred and must be dismissed. For the same reason, petitioner's claims against Barker Bus Company are time barred and must be dismissed.

The Board further contends that to the extent any of petitioner's claims are deemed to be neither moot nor time barred, those claims must nevertheless be dismissed since they do not constitute claims upon which relief can be granted. Specifically, the only claims raised by petitioner that may be in compliance with the 90-day limitation concern the two suspensions given to J.J.B. in October 2002, and the allegation that Interim Principal Schmidt questioned J.J.B. regarding an assault allegedly committed by J.J.B. at an A&P. As to the latter claim, although the Board denies that the questioning actually occurred, such questioning of a student regarding an assault that allegedly involved the student is well within the scope of a school principal's authority, regardless of where the alleged assault occurred. *In re State in the Interest of G.C.*, 121 *N.J. Super.* 108, 117 (J. & D. R. Ct. 1972).

With regard to petitioner's claims concerning the October 2002 suspensions, a local board of education has the authority to impose discipline upon the students under its care, and the decision of a local board as to the appropriate penalty to be imposed upon a student for a disciplinary infraction should not be disturbed absent evidence that the board's action was arbitrary, capricious, or unreasonable. In J.D. *and E.D. obo B.D. v. Bd. of Ed. of Toms River Reg. Sch. Dist.*, OAL Dkt. No. EDU 6009-97 (February 17, 1998), the Commissioner of Education adopted the determination of the administrative law judge granting summary decision in favor of the local board of education:

> Upon careful and independent review, the Commissioner concurs with the ALJ that the Board's motion for summary decision may be properly granted. Even accepting as true the facts alleged by petitioners the Commissioner finds that they have failed to meet their burden of proving that the Board's decision to suspend B.D. for one day, out of school, is arbitrary, capricious or unreasonable. In this regard, the Commissioner underscores the ALJ's observation that B.D.'s use of profanity was the result of her own exercise of free will in her choice of words, and may not be viewed as an act of "self-defense," deserving of a lesser penalty.

The Board further notes that under the New Jersey School Laws, suspensions may be imposed for continued or willful disobedience, open defiance of authority, physical assault on another pupil, as well as other forms of student misconduct. *N.J.S.A.* 18A:37-2. Significantly, petitioner does not deny that J.J.B. engaged in the misconduct for which she was suspended in October 2002. The Board argues moreover that petitioner has presented no evidence to support her conclusory allegation that J.J.B. was disciplined more severely than other students, and emphasizes that, in light of the severity of J.J.B.'s misconduct, petitioner cannot show that the suspensions were arbitrary, capricious, or unreasonable.

The Board's final argument in its moving papers is that petitioner is not entitled to the relief she seeks in her petition. Petitioner requests that the Commissioner permanently remove Interim Principal Schmidt from her position with the Bedminster School and charge her with harassment and conspiracy against an emotionally disabled child. The Board notes that non-tenured certificated staff of a local board of education, such as Mrs. Schmidt, may be removed from their employment by the local board only upon the recommendation of the Superintendent of Schools. *N.J.S.A.* 18A:16-1.1; *N.J.S.A.* 18A:27-4.1(b). The Commissioner has no authority to remove a non-tenured building principal from her position, and has no authority to charge a school employee with "harassment" and "conspiracy," as these are criminal charges under *N.J.S.A.* 2C:33-4 and *N.J.S.A.* 2C:5-2, respectively, over which the Commissioner would have no jurisdiction. *N.J.S.A.* 18A:6-9.

Petitioner also requests financial relief. However, the Board asserts that the Commissioner of Education's authority to award monetary damages is very limited, occurring in cases such as those seeking lost earnings or restoration of an increment improperly withheld. *Spivak, supra,* at 272. There is no authority to award monetary damages in circumstances such as those present in this case.

In her response to the motion for summary decision, petitioner disagreed with respondent Board's legal arguments that her claims are moot, time barred, or not susceptible to relief by the Commissioner. She further stated in her brief that she charges the respondents with the following:

1. Mrs. Schmidt harassing J.J.B. and S.B. about "headbands being gang related" because they wore a headband to School on or about October, 2002 when other children wore Headbands without anyone saying anything. Mrs. Roth and Mrs. Fitzmaurice were present with Petitioner. Testimony is required in trial.

2. Mrs. Schmidt harassing J.J.B. and asking her to confess to assault about A&P incident which was a non-school incident because "she was part of a gang in that incident" around October, 2002. Mrs. Schmidt stated "Sometimes children are good, but when they get together they do things they normally would not do by themselves" on October, 2002, with Mrs. Roth and Mrs. Fitzmaurice were present with Petitioner. Testimony is required in trial.

3. Fabricating story about J.J.B. giving child [J.G.] receiving a head injury from child play slap. J.J.B. was suspended for 10 days for this alleged injury under false pretences. I will subpoena Mr. and Mrs. [G.] to court for the trial to get their testimony on this story. BOE has not furnished any facts about any other child that suspended for 10 days at Bedminster for doing anything.

4. Stating that J.J.B. is a "violent child" to fit conspiracy and discrimination against children story in Bedminster on October, 2002 with Mrs. Roth and Mrs. Fitzmaurice were present with Petitioner. These people need to testify in a trial.

5. In June 2002 J.J.B. was required to pull her pants down and searched because a child falsely accused her of having marijuana. Mrs. Fitzmaurice, Mrs. Shabot, and Mr. Beltramba need to testify in a trial. Report by DYFS take by Ms. Stephanie Wilson about June 30, 2002 will support this fact in trial. Report taken by James Gregory in May, 2003 will state his finds in this Institutional Abuse complaint by the Petitioner.

6. J.J.B. was accused of her "kid's tattoo" being gang related by Mrs. Schmidt with Petitioner, Mrs. Roth, and Mrs. Fitzmaurice present in October, 2002. These witnesses need to testify.

7. Mrs. Schmidt stating harassing remark about J.J.B. "When children act like this their parents take them to St. Clairs Hospital," with Petitioner, Mrs. Roth, and Mrs. Fitzmaurice present in October, 2002. These people need to testify in a trial.

8. During the school year 2000/2001 J.J.B. was continually harassed by the Barker Bus Company driver. Mr. Beltramba did not investigate the bus driver's story and kept issuing bus suspensions.

A parent [M.M.] came forward and said J.J.B. was not doing anything except the first time with the bus driver. BOE or Barker Bus Company did nothing to apologize to J.J.B. or issue any punishment to the driver. She was extremely upset and punished over and over for something she did not do. J.J.B. was given cruel and excessive punishment for something she did not do over and over again.

9. In the school year 2002, J.J.B. was given a detention for waiving to a teacher during a detention. This is excessive and cruel punishment to an emotional disabled child.

10. J.J.B. was sent to the office for saying "I found my paper" in a loud voice. This is excessive punishment.

11. J.J.B.'s disciplinary records were transferred to the new school where the original suspension notice in blue pen signed by Diane Schmidt sits in her file. There are other documents written by hand without any signature or any indication who wrote them they look extremely suspiciously false. There are multiple copies of one disciplinary sheet that was copied and whited out to look like there were occurrences of this document.

In its reply to petitioner's opposition brief, respondent Board argues that none of the eleven separate allegations requires an evidentiary hearing, either because the allegations are stale and barred by the applicable statute of limitations, or because the allegations, even if accepted as true, do not constitute a claim upon which relief can be granted. The Board further contends that it is entitled to summary decision based upon the arguments set forth in its initial brief. I agree.

Summary decision may be granted by an administrative law judge "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." *N.J.A.C.* 1:1-12.5(b). This evidence is to be considered in the light most favorable to the non-moving party. *Brill v. Guardian Life Ins. Co. of Am.*, 142 *N.J.* 520, 523 (1995). The essential question is "whether the evidence presents a sufficient disagreement to require [a hearing] or whether it is so one sided that one party must prevail as a matter of law." *Id.* at 536. The rationale behind the procedure is clear. Summary decision is:

> designed to provide a prompt, businesslike and inexpensive method of disposing of any cause which a discriminating search of the merits in the pleadings, depositions and admissions on file, together with the affidavits submitted on the motion, clearly shows not to present any genuine issue of material fact requiring disposition at a trial. *Judson v. Peoples Bank and Trust Co. of Westfield*, 17 *N.J.* 67, 74 (1954).

As respondent aptly argued, some of petitioner's claims are time barred, pursuant to *N.J.A.C.* 6A:3-1.3(d), because her petition of appeal was filed subsequent to the expiration of the 90-day limitation. The first petition document was filed November 13, 2002. Thus, the claims concerning discipline and a strip search allegedly occurring during the school year ending in June 2002 are time barred and must be dismissed. I so **CONCLUDE**. For the same reason, I **CONCLUDE** petitioner's allegations regarding harassment by a bus driver and claims against Barker Bus Company from previous years are time barred and must be dismissed. Petitioner was aware of each of the actions or events at the time they occurred; yet she failed to file a petition of appeal within the requisite 90-day limitation.

It is axiomatic that when a local board of education acts within its authority, its decision is entitled to a presumption of correctness. The Board's decision may not be disturbed absent a finding that it was arbitrary, capricious or unreasonable. Petitioner's claims that are not time barred must be evaluated in this context.

As to petitioner's claim that J.J.B. was asked to remove her headband on the basis that it appeared to be gang related attire, such an action would be well within the authority of a local board of education. *N.J.S.A.* 18A:11-9 provides in part that a board of education may adopt a dress code to prohibit students from wearing on school property any type of clothing, apparel or accessory which indicates that the student has membership in, or affiliation with, any gang associated with criminal activities. In the absence of evidence showing that respondent Board acted in an arbitrary, capricious, or unreasonable manner, petitioner cannot prevail on this claim as a matter of law and it should be dismissed. I so **CONCLUDE.** By the same reasoning, I **CONCLUDE** that petitioner's claim that J.J.B. was accused of wearing a gang related tattoo should be dismissed.

It is well within the scope of a school principal's authority to question a student regarding an assault in which the student was allegedly involved. *In re State in the Interest of G.C.*, 121 *N.J. Super.* 108, 117 (J. & D. R. Ct. 1972). So, even if Interim Principal Schmidt actually questioned J.J.B. about an alleged assault, which the Board denies, I **CONCLUDE** that petitioner cannot prevail on this claim as a matter of law and it should be dismissed. Respondent Board also denies petitioner's allegations that Mrs. Schmidt stated that J.J.B. is a "violent child" and that "when children act like this their parents take them to St. Clair's Hospital." Even if these statements were made, petitioner has not shown how they are beyond the scope of authority of the Board's employee. These do not constitute claims upon which relief may be granted, and I **CONCLUDE** these claims should be dismissed.

On or about October 11, 2002, while she was a seventh grade student at the Bedminster School, J.J.B. was issued a one day, out-of-school suspension for being disrespectful towards authority figures. Petitioner acknowledges that her daughter was openly defiant. Later that month, J.J.B. was issued a ten day out-of-school suspension after she hit another student on the back of his head. While petitioner disputes the degree of injury J.J.B. caused the other child to suffer, she admits that this misconduct occurred. The decision to suspend J.J.B. for a period of ten days was made by the Interim Principal in consultation with the Superintendent of Schools and the school's child study team. The suspension decisions are authorized by the New Jersey School Laws, which provide that suspensions may be imposed for continued or willful disobedience, open defiance of authority, physical assault on another pupil, as well as other forms of student misconduct. *N.J.S.A.* 18A:37-2. Absent any evidence in this matter that could support a conclusion that the Board's action was arbitrary, capricious, or unreasonable, the decision of the local board as to the appropriate penalty to be imposed for these disciplinary infractions should not be disturbed. Petitioner cannot prevail on her claims regarding the suspensions as a matter of law and they should be dismissed. I so **CONCLUDE.**

In regard to petitioner's allegations that J.J.B. was excessively punished by a detention for waiving to a teacher while in detention, and by being sent to the office for saying "I found my paper," it is well settled that a local board of education has the authority to discipline its students. Given the presumption of correctness that applies to the Board's actions, such discipline should not be overturned absent evidence that the actions were arbitrary, capricious, or unreasonable.

There is no such evidence here, so I **CONCLUDE** that petitioner cannot prevail as a matter of law and these claims should be dismissed.

Petitioner and J.J.B. moved out of the Bedminster School District in November 2002. Petitioner alleges in her response to the motion for summary decision that J.J.B.'s disciplinary records were transferred to her new school. Such a transfer would be in accordance with the law's requirements. *N.J.S.A.* 18A:36-25.1(b) provides that when a child transfers from one school district to another, the receiving school shall obtain the child's school record from the district from which the child has transferred. The school district of last attendance shall provide to the receiving district all information in the child's record related to disciplinary actions taken against the child by the district, and written consent of the parent shall not be required as a condition of the transfer of information. Thus, petitioner's assertion does not constitute a claim for which relief can be granted.

Petitioner is not entitled to the relief she seeks in her petition. Her request that the Commissioner permanently remove Interim Principal Schmidt from her position with the Bedminster School and charge her with harassment and conspiracy cannot be granted. Non-tenured certificated staff of a local board of education, such as Mrs. Schmidt, may be removed from their employment by the local board only upon the recommendation of the Superintendent of Schools. *N.J.S.A.* 18A:16-1.1; *N.J.S.A.* 18A:27-4.1(b). The Commissioner has no authority to remove a non-tenured building principal from her position, and the Commissioner is also without jurisdiction to bring criminal charges against a school employee under *N.J.S.A.* 2C:33-4 or *N.J.S.A.* 2C:5-2 for harassment or conspiracy. *N.J.S.A.* 18A:6-9. Finally, petitioner's claims gain no greater legal sufficiency for being accompanied by a claim for monetary damages, inasmuch as such damages cannot be awarded by the Commissioner. *Spivak v. Westwood Regional High School District*, 97 *N.J.A.R.2d* (EDU) 270, 272.

Based upon the foregoing reasons, I **CONCLUDE** that respondent Board has demonstrated that there are no genuine issues of material fact requiring a hearing and that it is entitled to prevail as a matter of law. *N.J.A.C.* 1:1-12.5(b). Therefore, respondent Board's Motion for Summary Decision is **GRANTED** and I **ORDER** that the Petition of Appeal be **DISMISSED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 11, 2003
DATE

Joseph F Fidler
JOSEPH F. FIDLER, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

September 11, 2003
DATE

Mailed to Parties:

SEP 15 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

EXHIBITS

For petitioner:

Brief in Opposition to Motion for Summary Decision

For respondent:

Brief in Support of Motion for Summary Decision, with attached Affidavits; Brief in Reply to Opposition Motion

WITNESSES

For petitioner:

None

For respondent:

None

OAL DKT. NO. EDU 738-03
AGENCY DKT. NO. 362-11/02

R.P., on behalf of minor child, J.J.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BEDMINSTER, SOMERSET COUNTY, AND BARKER BUS COMPANY,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

This matter was opened before the Commissioner of Education by Petition of Appeal and a letter requesting emergent relief dated November 13, 2002. By letter dated November 14, 2002 from the New Jersey Department of Education, petitioner was apprised of the deficiencies in her petition and request for emergent relief. Additionally, due to the nature of her claims, petitioner was specifically advised therein:

> that to the extent any issues related to your claim(s) herein implicate education programming and services regulated by Section 504 of the Rehabilitation Act of 1973 and/or the Individuals with Disabilities Education Act (IDEA), any such claim must be pursued before the Office of Special Education pursuant to *N.J.A.C.* 6A:14-1.1 *et seq.* (Letter from Director, Bureau of Controversies and Disputes at 2)

A copy of the letter was also sent to the Board Secretary, Superintendent and County Superintendent. Thereafter, although petitioner perfected her Petition of Appeal, she did not file

a proper application for emergent relief pursuant to *N.J.A.C.* 6A:3-1.6. Neither did petitioner clarify, amend or withdraw her petition in response to the Director's advisement, noted above.

The Board filed its Answer with Separate Defenses on February 6, 2003.[1] Notably, although the Answer addressed petitioner's substantive claims regarding the discipline issued to J.J.B. as raised in the Petition of Appeal, the Board did not indicate that J.J.B. had been classified while attending school in its District. Neither did the Board raise, within its Separate Defenses, the issue of the Commissioner's jurisdiction herein. Therefore, this matter was transmitted to the OAL for proceedings.

While at the OAL, the following evidence was placed on the record:

- A copy of a report from an IEP conference held for J.J.B. April 11, 2002, when J.J.B. was in sixth grade. The report indicates that J.J.B. is "eligible for special education services in the category of Emotionally Disturbed based on her initial assessment and eligibility of 4/6/01." (Bedminster Township School District IEP, received by the OAL on May 1, 2003 and again on May 28, 2003)
- A letter dated November 1, 2002 from Joyce Fitzmaurice, Director of Student Services for the Board, to petitioner, stating, in pertinent part:

> As [J.J.B.] has been suspended for more than ten days this academic year, it is required that we hold a "manifestation determination" meeting to address such issues as to the appropriateness of [J.J.B.'s] IEP and placement and whether her behavior is manifestation of her disability.
>
> We will hold this meeting on Monday, November 11th, at 9:00 a.m. [J.J.B.'s] teachers, the Child Study Team, the principal and I will be present. You are invited to attend.*** (Fitzmaurice's Letter, November 1, 2002, received by OAL on May 28, 2003)

[1] The delay in filing an Answer was due to petitioner's improper service of the Petition of Appeal.

- A letter dated November 20, 2002 from Joyce Fitzmaurice, enclosing a copy of the manifestation determination that was developed at the aforementioned meeting, wherein it was found that J.J.B.'s "behavior is judged to be a manifestation of her disability."[2] (Fitzmaurice's Letter and Report, November 20, 2002, received by OAL on May 28, 2003)

- An Affidavit dated April 23, 2003 from Diane Schmidt, Interim Principal of the Bedminster School, affirming, in pertinent part:

> In late October of 2002, J.J.B. was issued a ten (10) day out of school suspension after she hit a male student on the back of his head, causing the child to suffer a recurrence of a previous head injury. The decision to suspend J.J.B. for a period of ten (10) days was made by me in consultation with the Superintendent of Schools as well as the Director of the Child Study Team.*** (Brief on Behalf of Respondent Board of Education of the Township of Bedminster In Support of Motion for Summary Decision Pursuant to *N.J.A.C.* 1:1-12.5, Affidavit of Diane Schmidt at 2)

Upon careful review of the record as supplemented at the OAL, the Commissioner determines that to the extent he has jurisdiction to hear and decide this matter, he concurs with the findings and conclusions of the ALJ. However, notwithstanding the parties' silence in their initial pleadings as to J.J.B.'s classification for special education, a fact which is of paramount importance when considering student discipline issues, the evidence later placed on this record strongly indicates that this matter is not properly before the Commissioner.[3] *I.D. and M.D. on Behalf of C.D. v. Board of Education of the Township of Hazlet, Monmouth County*, State Board Decision April 2, 1997; s*ee also*, *East Brunswick Board of Education v. New Jersey*

[2] Petitioner was not listed as attending the meeting.

[3] The Commissioner so concludes, notwithstanding that the record additionally contains a letter dated July 10, 2003 from petitioner to respondent's counsel, wherein petitioner states, in pertinent part, "Let me also remind out [sic] that JJB is not classified as an emotionally disturbed child.*** (Letter from Petitioner to Paul Green, Esq., July 10, 2003, received by the OAL on July 11, 2003)

State Board of Education, EHLR DEC. 554:122 (DCNJ 1982); *A.N. v. Clark Bd. of Ed.*, 6 *N.J.A.R.* 360 (1983).

Accordingly, the within Petition of Appeal is dismissed.

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: 10/27/03

Date of Mailing: 10/27/03

[4] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

606-03

C.B., on behalf of minor children, C.B. AND J.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PENNSVILLE, SALEM COUNTY,	:	DECISION
RESPONDENT.	:	

October 27, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 2711-03

AGENCY DKT. NO. 108-4/03

C.B. O/B/O C.B. AND J.B.,

Petitioner,

v.

PENNSVILLE OF EDUCATION

Respondent.

C.B. parent appearing *pro se* for petitioners

Gary M. Salber, Esq., for respondent (Karr & Salber, attorneys)

Record Closed: September 8, 2003 Decided: September 8, 2003

BEFORE **W. TODD MILER,** ALJ:

On May 12, 2003, the Bureau of Controversies and Disputes of the Department of Education referred the present matter to the Office of Administrative Law (OAL) for determination as a contested case pursuant to *N.J.S.A.* 52:14-B-1 to -15 and *N.J.S.A.* 52:14F-1 to –13. The Commissioner requested that an administrative law judge be assigned to conduct a hearing. The Director of the Office of Administrative Law assigned the matter to me to hear. *N.J.S.A.* 52:14F-5(o).

The hearing was secheulded for July 7, 2003. Prior to a hearing, the parties conferred and arrived at a settlement agreement, and the terms were reduced to writing in the attached stipulation of settlement.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached stipulation of settlement. (Signed by petitioner on July 20, 2003 and respondent on August 5, 2003 and thereafter filed with this ALJ on September 8, 2003)

2. The settlement fully disposes of all the issues in controversy and is consistent with the law.

Therefore, I **ORDER** that the parties comply with the settlement terms.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

9-8-03
DATE

W S Miller
W. TODD MILLER, ALJ

Sept. 11, 2003
DATE

M Kathleen Duncan (ta)
DEPARTMENT OF EDUCATION

SEP 12 2003

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

KARR & SALBER
681 South Broadway, Suite 1
Post Office Box 346
Pennsville, New Jersey 08070
Telephone: (609) 935-8500
Facsimile: (609) 935-4570
By: Judith A. Karr, Esquire
Attorneys for Pennsville Township Board of Education

C.B. O/B/O MINOR CHILDREN C.B. & J.B. Petitioner,	:	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY
vs.	:	OAL DOCKET NO. EDUOS 02711-03S AGENCY REF. NO. 108-4/03
TOWNSHIP OF PENNSVILLE BOARD OF EDUCATION Respondents.	:	STIPULATION OF SETTLEMENT

THIS MATTER having come before the Honorable W. Todd Miller, A.L.J. by way of a telephonic pre-hearing conference with Carla Barnhart, petitioner, appearing and Gary M. Salber, Esquire, of Karr and Salber, appearing on behalf of the Pennsville Township Board of Education and the parties having reached an agreement for settlement with the terms of settlement set forth hereinafter.

1. If petitioner establishes a bona fide residence within the Township of Pennsville by August 18, 2003, her children, C.B. and J.B. shall be permitted to continue enrollment in the Pennsville Township School District and the Pennsville Township Board of Education will not seek reimbursement for any past tuition for said children.

2. In the event that the petitioner has not established a bona fide residence within the Township of Pennsville by August 18, 2003, Carla Barnhart shall have said children's records transferred to the Penns Grove/Carneys Point Township School District and that in said event the Pennsville Township Board of Education shall not seek reimbursement for past tuition in regard to said children.

3. Said children shall not be permitted to attend the Pennsville Township School District if said bona fide residency within the Township of Pennsville has not been established by August 18, 2003.

4. This Stipulation of Settlement resolves all issues concerning this matter.

CARLA BARNHART
Petitioner, On behalf of
C.B. & J.B.

Carla Barnhart
CARLA BARNHART

Dated: July 20, 2003

Pennsville Township Board
of Education

By:

Dated: August 5, 2003

OAL DKT. NO. EDU 2711-03
AGENCY DKT. NO. 108-4/03

C.B., on behalf of minor children, C.B. AND J.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PENNSVILLE, SALEM COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Stipulation of Settlement and Release, and Initial Decision issued by the Office of Administrative Law (OAL), pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner observes that the President[1] of the Pennsville Township Board of Education signed the Stipulation of Settlement and Release on behalf of the Board. In that neither the file nor the settlement agreement contains a copy of the Board's resolution approving the settlement and designating the Board President to sign the agreement on its behalf, and the agreement is not signed by the Board attorney, who is the Board's duly authorized representative in litigation, the Commissioner cannot approve the within settlement agreement.

[1] The Commissioner notes that the proposed settlement agreement does not identify the name and title of the person signing the agreement on behalf of the Board, nor is the Commissioner able to discern the name of the person signing on behalf of the Board from the signature. However, a letter in the file from counsel for the Board states:

> Enclosed please find original and two (2) copies of the Stipulation of Settlement which has been signed by both (C.B.) and the President of the Pennsville Township Board of Education in connection with the above-referenced matter. (Board Counsel's Letter of August 5, 2003)

Accordingly, the Commissioner hereby remands this matter to the OAL for revision of the Stipulation of Settlement and Release consistent with the concerns set forth above. If the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to hearing.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 10/27/03

Date of Mailing: 10/27/03

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

607-03

J.K. AND S.K., on behalf of minor child, D.K.. :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE VILLAGE OF RIDGEWOOD, BERGEN COUNTY, : DECISION

RESPONDENT. :

October 27, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 09074-02

AGENCY DKT. NO. 265-8/02

J.K. AND S.K. ON BEHALF OF MINOR CHILD D.K.,

Petitioners,

v.

BOARD OF EDUCATION OF THE VILLAGE OF RIDGEWOOD, BERGEN COUNTY,

Respondent.

Brian J. Halligan, Esq., for petitioners (Crawford & Hillgan, attorneys)

Philip E. Stern, Esq., for respondent (Sills, Cummis, Radin, Tischman, Epstein and Gross, attorneys)

Record Closed: July 24, 2003 Decided: September 12, 2003

BEFORE **LESLIE Z. CELENTANO,** ALJ:

STATEMENT OF THE CASE

This matter was transmitted to the Office of Administrative Law on October 11, 2002, for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F1 to -13.

A hearing was scheduled on September 12, 2003. Prior to the date of hearing the parties agreed to settle this matter. The attached Settlement Agreement was submitted indicating the terms of agreement which are incorporated herein by reference.

Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

September 12, 2003
DATE

LESLIE Z. CELENTANO, ALJ

Receipt Acknowledged:

9/16/03
DATE

M. Kathleen Duncan (CT)
DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

SEP 22 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

da

SETTLEMENT AGREEMENT

This Settlement Agreement is made this 24 day of July, 2003, by and between the Village of Ridgewood Board of Education ("Board"), and J.K. and S.K. o/b/o of minor child, D.K. ("Petitioners").

RECITAL

WHEREAS, the Board and Petitioners have been involved in a Litigation styled, J.K. and S.K. o/b/o of minor child, D.K. v. Board of Education of the Village of Ridgewood, Docket No.: EDU DS-09074-02M (hereinafter referred to as "the Litigation"); and

WHEREAS, the Board and Petitioners desire to resolve amicably and in good faith all matters and issues arising out of the Litigation;

NOW, THEREFORE, in consideration of the foregoing and in consideration of their respective rights and obligations set forth herein and for other good and sufficient consideration, receipt of which is hereby acknowledge, the Board and Petitioners agree as follows:

ARTICLE I

WITHDRAWAL OF PETITION

For its obligations pursuant to this agreement, Petitioners hereby withdraw the Litigation styled J.K. and S.K. o/b/o of minor child, D.K. v. Board of Education of the Village of Ridgewood, Docket No.: EDU DS-09074-02M.

ARTICLE II

TERMS OF SETTLEMENT

2.1 Consideration - As consideration of Petitioner's withdrawal of the Litigation as set forth herein, the Board hereby rescinds the suspension of Petitioners' minor child that is underlying the cause of the Litigation. The Board has signed a letter on its letterhead attached hereto stating that the suspension of the child that took place on or about May 9, 2002, is hereby

rescinded.

ARTICLE III

MISCELLANEOUS

3.1. Entire Agreement – This Agreement sets forth the entire agreement between the parties with respect to the subject matter hereof and supersedes any and all prior agreements relating thereto. There are no other understandings or agreements between or among the parties with respect to the subject matter hereof, except to set forth herein, and as set forth in any other documents executed directly or in connection with this Agreement. No condition or provision of this Agreement may be modified, waived or revised in any way except in writing executed by all parties and referring specifically to this Agreement.

3.3. No Admissions – Nothing contained in this Agreement shall be construed to constitute an admission or acknowledgment by any party hereto of any wrongful or improper conduct, nor of any liability to any other party.

3.4 Binding Effect – This Agreement and all rights and duties set forth herein shall be binding upon and inure to the benefit of the parties hereto, as well as their respective successors and assigns.

3.5 Governing Law and Choice of Forum – This Agreement and its interpretation and performance shall be governed by the laws of the State of New Jersey, without giving effect to its conflicts of law rules.

3.6 Partial Invalidity – In the event any provision of this Agreement is held to be contrary to or invalid under the laws of any country, state, municipality or other jurisdiction, such illegality or invalidity shall not affect in any way any of the other provisions hereof, all of which shall continue in full force and effect.

3.7 Captions – The captions set forth in this Agreement are intended solely for the parties' convenience and ease of reference and are not intended to modify, limit, describe or affect in any way the scope, content or intent or this Agreement.

3.8 Signature in Counterpart - This Agreement may be executed simultaneously in counterparts, each of which shall be deemed to be an original, but all of which shall constitute one and the same instrument.

3.9 Authorization - The undersigned officer of the Board hereby represents that he/she is fully authorized by the Board to execute this agreement on the Board's behalf.

3.10 Investigations - The parties to this Agreement acknowledge and agree that they have entered into this Agreement and have executed it without duress or coercion, and have done so with the opportunity to consult counsel. Each party further acknowledges and agrees that no other party has made representations, warranties, promises or agreements not set forth herein and no party relies in any way upon any representation, warranty, statement of fact or opinion, understanding, disclosure or non-disclosure not set forth herein in entering into this Agreement and executing it, no party has been induced in any way, except for the consideration, representations, warranties, statements and covenants recited herein, to enter into this Agreement.

3.11 Construction and Enforcement - The terms of this Agreement are the product of negotiations between the parties, and shall be construed without regard to any presumption or other rule requiring construction against the party causing this Agreement to be drafted.

IN WITNESS WHEREOF, the parties have executed this Agreement on the date above written.

BOARD
Robert A. Weakley
Director of Human Resources

Dated: July 24, 03

PARENT - Susan Knudsen

PARENT - John Knudsen

689244.1

J.K. AND S.K., on behalf of minor child, D.K..	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE VILLAGE OF RIDGEWOOD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Settlement Agreement, and Initial Decision issued by the Office of Administrative Law (OAL), pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner observes that the Director of Human Resources of the Ridgewood Board of Education signed the Settlement Agreement on behalf of the Board.[1] In that neither the file nor the settlement agreement contains a copy of the Board's resolution approving the settlement and designating the Director of Human Resources to sign the agreement on its behalf, and the agreement is not signed by the Board attorney, who is the Board's duly authorized representative in litigation, the Commissioner cannot approve the within settlement agreement.

Accordingly, the Commissioner hereby remands this matter to the OAL for revision of the Settlement Agreement consistent with the concerns set forth above. If the parties

[1] Notwithstanding the provision in Item 3.9 of the Settlement Agreement that states that "The undersigned officer of the Board hereby represents that he/she is fully authorized by the Board to execute this agreement on the Board's behalf," the Board's attorney is the only individual who may sign on behalf of the Board without submission of a Board resolution approving the settlement.

are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to hearing.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 10/27/03

Date of Mailing: 10/27/03

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

610-03

610-03E

D.T. AND M.T., on behalf of minor child, R.S.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BRIDGEWATER-RARITAN REGIONAL SCHOOL DISTRICT, SOMERSET COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

October 29, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING PETITIONERS' MOTION FOR EMERGENT RELIEF

OAL DKT. NO. EDU 6982-03

AGENCY DKT. NO. 382-10/03

D.T. AND M.T. ON BEHALF OF MINOR CHILD, N.T.,

Petitioners,

v.

BRIDGEWATER –RARITAN REGIONAL SCHOOL DISTRICT BOARD OF EDUCATION,

Respondent.

D.T. and M.T., petitioners, *pro se*

Daniel C. Soriano, Jr., Esq., for respondent (Soriano & Soriano, attorneys)

Record Closed: October 21, 2003 Decided: October 21, 2003

BEFORE **STEVEN C. REBACK,** ALJ:

PROCEDURAL HISTORY

This matter was initiated by the petitioners D.T. and M.T. instituting a motion for emergency relief seeking to bar the imposition of a five-day bus suspension for their child, N.T., pending appeal of the matter on a plenary basis. This suspension is scheduled to commence tomorrow, Wednesday, October 22, 2003. The matter was heard commencing at 1:00 p.m. in the afternoon of the preceding day, October 21, 2003, the morning having been set aside for in-depth

in chambers discussions which weren't successful in respect to a settlement. Nevertheless, the Board has withdrawn and will formally do so by letter of counsel all other disciplinary actions pending against N.T. occurring during the 2002-2003 school year. That includes the withdrawal of a matter already and currently pending before the OAL docketed EDU 470-03. At my request, counsel will submit a formal letter of withdrawal as soon as possible.

The current motion for emergency relief seeks to stay the implementation of a five-day school bus suspension imposed upon N.T. based upon conduct allegedly committed by him on a school bus on October 7, 2003. The supportive documentation in respect to that conduct has been provided by the Board via affidavits of the bus driver as well as by the Bridgewater-Raritan Regional Board of Education principal of the middle school. The Zimmerman Affidavit notes that she has been employed with the District as a school bus driver and that she was, in fact, performing her duties on October 7, 2003 when the incident occurred at approximately 2:30 p.m. There is no dispute that N.T. was a passenger on the bus. The bus had been parked along the curb of the middle school loading students to return them to their bus stops and allow them to go home. The rear emergency roof hatch had been opened approximately three inches above the bus roof for purposes of ventilation only. Zimmerman alleges that when N.T. entered the bus, N.T. wanted to shut the rear emergency roof hatch. Zimmerman told him not to touch the roof hatch. N.T. did not listen to her and turned the red handle of the emergency roof hatch "causing the roof hatch to open as an emergency exit and setting off an alarm." Zimmerman Affidavit, Paragraph 4. As a consequence, it was necessary for the District's safety coordinator to reset the hatch in order to turn off the emergency alarm.

She further alleges that following this incident, she proceeded on her bus route and N.T. proceeded to exit the bus at a stop which was not his. Zimmerman attests that she admonished him two or three times to return to the bus but N.T. refused. He had neither permission nor authority to get off the bus at a stop other than his bus stop.

As an incident to the affidavit, Ms. Zimmerman and the respondent submitted a bus conduct report dated the date of the incident, October 7, 2003, and attached to the affidavit. In the report, Zimmerman notes in handwriting, "I had the emergency door and roof opened for air, he [illegible] back windows and wanted to shut emergency door. I told him not to touch it but he

didn't listen. He released the door completely from bus using red handle. Then [N.T.] got off bus" at a stop other than his own despite admonition by the driver to the contrary. The affidavit submitted by Nancy Mahoney, the principal of the middle school, indicates that when she became aware of the allegations set forth by Ms. Zimmerman, she concluded that N.T.'s conduct violated school policy 3711-3-R. That policy, which is attached to the affidavit, sets out the parameters of students' conduct on the bus and sets forth the justification for the imposition of discipline should that conduct be improperly exercised by the student. It is clear that the alleged actions by N.T. would directly violate the policy.

Ms. Mahoney notes as well that this was the second infraction by N.T. during the current school year which required an exclusion from the bus for a period of five school days. Mahoney advised as well that she sent a letter to N.T.'s mother, dated October 13, 2003, advising of the suspension, and based upon the mother's request, the suspension was delayed until October 22, 2003.

In addition, Ms. Mahoney notes that the policy previously alluded to mandates that students exit and enter the bus at their designated bus stops. This, by N.T.'s own written admission, was not done. Mahoney also advises that it was her understanding that when she made an effort to discuss the incident of October 7 with N.T., she was advised that based upon his father's instructions, he would not speak with her when summoned to her office. She characterizes this as an unacceptable situation indicating that under law N.T. must submit himself to authority.

As noted previously, N.T. submitted a handwritten statement which was neither certified nor in the form of an affidavit. In the interest of justice, however, I permitted the document to be admitted for purposes of the motion. He acknowledges closing the emergency roof hatch; however, he indicates that he was given permission to do so by the driver, Ms. Zimmerman. He further acknowledges making an effort to pull the roof hatch down but he was unable to move it, so he consequently pulled the red handle thinking that it would be effective to accomplish his ends. Once he did this, and presumably once the alarm was activated, Ms. Zimmerman, pursuant to N.T.'s written statement, screamed "I told you not to turn the red handle." N.T., in his written statement, denies having heard her say that. N.T. acknowledges getting off the bus at an

impermissible bus stop with a friend so as to visit the friend's home. He further notes that he was never admonished by the driver to remain on the bus.

A temporary restraint is an extraordinary equitable remedy, utilized primarily to preclude and prevent irreparable harm; it must, therefore, be administered with sound discretion and always upon consideration of justice, equity and morality in a given case. *See New Jersey Bar Association v. Northern New Jersey Mortgage Associates*, 22 *N.J.* 184, 194 (1956); *Citizens Coach Company v. Camden Horse R.R. Co.*, 29 *N.J. Eq.* 299, 303 (1878). Through the common law, it has been well established over a long term that a temporary restraining order or a stay will not issue unless the petitioner demonstrates:

1 A probability of eventual success on the merits of the appeal at the plenary hearing;

2. A threat of immediate and irreparable harm to the petitioner; and

3. The inconvenience or loss to the opposing party will be minimal if the relief is obtained. *See Crowe v. Degioia*, 90 *N.J.* 126, 132-134 (1982).

It should be noted that the standards have been promulgated in various ways and pursuant to various regulations. *See e.g. N.J.A.C.* 1:6A-12.1 (applying specifically to special education hearings) and *N.J.A.C.* 1:1-12.6, which applies to all OAL emergency matters. In reviewing the record in this case, it is my view that the petitioners are not entitled to emergent relief. Based upon the record before me, which excludes the disallowed testimony of N.T.'s father (who has no personal knowledge of the incident), it is my view and I **CONCLUDE** that the petitioners have failed to demonstrate that they have a likelihood of prevailing on the merits of this matter. The affidavits and accompanying exhibits clearly spell out that what N.T. was purported to have done was sworn to by the bus driver. The bus driver, based upon the evidence, has absolutely no reason to prevaricate or to make up a story. Of course, N.T.'s statement which, while acknowledging much of what he's accused of, indicates that he was never advised not to exit the bus or to close the hatch. This seemed somewhat strange because in respect to the latter, he does note that the driver screamed "I told you not to turn the red handle on." He then notes that he never heard her say it. If he's acknowledging that she screamed it, it's difficult to reconcile that with his inability to have heard her say it. Nevertheless, if anyone in this matter has a reason to

distort the facts or to mislead or to convince himself that he was not guilty of any wrongdoing, it would have to be N.T. Since if the case were to go to plenary hearing the issue of credibility would be crucial, then there is no probable likelihood that an administrative law judge would accept the credibility of the disciplined party over that of an objective witness. N.T.'s father indicated that it was his understanding that there was a Board policy mandating that all bus trips be videotaped. In response to my questioning him concerning the authority for that position, he cited a Board policy which merely authorized the District to utilize videotape on school buses. Thus, it is my view that the District is not mandated to use videotape on every single bus ride. That it didn't choose to use it on the bus trip in question is not to conclude that the District erred.

N.T.'s father also argues that it's a violation of law to have the hatch of the school bus opened. He is suggesting that the driver contravened law and, therefore, whatever actions his son may have taken could not be considered misconduct. No evidence was offered to convince me that the law imposes a requirement on the school bus driver to keep the hatch roof closed in the fashion in which it was. Mr. Soriano, although not an expert, did represent as an officer of the court that it is his understanding that the emergency hatch was not opened; rather, the vent latch was opened which allowed air to circulate through the bus and that keeping that hatch open is perfectly permissible. It seems somewhat tertiary to resolve the emergency issue to determine whether the bus driver did or did not do what was advised of her. Assuming for the moment that she did not comply with all of the legal requirements does still does not provide an excuse for N.T. to behave in a manner which is contrary to school policy.

In addition, it is my view that the petitioners have been unable to demonstrate that if the five-day bus suspension were imposed that N.T. would suffer irreparable harm. The Board of Education cites to the unreported decision of the Commissioner of Education issued on June 4, 1993 affirming an administrative law judge's decision denying an application for emergency relief. *See W.H.V.P. and J.P.V.P. on behalf of their minor child, T.L.V.P. v. Board of Education of the Township of Edison, et al, Middlesex County*. In that matter, the administrative law judge determined that it was not irreparable harm to suspend a student from school and classes for three days. Clearly, a suspension from classes for three days is much more severe than a suspension from the school bus. The impression clearly given to me by the petitioners was that they would somehow and in some way get their child to and from school during the suspension. While there

is no doubt that there is some harm inuring to N.T. because of a suspension and the consequential discipline attached to it, based upon prior case law, that harm does not rise to the level of irreparability such that it would warrant the imposition of emergency relief. Based upon the foregoing, I **CONCLUDE** that the petitioners have failed to meet the standards for granting emergency relief. Accordingly, I **ORDER** that the petitioners' application for emergency relief is **DENIED**. Since there are no other issues remaining in this matter once the emergency relief matter has been resolved, I deem this decision to be the final decision issued by the Office of Administrative Law subject, of course, to review by the Commissioner of Education. Should the Commissioner choose to reverse, then, of course, the matter will be remanded, a stay will be imposed and a plenary hearing will determine the outcome. If the decision is affirmed, then it becomes a final decision in the matter.

Without prejudice to N.T.'s rights and/or without in any way assessing the other matters against him, it is my understanding based upon conferences in chambers that there were numerous acts of alleged misconduct committed by N.T. last school year on the bus, and there were at least two allegedly committed this year on the school bus. It would seem to me that given that N.T. apparently is a good student and well liked by faculty and peers, the conduct engaged in on the bus is a significant departure from his conduct, behavior, and acting out everywhere else. Under those circumstances, I would recommend to the Board that serious consideration be given to conducting an evaluation of N.T. I am not suggesting that N.T. requires classification. I am merely suggesting that perhaps an evaluation – given his record of discipline may be appropriate and beneficial.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

10/21/03
DATE

STEVEN C. REBACK, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

10/24/03
DATE

cmo

OAL DKT. NO. EDU 6982-03
AGENCY DKT. NO. 382-10/03

D.T. AND M.T., on behalf of minor child, R.S.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BRIDGEWATER-RARITAN REGIONAL SCHOOL DISTRICT, SOMERSET COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

The record of this emergent matter, including the audiotapes of the hearing conducted by the Administrative Law Judge (ALJ) of the Office of Administrative Law on October 21, 2003, and the Order Denying Petitioners' Motion for Emergent Relief issued by the ALJ denying emergent relief and dismissing the petition in this matter have been reviewed.

Upon such review, the Commissioner concurs that petitioners have failed to satisfy the four-pronged standard set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982) for obtaining emergent relief. In accordance with *N.J.A.C.* 6A:3-1.6, a grant of emergent relief is considered an extraordinary remedy which may only be issued where petitioner has demonstrated that the relief is necessary to prevent irreparable harm; where the legal right underlying petitioner's claim is settled; where there is a likelihood of success on the merits; and where the relative hardship to the moving party favors granting such relief. *Crowe* at 132-34. As set forth by the ALJ, petitioners' application does not, on its face and granting petitioners every inference for purposes of this motion, meet the standards required by *Crowe* for the granting of extraordinary relief and must, therefore, be denied.

However, in reviewing petitioners' Motion for Emergent Relief, it is noted that the Board has not made a decision with respect to petitioners' appeal of the bus suspension imposed on their son.[1] As the merits are not properly before him at this juncture, therefore, the Commissioner makes no findings on the underlying conduct which constitute the merits of this matter.

Accordingly, the Commissioner adopts the Order Denying Petitioners' Motion for Emergent Relief in the instant matter, as modified above, for the reasons expressed therein.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 10/29/03

Date of Mailing: 10/29/03

[1] Petitioners specifically state that "[a]fter this granted stay the Commissioner should remand Appeal back to the Board of Education to be heard, pending petition of Appeal back with the Commissioner." (Motion for Emergent Relief at 2)

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

611-03

BOARD OF EDUCATION OF THE TOWN OF HAMMONTON, ATLANTIC COUNTY,	:	
PETITIONER,	:	
AND	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF EGG HARBOR, ATLANTIC COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
AND	:	DECISION
BOARD OF EDUCATION OF GALLOWAY TOWNSHIP, ATLANTIC COUNTY,	:	
PETITIONER,	:	
V.	:	
NEW JERSEY STATE DEPARTMENT OF EDUCATION AND WILLIAM L. LIBRERA, COMMISSIONER OF EDUCATION,	:	
RESPONDENTS.	:	SYNOPSIS

In consolidated matter, petitioning Boards contested the calculation of their school year aid being contrary to CEIFA.

The ALJ concluded that respondents and the Appellate Court had correctly addressed the issues in this matter and observed that the legislative intent of the FY03 Appropriations Act was to limit expenditures of the State treasury and that the Legislature's action to enact the FY03 Appropriations Act superseded any and all statutory provisions which would increase such expenditures including, among others, CEIFA. The ALJ concluded that petitioners failed to demonstrate that respondents were required to recalculate CEIFA aid based upon petitioners' student population counts; nor did petitioners demonstrate that respondents were required to apply any new or increased student population count for an updated calculation formula to increase their Core Curriculum Standards Aid, Demonstrably Effective Program Aid, or any other aids. The ALJ entered Summary Decision on behalf of respondents and denied petitioners' Motions for Summary Decision.

The Commissioner concurred with the ALJ and the Appellate Court that the funding formula as set forth in CEIFA cannot coexist with the Legislature's enacted State budget appropriation, and, consequently, must be deemed to be suspended by the adoption of the FY03 Appropriations Act.

October 27, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NOS. EDU 4613-02;
EDU 4614-02, and EDU 6458-02
AGENCY REF. NOS. 125-4/02;
123-4/02, and 153-5/02
(CONSOLIDATED)

BOARD OF EDUCATION OF THE TOWN OF HAMMONTON, ATLANTIC COUNTY, ATLANTIC COUNTY,

Petitioner,

and

EGG HARBOR TOWNSHIP BOARD OF EDUCATION, ATLANTIC COUNTY,

Petitioner,

and

BOARD OF EDUCATION OF GALLOWAY TOWNSHIP, ATLANTIC COUNTY,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION; WILLIAM LIBRERA, COMMISSIONER OF EDUCATION, DEPARTMENT OF EDUCATION,

Respondent.

William S. Donio, Esq., for Board of Education of the Township of Hammonton and Egg Harbor Township Board of Education, petitioners (Cooper Levenson, attorneys)

William S. Cappuccio, Esq., for Galloway Board of Education, petitioner

Michael C. Walters, Deputy Attorney General, for respondent (Peter C. Harvey, Attorney General of New Jersey, attorney)

Record Closed: August1 11, 2003 Decided: September 12, 2003

BEFORE **LILLARD E. LAW,** ALJ t/a:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners, the Boards of Education of the Town of Hammond and the Township of Egg Harbor (Boards), contests the calculation of its Comprehensive Education Improvement and Financing Act of 1966 (CEIFA) and seeks an Order from the Commissioner of Education (Commissioner) directing the New Jersey Department of Education (DOE) to recalculate its CEIFA aid based upon petitioners' student population; directing the DOE to provide the mid-year adjustment as required by law; directing the DOE to use said new pupil count in an updated calculation of the district's local share formula and increase petitioner's Core Curriculum Standards Aid; Demonstrably Effective Program Aid and all other aids, among other things.

In lieu of an Answer to the Verified Petitions of Appeal before the Commissioner, the DOE submitted a letter brief in support of its Motion to Dismiss the matters, pursuant to N.J.A.C. 6A:3-1.5(g), among other things.

Prior to filing of the Verified Petition by the Hammonton Board before the Commissioner, the Board filed a Verified Complaint in Lieu of Prerogative Writ and Order to Show Cause with Temporary Restraints before the Superior Court against the DOE, William L.

Librera, Commissioner, Honorable James McGreevey, Governor of the State of New Jersey and the New Jersey Legislature, defendants. The Board sought, among other things, an Order directing defendants to recalculate CEIFA aid based upon the Board's pupil population counts; directing the defendants to provide the mid-year adjustment set forth in CEIFA; and directing defendants to use said count in an updated calculation of the Board's local share formula and adjust the Board's Core Curriculum Standards Aid, Demonstrably Effective Program Aid and all other aids as required by CEIFA.

The Honorable Valerie H. Armstrong, PJSC, dismissed the Complaint for lack of jurisdiction and reasoned that the Board's judicial remedy lies with the Appellate Division of Superior Court because the trial court had no jurisdiction over the subject matter which is purely a matter of school law and which arises out of State agency action.

On March 26, 2002, the Appellate Division denied the Board's emergent application for temporary relief. On March 26, 2002, the New Jersey Supreme Court denied the Hammonton Board's motion for emergent relief pending appeal in the Appellate Division.

On April 25, 2002, petitioners filed the instant Verified Petitions of Appeals which raises issues identical to those raised in the Verified Complaint in Lieu of Prerogative Writ. On July 18, 2002, the matters were transmitted to the Office of Administrative Law (OAL) for determination, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The parties filed cross-motions for summary decision and the date of the hearing record was extended to August 11, 2003, due to illness, with a close of the record now September 25, 2003.

LEGAL ARGUMENTS OF THE PARTIES

The Board's Position

Background Facts

It is noted here that the Egg Harbor Township Board's legal arguments are similar to the legal arguments set forth in the Hammonton Board's Legal Brief. Therefore, the legal arguments set forth by the Hammonton Board are relied upon here.

The Hammonton Board observes that its schools consist of (1) an early childhood center housing pupils in grades Pre-Kindergarten through First Grade; (2) an elementary school housing pupils in Second Grade through Sixth Grade; (3) a middle school housing pupils in Seventh and Eighth Grades; (4) a high school housing students in Ninth Grade through Twelfth Grade. The Board is also currently the receiving district for Folsom Borough pupils in Grades Nine through Twelve. The Egg Harbor Board operates a K-12 school district.

School districts in the State of New Jersey have been divided by the DOE since 1974 into socioeconomic groups known as District Factor Groups (DFG) and designated DFG "A" through "J", with "A" the group with the lowest socioeconomic status and "J" with the highest socioeconomic status. Another statistical category adopted by the DOE was the urban or Abbott district. Hammonton has been designated as a DFG "B" district by the DOE, categorizing it in the second lowest socioeconomic group.

On December 20, 1996, the New Jersey Legislature adopted the CEIFA to provide funding by the State in order to comply with its constitutional mandate of providing a thorough and efficient education (T & E). The T & E mandate is expressly provided in the New Jersey Constitution, a clause the New Jersey Supreme Court has interpreted as a mandate to ensure equal opportunity in education for children of the State. Robinson v. Cahill, 69 N.J. 449, 473 (1975). Prior funding laws, including the Public School Education Act of 1975 and the Quality of Education Act, have been ruled unconstitutional by the New Jersey Supreme Court. Abbott v.

Burke, 119 N.J. 287 (1990); Abbott v. Burke, 136 N.J. 444 (1994).

The Boards observes that school districts have been operating under CEIFA since 1997. See Stubaus v. Whitman, 339 N.J. Super. 38 (App. Div. 2001), cert. den. 171 N.J. 442 (2002). CEIFA has been found unconstitutional as applied to special needs districts in Abbott v. Burke, 149 N.J. 145 (1997), resulting in the New Jersey Supreme Court retaining jurisdiction to ensure the remedial relief it ordered would be implemented by the State with regard to special needs districts. Hammonton, although a "B" district, is not an urban school district and, therefore, does not receive additional special needs aid. The Appellate Court, however, has recently rejected a challenge on equal protection clauses to the constitutionality of the CEIFA funding formula. See Stubaus, 339 N.J. Super. 38. Thus, for these petitioners, CEIFA is, and remains, the funding law governing their aid.

Under CEIFA, core curriculum standards have been established which "provide a substantial framework detailing what children need to know in order to participate as workers and citizens in contemporary society, which is the goal of the T & E public education system. 339 N.J. Super. at 45. CEFIA sets forth a model of prototypical school district that efficiently provides the programs and services necessary for pupils to achieve the core curriculum standards and it is the program that the Legislature believed would satisfy the T & E constitutional requirements. Id. The basis for distributing State education aid is then derived from the per pupil cost to implement the prototypical model, combined with the local school district's ability to contribute to that cost. Id.

In Stubaus, the Appellate Court set forth succinctly the framework for deriving state aid under CEIFA as follows: In order to implement CEIFA, the Commissioner is required under the Act to establish what is called the T & E amount which is "based on the costs necessary to provide the programs and services that will enable an elementary school pupil to achieve the core

curriculum standards. N.J.S.A. 18A:7F-3; N.J.S.A. 18A:7F-12. The T & E amount is then weighted for the additional cost of middle and high school pupils and a half-day kindergarten program. Ibid. The T & E weighted amount is then multiplied by the number of pupils in the district to arrive at the T and E budget. N.J.S.A. 18A:7F-3; N.J.S.A. 18A:7F-13." Id.

It is the T & E budget that is used in determining and calculating a district's State Aid. Id. A district's local share of the T & E budget is established by the relative wealth of a school district based upon property values and income. A district's core curriculum standard aid is the "T and E budget figure less the local share." Id. 46.

Student enrollment data, that is, the number of children attending a district's schools, plays a critical part in determining each district's school aid. In fact, aid is based on certain student enrollment data as defined under CEIFA, including "school enrollment," "modified district enrollment" and "resident enrollment." N.J.S.A. 18A:7F-3.

Aid is generally calculated in February for the following school fiscal year which begins in July. However, because enrollment data changes, CEIFA provides that districts receive what is called mid-year adjustments based on the actual enrollment of the fiscal year determined by pupil enrollment in October. Under CEIFA, each year in or about March, adjustments to state aid are made to reflect actual pupil enrollments as of October 15 of the budget year. N.J.S.A. 18A:7F-5. The mid-year adjustments are reported to a district and are required to be shown as account receivables for the following year's budget.

In sum, as the Supreme Court noted, the CEIFA funding provisions are critical in determining constitutionality because "they determine the types and amounts of resources that will be available to enable students to achieve a thorough and efficient education, as defined by the content standards." Abbott, 149 N.J. at 163.

Moreover, the funding time schedule set forth in CEIFA is critical as each year districts prepare their budget. The CEIFA statute also sets forth a timeline for receipt by the DOE state aid figures. The timeline begins with the Governor's budget address. In the year 2002, under N.J.S.A. 52:27B-20, the Governor was required to submit by February 15, a budget to the Legislature that includes the amount of state aid to be provided to public school districts. Thereafter, under N.J.S.A. 18A:7F-5, within two days, the Commissioner notifies each public school district of the amount of aid payable to that particular district. Prior to this fiscal year, state aid figures had been released by the DOE at the time school budgets were prepared in January of that year. However, for the year challenged here, in or about late January 2002, Governor James McGreevey requested and the Legislature approved his request to wait until March 26, 2002, to submit his fiscal year budget to the Legislature. The Commissioner had the legislative power to make adjustments to the school budget and election calendar. P.L. 2002, Ch. 2. The DOE, however, failed to make corresponding postponement in the date for the public hearings for local school budgets of the date of the April 16, 2002 school elections. Consequently, the last day to hold budget hearings and adopt budgets to be voted upon at the school election was March 26, 2002, despite the fact that the school districts had been deprived of certified state aid figures and/or state aid figures calculated in accordance with CEIFA.

Moreover, and in direct contravention of CEIFA, the DOE provided to the Boards in early March 2002, anticipated state aid figures for the 2002-2003 fiscal year and advised that the preloaded aid amounts for 2002-2003 SAI's printout (the 2001-2002 cash payment). The end result is that Hammonton, like other districts, was forced to complete a budget with flat, or level, state funding. The unofficial state aid numbers became official on March 26, 2002. Consequently, Boards' state aid numbers for fiscal year 2002-2003 were based exactly on 2001-2002 school fiscal year school aid numbers, in complete disregard of the CEIFA statutory formulas. Petitioners asserts that the DOE did, in fact, recalculate its debt service, school choice

aid and parity aid, however, it does not receive such aid nor did it recalculate its other aid; i.e., core curriculum, demonstrably effective program aid or district learning network aid. The end result was that the Boards are to receive, and is currently receiving, in state aid that which it received the prior year, without regard to its increased enrollment or its failure to receive its midyear adjustment.

The Hammonton Board's pre-budget total entitlement state aid for fiscal year 2002-2003 is $8,522,542. For the categories set forth therein including core curriculum aid. The Board's 2001-2003 state aid numbers for the same categories was $8,522,524. For example, core curriculum aid in 2002-2003 is $4,377,2 55, and in 2001-2002 was the same $4,377,255.

However, although State aid was frozen, the Boards' enrollment has increased. For the budget year 2001-2002, the Hammonton Board's State aid was based on the DOE's projected resident enrollment of 2,125 pupils and a weighted projected resident enrollment of 2,146 pupils. The actual resident enrollment on October 15, 2001 was 2,286.5 pupils. The Board's and DOE's projected resident enrollment for the budget year 2002-2003 was 2,374 pupils and the projected weighted enrollment was 2,376 pupils.

Similarly, the Egg Harbor Board's pre-budget total entitlement State aid for fiscal year 2002-2003 is $27,872,214, for the categories set forth therein including core curriculum aid. The Egg Harbor Board's 2001-2002 State aid numbers for the same categories was $27,872,214, where the core curriculum aid in 2002-2003 was $20,341,417, the same as 2001-2002.

The Egg Harbor Board's State aid was based on the DOE's projected resident enrollment of 6,008 pupils and a weighted projected resident enrollment of 6,027 pupils. The actual resident enrollment on October 15, 2001 was 6,130 pupils. The Board's projected resident enrollment for the budget year 2002-2003 was 6,428 pupils and the projected weighted enrollment was 6, 474

pupils.

As a result of the DOE's failure to calculate State aid, the Boards' proposed State aid for 2002-2003 was based incorrectly on the Boards' 2001-2002 enrollment data and failed to take into account an increase of 230 and 420 respectively, in projected resident enrollment. The DOE's failure to make mid-year required adjustments and failure to use appropriate enrollment data, contravene and ignore the express statutory requirements set forth in CEIFA. The end result is that the school districts have been deprived of State aid due it under CEIFA, and in particular, the mid-year adjustment that would be shown as an account receivable.

The 2002-2003 T & E education per pupil ranges announced on March 4, 2002 were as follows: $7,734 to $8,548. Under the Hammonton Board's 2002-2003 advertised budget, which was soundly defeated by the voters, the Board's per pupil spending based upon the Board's projected weighted enrollment was $6,352, well below the State's T & E range. Similarly, the Egg Harbor Board's 2002-2003 advertised budget was defeated at the polls, its per pupil projected weighted enrollment was $7,500, again, well below the State's T & E range.

As a result of the State's failure to provide state aid as required under CEIFA, the Board filed a Verified Complaint in Lieu of Prerogative Writ with Order to Show Cause with Temporary Restraints against the New Jersey DOE, the Commissioner of Education, the Governor of New Jersey and the New Jersey Legislature on March 19, 2002 in the Superior Court, Law Division, Atlantic County. The complaint was dismissed for lack of jurisdiction and, subsequently, the Appellate Division and the New Jersey Supreme Court denied the Board's request for emergent relief.

The annual school election occurred on April 16, 2002 and the Board's school budget was defeated. After the defeat of its school budget on April 16, 2002, the Board filed the herein

Petition of Appeal on April 25, 2002 with the Commissioner based upon the certified state aid numbers supplied on March 26, 2002, that failed to include current student population counts despite the statutory requirement to do so. On the budget front, the Town of Hammonton reduced the Board's advertised budget by the amount of $880,000, the same amount the Board claimed it had lost through state aid. The Board appealed, seeking restoration of that amount, and the Commissioner reinstated $737,000 in cuts made by the Town Council on June 26, 2002.

By this Petition of Appeal, the Board seeks an order from the Commissioner for the DOE to recalculate the state aid numbers in accordance with CEIFA. The exact relief the Board seeks is as follows:

a. Directing the DOE to recalculate 2002-2003 CEIFA aid based upon Petitioner's pupil population counts as set forth in CEIFA;
b. Directing the DOE to provide the mid-year adjustments as required by law;
c. Directing the DOE to use the CEIFA formulas in an updated calculation of the district's local share formula and the Board's Core Curriculum Standards Aid, Demonstrably Effective Program Aid and all other aids.

The Boards' Legal Arguments

I. Standard For Summary Decision

Under the Uniform Administrative Procedural Rules, a motion for summary decision may be granted "if there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). This rule is essentially the same as N.J. Court Rule 4:46-2 and the legal principles under that rule apply to administrative

proceedings. Summary judgment is "designed to provide a prompt, businesslike and inexpensive method of disposing of any case" where the record establishes that there is no genuine issue of material fact. Brill v. Guardian Life Ins. Co. Of Am., 142 N.J. 520, 523 (1995). As such, "by its plain language, Rule 4:46-2 dictates that a court should deny a summary judgment motion only where the party opposing the motion has come forward" with specific facts showing that there is a genuine issue for trial. Brill, 142 N.J. at 529 [emphasis in original]. In addition, "a non-moving party cannot defeat a motion for summary judgment merely by pointing to any fact in dispute." Id. [emphasis in original]. Disputed issues of fact that are not significantly probative and "of an insubstantial nature" or simply colorable cannot preclude summary judgment. Id. Rather, Rule 4:46-2 (c) expressly sets forth that a dispute of fact only will be genuine if "the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." Only when there is a need for trial should summary judgment be denied. Id.

In this regard, the following material facts are undisputed:

1. CEIFA expressly requires that state aid amounts be calculated using projected enrollment. CEIFA, in relevant part, provides as follows: "aid amounts payable for the budget year **shall be based on budget year pupil counts**, which shall be projected by the Commissioner using data from prior years. Adjustments for the actual pupil counts of the budget year shall be made to State aid amounts payable during the school year succeeding the budget year. Additional amounts payable shall be reflected as revenue and an account receivable for the budget year." N.J.S.A. 18A:7F-5 (emphasis added).

2. Respondent admits in its answer that the State Aid figures for the 2002-2003 fiscal year are the same as the previous fiscal year, without regard to any changes in enrollment figures.

3. The District had a projected increase for the budget year 2002-2003 of 230 resident enrollment pupils for the Board from the 2001-2002 year.

4. Respondents have failed to make any mid-year adjustments to aid based on enrollment.

II. THE BOARDS ARE ENTITLED TO THE RELIEF THEY SEEKS AND THE DEPARTMENT SHOULD BE ORDERED TO CALCULATE THE BOARD'S STATE AID PURSUANT TO CEIFA

The Boards' action here challenges the Respondents' failure to calculate the Boards' State aid in accordance with CEIFA - regardless of whether the Legislature chooses to appropriate less or more funds. It is the CEIFA formulas that must be utilized to calculate the Boards' State aid amounts. CEIFA is designed as its own funding mechanism for school State aid and its statutory definitions and formulas are required to be followed regardless of whether the annual appropriations act sets forth a decrease or increase in the overall appropriated aid amount.

The DOE had not, and indeed cannot, dispute that the State aid it allocated to the Boards directly contradicts CEIFA. Rather, the entire defense of the DOE's action is that their inactivity or otherwise failure to adhere to the CEIFA requirements was either permitted or ultimately excused by the FY03 Appropriations Act. However, the Boards asserts that the Appropriations Act, a general statutory annual enactment, does not supercede the carefully tailored statutory language of CEIFA, which was specifically enacted to address constitutionally required funding and certainly does not cure the Department's admitted violation of the statutory requirements last March. Moreover, even if the FY03 Appropriations Act excuses the Department's failure to calculate state aid figures in accordance with CEIFA, Petitioners here are entitled to a least its mid-year adjustment - an amount that was payable and vested prior to the enactment on June 30, 2002 of the Appropriations Act.

A. The Appropriations Act Cannot Supercede or Excuse the Department's Failure to Calculate Aid Pursuant to the CEIFA Statutory Formulas.

The New Jersey Constitution mandates that:

> The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the Instruction of all the children in the State between the ages of five
> and eighteen years. [*N.J. C*onst. art. VIII, §4.]

The Legislature in enacting CEIFA declared that CEIFA would establish:

> (1) A definition of a thorough and efficient system of public education which is uniformly applicable to all districts in the State and specifics what must be learned with reference to academic standards that must be achieved by all students.
> (2) The types of programs and services that will accomplish these goals in a manner that is thorough and efficient.
> (3) A level of financial support sufficient to provide those program and services.
> (4) A funding mechanism to ensure that support.
> (5) A system which ensures that the expenditure of public funds will be undertaken both with prudence and sound management and with accountability that includes mechanisms for enforcement in the event a district fails to meet the substantive standards established as set for herein.
> N.J.S.A. 18A:7F-1 [emphasis added]

Moreover, the Legislature in CEIFA set forth the time, mode and occasion for the state funding mechanism. Specifically, 18A:7F-5a states in pertinent part:

> "Beginning in the 1998-99 school year, unless otherwise specified within this act, aid amounts payable for the budget year shall be based on budget year pupil counts, which shall be projected by the commissioner using data from prior years. Adjustments for the actual pupil counts of the budget year shall be made to State aid amounts payable during the school year succeeding the budget year. Additional amounts payable shall be reflected as revenue and an account receivable for the budget year."
> N.J.S.A. 18A:7F-5a [emphasis added]

CEIFA is not ambiguous as it relates to determination of aid calculations. Specifically, CEIFA defines aid in part based on enrollment and enrollment is determined utilizing enrollment figures from October 15 of the current school year plus projections based on prior years. N.J.S.A. 10A:7F-5

The Legislature expressed legislative intent that CEIFA would be a permanent funding formula when it stated that CEIFA provides and establishes "a funding mechanism" to ensure a thorough and efficient education. N.J.S.A. 18A:7F-2b (4). Moreover, there is nothing discretionary in the language of 18A;7F-5, which states in pertinent part, "Beginning in the 1998-99 school year, unless otherwise specified **within this act**, any amounts payable for the budget year shall be based on budget year counts, which shall be projected by the Commissioner using data from prior years." N.J.S.A. 18A:7F-5a [emphasis added]. That is, CEIFA stands alone and independent of other legislative machinations. It is through CEIFA that the Legislature answered its constitutional obligations, and it is CEIFA which directs how to answer the Legislature's constitutional obligations.

In its moving papers to dismiss the Boards' petitions, respondents relied upon the case of City of Camden v. Byrne, 82 N.J. 133 (1980), and at first glance it would appear that the Boards' actions is rendered moot by FY03 Appropriations Act. But careful analysis demonstrates that the Camden case in inapposite. In Camden, a number of municipalities and counties brought several court actions against the State to have certain amounts appropriated for their use claiming that the

funds were required purportedly under several state statutes. The lower courts in the actions granted summary judgment in favor of the defendants and the decisions were affirmed on appeal. The actions were consolidated before the New Jersey Supreme Court which used the cases to embark upon an analysis of the constitutional framework in the state budgetary process. In rejecting the municipalities' claim, the New Jersey Supreme Court noted that withdrawal of monies from the State treasurer can be accomplished only by legislative appropriations, Id. at 145, and that the power and authority to appropriate funds lies solely and exclusively with the legislative branch. Id. In reaching its conclusions, the Court noted that the statutes in question which called for disbursements of tax revenues - sales and use tax - were not legislative appropriations in and of themselves and determined they gave way, in part, because of other constitutional provisions including a constitutional provision requiring appropriations to be incorporated into a single balance budget and the constitutional debt limitation provisions. Id.

Here, the Boards in these petitions are not directing or requesting that more money be appropriated to the education line item in the State budget for school districts, although the Boards' assert that educational funding should certainly be the top priority in disbursing State funds. Rather, remedy sought here is their share of the State aid amount appropriated in accordance with the CEIFA formula. The first step in achieving those amounts is for the Court here to direct the DOE to calculate the aid payable as determined under CEIFA.

Similarly, the respondent's reliance in their motion to dismiss on the case of County of Camden v. Waldman, 292 N.J. Super. 268 (App Div. 1996), cert. den. 149 N.J. 139 (1997) is not determinative. In Waldman, the Department of Human Services refused to provide to counties funds received by the State from the federal government, in essence, the counties were challenging the Legislature's decision not to appropriate the funds. But unlike here, there was no asserted constitutional mandate as there is for the Legislature to fund education. Nor are the detailed funding levels under CEIFA to be casually disregarded in the annual appropriations act -

certainly the contrary is true. CEIFA and its formulas were enacted to provide a funding mechanism. N.J.S.A. 18A:7F-1.

Moreover, it can be stated, without the need of lengthy citations, that "there generally exists a strong presumption against any implied negation of statutory enactments." Id. at 154. In fact, the presumption may be overcome only "when there is a clear showing that two legislative measures are patently repugnant or inconsistent." Id. In Camden, the Court examined the complete failure of the Legislature to appropriate funds and concluded that the failure was an intentional and an advertent act. Id. Here, however, the expressed determination of the Legislature was to hold Districts harmless. Indeed, the FY03 Appropriations Act states in relevant part that "each district shall receive no less of a total State aid amount payable for the 2002-2003 year than the sum of the district's total State aid amount for the 2001-02 school year."

Thus, there is nothing inconsistent in directing the DOE to make the CEIFA calculations, which once finally made, will permit the petitioners to have at least a baseline of the State aid under the "permanent funding mechanism." N.J.S.A. 18A:7F-1. This is indeed important even if the end result is that the petitioners are unable to obtain additional funds.

Presumably, the DOE will argue that its inaction in calculating State aid in direct contradiction of CEIFA is somehow excused by the budget Appropriations Act and that the DOE's actions were prudent because the failure to calculate the requisite aid levels under CEIFA gave districts advance warning of the State aid cuts. This argument, apparently relying on a pre-CEIFA case of Board of Education of Fairfield Twp. v. Kean, 188 N.J. Super. 244, 250 (Ch. Div. 1982), however, turns the entire statutory framework upon which CEIFA was enacted on its face. Under CEIFA, N.J.S.A. 18A:7F-5, within two days of the budget address, the Commissioner was to notify each public school district of the amount of aid payable to that particular district. The CEIFA statute did not permit the DOE to just ignore the CEIFA formulas. Thus, when the

Governor announced flat funding, it was incumbent upon the DOE to at least use that set flat amount to calculate the aid in accordance with the CEIFA funding requirements including, without limitation, the enrollments. The DOE ignored the statutory requirements and now uses an end justifies the means defense: claiming that since no calculations were done, the Districts have to receive the same amount as the prior year. Of course, the actual result for districts, as petitioners, with increased enrollments is that petitioners did not receive the same aid as the prior year based on a per pupil analysis while districts with decreased enrollments received a windfall. Certainly, the CEIFA statutory framework was not enacted with such detail in order to be generally ignored at the arbitrary and capricious notion of the DOE. The FY03 Appropriations Act does not expressly relieve the DOE from its statutory duties.

For all of the above reasons, the petitioners should be entitled to the relief it seeks: namely, requiring the DOE to engage and calculate the CEIFA statutory formulas.

B. Even Under the appropriations Act, the Boards are Entitled to Receive their Mid-Year Adjustments.

Even, if the Court were to determine that the FY03 Appropriations Act excused the DOE from its failure to comply with CEIFA in March, the Appropriations Act clearly stat that:

> Notwithstanding any other law or regulations to the contrary, each district shall receive no less of a total State aid amount payable for the 2002-2003 school year than the sum of the district's total State aid amount payable for the 2001-2002 school year for the following aid categories: Core Curriculum Standards Aid, Supplemental Core Curriculum Aid, Early Childhood Program Aid, Instructional Supplemental Aid, Demonstrably Effective Program Aid, Rewards and Recognition, Stabilization Aid, Stabilization Aid 2, Stabilization Aid 3, Large Efficient District Aid, Aid for Districts with High Senior Citizen Populations, Regionalization Incentive Aid, Distance Learning Network Aid, Adult and Postsecondary Grants, Bilingual Education Aid, Special Education Aid, County Vocational Program Aid, Transportation Aid, and Aid for Enrollment

Adjustments.

Aid for Enrollment Adjustments is determined under N.J.S.A. 18A:7F-5, which expressly provides that "Adjustments for the actual pupil counts of the budget year shall be made payable during the school year succeeding the budget year." However, despite this clear statutory authority, the DOE failed to make any enrollment adjustments for the school year 2001-02. The net effect of failing to make the adjustments is that petitioners have been deprived of its cash adjustments payable to in the school year 2002-03. Certainly, the FY03 Appropriations Act cannot strip petitioners or, in other words, divest petitioners of the amount the law vested under CEIFA prior to June 30, 2002. The fact that the amount was payable during the 2002-2003 school year does not in any way excuse the DOE's failure to make the enrollment adjustments.

Indeed, the net result of the DOE's failure to calculate and book mid-year adjustments is that districts with increased enrollment the prior year and no increase in 2001-2002 received a windfall bonus; whereas, districts that experienced continued growth have a continued and exacerbated hardship. Surely, the constitutional mandate to fund a through and efficient education does not relieve the DOE from making the calculations so that some districts get bonuses, and districts, such as petitioners, suffer further hardship. It is hard to imagine action which could be more readily characterized as arbitrary and capricious action.

Finally, it is anticipated that the DOE will assert a "no harm" defense. Specifically, the DOE's steadfast refusal to calculate aid is premised solely on the idea that since there is only one pot of monies (and no Court can order more money), and districts are to obtain the same amounts as prior years, there was no reason to calculate aid amounts under CEIFA. However, this position ignores the basic tenet of CEIFA. CEIFA's formulas - mid-year adjustments, enrollment data, stabilization growth limits - are all based on formulas that reflect prior budget years. If the 2002-2003 numbers are never run, districts such as petitioners will lose any incremental base or adjustments in upcoming budget years. It will be as if 2002-2003 never occurred, and the CEIFA

formula would be all for naught. Certainly, this Court should not permit the DOE to be derelict in its obligations to make the adjustments and calculations under CEIFA.

In conclusion, the Board asserts that there is no disputed issue of fact. The matter is really solely of law and remedy. The Boards have met their burden demonstrating that the CEIFA laws have not been followed. The Court should order respondent to calculate the petitioners' 2002-2003 aid in accordance with CEIFA, including mid-year adjustments.

Respondent Department of Education Legal Arguments

Respondent, DOE, asserts that the "inaction" alleged by the Boards is that the certified State school aid figures for the 2002-2003 fiscal year were not calculated pursuant to CEIFA. The Boards' argument, however, ignores the fact that the purpose of certifying the State aid amounts is to provide an accurate estimate upon which the public can rely when it is voting on the local tax levy in the school budget. See, *e.g.*, Board of Educ. of Fairfield Twp. v. Kean, 188 N.J. Super. 244, 250 (Ch. Div. 1982) (while dismissing plaintiffs action the court agreed with plaintiffs that it "would have been better for [plaintiffs] to have received some advance warning of [state aid] cuts"). Thus, State aid figures are not required to be provided to districts until after the Governor's budget message so that the figures provided are a more reliable estimate of what school districts are likely to receive. Often, the budget message and the Appropriations Act adopted in response to that budget message have altered the formula distributing aid to school districts. To that end, the Legislature wisely decided not to require certification of State aid numbers until after the Governor's budget message. Compare N.J.S.A.18A:7A-27 (repealed by L. 1990, c. 52 § 90) (On or before November 1, Commissioner shall determine for local budget purposes the amounts payable to each of the counties and districts under the Public School Education Act of 1975); and N.J.S.A. 18A:7D-26 (amended by L. 1992, c. 159 § 2) (Annually,

on or before December 15, the Commissioner shall notify each district of the maximum amount of aid payable under the Quality Education Act for succeeding school year); with L. 1992, c. 159, § 2 (repealed by L. 1996, c. 138, § 85) (Annually within seven days following transmittal of the budget message to the Legislature by the Governor, the Commissioner shall notify each district of the maximum amount of aid payable to the district under the act).

Moreover, the Commissioner's certification of State aid amounts at the same amount that the districts received for the 2001-2003 school year clearly cannot constitute agency "inaction" in light of the FY03 Appropriations Act. As demonstrated below, the FY03 Appropriations Act provides a clear legislative intent to maintain the amount of total State aid for school districts for the 2002-2003 school year at the same amount they received for the 2001-2002 school year, rather than distribute State aid pursuant to CEIFA. The FY03 Appropriations Act provides:

> Notwithstanding any other law or regulation to the contrary, each district shall receive no less of a total State aid amount payable for the 2002-2003 school year than the sum of the district's total State aid amount payable for the 2001-2002 school year for the following aid categories: Core Curriculum Standards Aid, Supplemental Core Curriculum Standards Aid, Early Childhood Program Aid, Instructional Supplemental Aid, Demonstrably Effective Program Aid, Rewards and Recognition, Stabilization Aid, Stabilization Aid II, Stabilization Aid III, Large Efficient District Aid, Aid for Districts with High Senior Citizen Populations, Regionalization Incentive Aid, Distance Learning Network Aid, Adult and Postsecondary Education Grants, Bilingual Education Aid, Special Education Aid, County Vocational Program Aid, Transportation Aid, and Aid for Enrollment Adjustments.
> [L. 2002, c. 38]

Notably, the FY03 Appropriations Act appropriates the same amount of funds for each of the above-listed aid categories that was appropriated for those aid categories in the FY02 Appropriations Act. For example, $3,080,318,000 was appropriated for Core Curriculum Standards Aid in both the FY02 and FY03 Appropriations Acts. Thus, in order for each district to receive no less of a total State aid amount payable for the 2002-2003 school year than the sum

of the district's total State aid amount payable for the 2001-2002 school year for the listed aid categories, it follows that no district can receive more total State aid for the 2002-2003 school year than it received for the 2001-2002 school year. Accordingly, the FY03 Appropriations Act reflects a clear legislative intent to maintain the amount of State aid for the listed aid categories for the 2002-2003 school year at the same amount districts received for the 2001-2002 school year.

Similarly, petitioners' argument that is entitled to additional Aid for Enrollment Adjustments must be rejected. The FY03 Appropriations Act explicitly provides that the same amount of Aid for Enrollment Adjustments that was appropriated for that aid category in the FY02 Appropriations Act is appropriated for FY03. Again, in order for each district, including petitioners, to receive no less of a total State aid amount payable for the 2002-2003 school year than the sum of the districts' total State aid amount payable for the 2001-2002 school year for the listed aid categories (including Aid for Enrollment Adjustments), it follows that no district can receive more Aid for Enrollment Adjustments for the 2002-2003 school year than it received for the 2001-2002 school year. Otherwise, some districts would receive less total State aid amount payable for the 2002-2003 school year than the sum of the district's total State aid amount payable for the 2001-2002 school year for the listed categories.

It follows that such a definitive legislative intent as reflected in the FY03 Appropriations Act supersedes any previously expressed legislative desires, *i.e.*, CEIFA, at least for the duration of the FY03. Clearly, the funding formula as set forth in CEIFA for the listed categories cannot coexist with the enacted appropriation and, consequently must be deemed to be suspended by the adoption of the FY03 Appropriation Act. See City of Camden v. Byrne, 82 N.J. 133, 153-55 (1980); see also County of Essex v. Waldman, 292 N.J. Super. 268, 290-93 (App. Div. 1996), cert. den. 149 N.J. 139 (1997. Therefore, the FY03 Appropriations Act dictated the Boards' statutory entitlement of State aid. To this end, the Commissioner's certification of State aid

figures at the same amount as the previous school year cannot constitute "inaction." Rather, the Commissioner, in accordance with the statutory time frame, provided an accurate certification of the State aid districts would receive for the 2002-2003 school year. Moreover, the Commissioner's certification of State aid figures at the same amount as the previous school year is consistent with the FY03 Appropriations Act which dictates the Boards' statutory entitlement of State aid.

Petitioners attempt to distinguish the statutes at issue in City of Camden v. Byrne, is hollow. CEIFA, similar to the statutes at issue in City of Camden v. Byrne, does not constitute a legislative appropriation in and of itself. CEIFA does not serve as valid authority for the withdrawal of monies from the State treasury under the State Constitution. Rather, CEIFA requires subsequent legislative appropriations to be effective authorizations of the expenditure of public monies. See e.g. FY2002 Appropriations Act. P.L. 2001, c. 130. Thus, the legal principles established in City of Camden v. Byrne apply equally to the present matter.

Finally, respondent submits that it is immaterial that the Hammonton Board's 2002-2003 district budget, as submitted to the local voters, was below the T&E range. First, the Verified Petition of Appeal contains no allegations that the Hammond Board is unable to provide a through and efficient education. Second, the Hammonton Board is statutorily entitled to submit such a budget as long as Hammonton is not failing to meet the core curriculum content standards. See, N.J.S.A. 18A:7F-6(a).

For the reasons set forth above, as well as those set forth in respondent's previous filings, respondent's motions for summarily decision should be granted in the above-captioned matters and petitioners' motions for summary decision should be denied.

Unpublished Appellate Division Opinion

Subsequent to the submissions of the parties briefs, the Deputy Attorney General submitted the unpublished Appellate Division opinion in the matter of Hammonton Board of Education v. New Jersey Department of Education, et. al. Docket No. A-3836-01T5, delivered by the Honorable Michael P. King, P.J.A.D. The Boards object, to the submission asserting, among other things, that unpublished opinions do not constitute precedent and is not binding upon any court. R. 1:36- 2. The respondent, on the other hand, asserts that the Appellate Division opinion deals with the very same issues contested in the instant matter.

Having reviewed and considered the arguments of the parties and having further considered the Appellate Court's opinion in Hammonton, supra, it is incumbent upon this tribunal to address the Court's analysis of the issue of the legislative function with respect to the Appropriations Act. To that end, the following is the Court's analysis of that issue:

The Honorable Michael P. King, in the opinion of the Court, observed:

> . . . Our courts have repeatedly affirmed that only the Legislature may appropriate funds. City of Camden v. Byrne, 82 N.J. 133, 148 (1980) (asserting that "New Jersey Courts have consistently adhere to the principle that the power and authority to appropriate funds lie solely and exclusively with the legislative branch of government"); Stubaus v. Whitman, 339 N.J. Super. 38 60, (App. Div. 2001) (holding that it is "the Legislature's responsibility to allocate the State's resources"); Franklin v. DHS, 225 N.J. Super. 504 (App. Div. 1988) (the "Constitution has placed matters [of appropriations] in the Legislature and it is that branch of government which must weigh the interests of its citizens"); Bd. of Ed. of Fairfield v. Kean, 188 N.J. Super. 244, 250 (App. Div. 1982) ("It is a rare case . . . in which the judiciary has any proper constitutional role in making budget allocations").
> (Slip op. at p. 15)

Judge King continues to state that:

> The principle is also well established that statutes which rely on State funding are not "self-executing." City of Camden, 82 N.J. at 147. Thus, even were "the Legislature has mandated a particular program, it is subject, insofar as it requires appropriations, to the Annual Appropriations Act." Franklin, 225 N.J. Super. at 516. Accordingly, "the judiciary is unable to compel a requested appropriation even where a statutorily defined substantive right to the monies is established." City of Camden, 82 N.J. AT 148. Furthermore, and most relevant to the claim mad in this case concerning the supposed "inaction" of the defendants, our Supreme Court has held that there can be "no redress in the courts to overcome either the Legislature's action or refusal to take action pursuant to its constitutional power over state appropriations." Id at 470. An order by the judiciary to appropriate funds would "constitute a judicial intrusion upon the legislative and executive authorities in violation of the doctrine of separation of powers." Smith v. Goldman, 159 N.J. Super. 297, 303 (App. Div. 1978). (Slip op. at pp. 15-16)

With respect to the alleged conflict between the Appropriations Act and CEIFA, the Court had this to say:

> The current appropriations act at issue in this case, the FY03 Appropriations Act, L. 2002, c. 38 (FY03), has the full effect of law and expresses a "definite legislative intent." City of Camden, 82 N.J. at 142. To the extent that the two enactments - CEIFA and FY03 – are irreconcilable, they cannot coexist. Our courts, consistent with federal statutory interpretation, have declined to apply the doctrine of "implied repeal." Id. See also Friends of the Earth v. Armstrong, 485 F. 2d. 1, 16 (10th Cir. 1973) (holding "the Supreme Court has consistently stated that judicial construction is disfavored as a means of establishing a repeal of legislation"). Because appropriations acts have "a life limited to its fiscal year," our courts have been sensitive to the impact of appropriations laws upon existing laws, choosing to characterize the effect of appropriations on standing legislation as an implied "suspension rather than an implied repeal"; however, for practical purposes, the effect is the same. City of Camden, 82 N.J. at 153. A suspension of an existing law in favor of an appropriations act overcomes the presumption against repeal "when the two legislative measures are patently repugnant or inconsistent." Id. at 154.
> (Slip op. at 16-17)
> . . . . . .
>
> . . . . .Where a legislative failure to appropriate funds is "an intentional and

> advertent act," the appropriations law will supersede "any previously expressed legislative desire at least for the duration of the particular appropriation act. Id. (Slip op. at 17)
>
> . . . .
>
> A suspension, as in the City of Camden, is appropriate because the appropriations bill, which defendants acknowledge disregards CEIFA's mandatory formula, expresses the clear legislative intent to supersede CEIFA's requirements. . . . . (Slip op. at 18)

CONCLUSIONS

The respondents and the Appellate Court have clearly and succinctly addressed the issues of these contested matters and observed, among other things, that the legislative intent of the FY03 Appropriations Act was to limit expenditures of the State treasury and that the Legislature's action to enact the FY03 Appropriations Act superseded any and all statutory provisions which would increase such expenditures including, among others, CEIFA. As observed in the matter of City of Camden v. Byrne, 82 N.J. 133, 148 (1980), that our courts "have consistently adhered to the principle that the power and authority to appropriate funds lie solely and exclusively with the legislative branch of government." (emphasis supplied).

The Legislature, in adopting the FY03 Appropriations Act, clearly limited the amount of State aid for each of the State's school public school districts. It specifically provided that ". . . .each district shall receive no less of a total State aid amount payable for the 2002-2003 school year than the sum of the district's total State aid amount payable for the 2001-2002 school year. . ." The language of the Act continues to list the categories for which aid was appropriated. There is nothing in the Act which provides for additional aid for any of the listed categories, including Aid for Enrollment Adjustments.

Having considered and assessed the arguments of the parties and having also considered the analysis of the Appellate Court, **I CONCLUDE** that petitioners' have failed to demonstrate that respondents are required to recalculate CEIFA aid based upon petitioners' student population counts. Nor have petitioners' demonstrated that respondents are required to apply any new or increased pupil population count for an updated calculation formula to increase their Core Curriculum Standards Aid; Demonstrably Effective Program Aid; or any other aids.

I **CONCLUDE**, therefore, that Summary Decision is hereby entered on behalf of respondents. I **FURTHER CONCLUDE**, that petitioners' Motions for Summary Decision is hereby **DENIED** and **DIMISSED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 12, 2003
DATE

Lillard E. Law - Dec'd. W/
LILLARD E. LAW, ALJ t/a

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

9-11-03
DATE

Mailed to Parties:

SEP 16 2003

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

/lam

OAL DKT. NOS. EDU 4613-02, EDU 4614-02 AND EDU 6458-02 (CONSOLIDATED)
AGENCY DKT. NOS. 125-4/02, 123-4/-02 AND 153-5/02

BOARD OF EDUCATION OF THE TOWN OF HAMMONTON, ATLANTIC COUNTY,	:	
PETITIONER,	:	
AND	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF EGG HARBOR, ATLANTIC COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
AND	:	DECISION
BOARD OF EDUCATION OF GALLOWAY TOWNSHIP, ATLANTIC COUNTY,	:	
PETITIONER,	:	
V.	:	
NEW JERSEY STATE DEPARTMENT OF EDUCATION AND WILLIAM L. LIBRERA, COMMISSIONER OF EDUCATION,	:	
RESPONDENTS.	:	
	:	

The record of this consolidated matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Joint exceptions of the Boards of Education of Egg Harbor and Hammonton, were timely filed pursuant to *N.J.A.C.* 1:1-18.4.

Petitioners' exceptions essentially recast and reiterate their arguments advanced below which the Commissioner determines were considered and addressed by the Administrative Law Judge (ALJ) in his Initial Decision and, therefore, these will not be revisited herein.

Upon his full and independent review, the Commissioner concurs with the ALJ and the guidance provided by the unpublished Appellate Division opinion of the Honorable Michael P. King, that the funding formula as set forth in CEIFA cannot coexist with the Legislature's enacted state budget appropriation and, consequently, must be deemed to be suspended by the adoption of the FY 03 Appropriations Act, at least for the duration of this particular Act. *See City of Camden v. Byrne*, 82 *N.J.* 133 (1980); *see, also, County of Essex v. Waldman*, 292 *N.J. Super.* 268 (App. Div. 1996), *certif. denied* 149 *N.J.* 139 (1997). Consequently, as the FY 03 Appropriations Act dictates the parties' statutory entitlement to state aid, petitioners cannot prevail on their claim that respondents are required to increase their CEIFA aid.

Accordingly, the Initial Decision of the OAL granting summary decision to respondents is adopted and the within Petitions of Appeal are hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 10/27/03

Date of Mailing: 10/29/03

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

612-03

612-05

RADAR SECURITY, INC., AND ROSE LOCKMAN,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CUMBERLAND REGIONAL SCHOOL DISTRICT, CUMBERLAND COUNTY, AND ATLANTIC COUNTY ALARM, INC.,	:	
RESPONDENTS.	:	

October 29, 2003

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NO. EDU 06220-97S

AGENCY DKT. NO. 265-7/97

RADAR SECURITY INC., AND ROSE LOCKMAN,

Petitioner,

v.

CUMBERLAND REGIONAL SCHOOL DISTRICT, CUMBERLAND COUNTY, AND ATLANTIC COUNTY ALARM, INC.

Respondent.

Thomas H. Ward, Esq., for petitioner (Albertson, Ward & McCaffrey, attorneys)

Samuel Serata, Esq., for respondent Cumberland Regional School District

Patrick F. Geubtner, Esq., for respondent Atlantic Coast Alarm Inc. (George K. Miller, attorney)

Record Closed: June 19, 2003 Decided: September 15, 2003

BEFORE **JEFF S. MASIN,** Acting Director and Chief ALJ:

This matter, alleging that respondent Cumberland Board of Education awarded a contract in violation of the public bidding statutes, was filed with the Office of Administrative Law on July 27, 1997. The matter was assigned to Administrative Law Judge Kathryn Clark who entered an order granting emergency relief on August 8, 1997.

No information has been received from the parties since that time. On June 9, 2003, I contacted the parties requesting information as to the status of this matter and as to whether or not the case had been resolved. I further informed the parties that if I did not receive response within ten (10) days, the file would be closed.

More than ten (10) days having passed without a response from either party, this matter is **DISMISSED** for failure to prosecute.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 15, 2003
DATE

JEFF MASIN, Acting Chief ALJ,

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

Sept. 16, 2003 (Via Email)
DATE

Mailed to Parties: M. Kathleen Duncan (Ex)

SEP 24 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
9 Quakerbridge Plaza
P.O. Box 049
Trenton, New Jersey 08625
(609) 588-6582
Fax - (609)588-6536

JEFF S. MASIN
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

June 9, 2003

Thomas H. Ward, Esq.
Albertson, Ward & McCaffrey
36 Euclid Street
P.O. Box 685
Woodbury, NJ 08096

Samuel Serata, Esq.
20 Franklin Street
Bridgeton, NJ 08302

Patrick F. Geubtner, Esq.
Law Offices of George R. Miller, Jr., Esq.
26 Penn Avenue
Atlantic City, NJ 08401

Re: *Radar Security Inc. and Rose Lockman v. Cumberland Regional School District, Cumberland County and Atlantic Coast Alarm, Inc.*
OAL Dkt. No. EDU 6220-97
Agency Dkt. No. 265-7/97

Dear Counsel:

We are attempting to clarify our records concerning the status of the above-referenced matter. The case was assigned to Administrative Law Judge Kathryn A. Clark for an administrative proceeding. An order granting emergency relief was issued by Judge Clark on August 8, 1997. No information has been received since that time. Please provide any information you may have as to whether the case was resolved. If I do not receive a response within 10 days, I will assume that this contested case has been resolved and will close our file administratively.

Very truly yours,

Jeff S. Masin

JSM/cmo

OAL DKT. NO. EDU 06220-97
AGENCY DKT. NO. 265-7/97

RADAR SECURITY, INC., AND ROSE LOCKMAN,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CUMBERLAND REGIONAL SCHOOL DISTRICT, CUMBERLAND COUNTY, AND ATLANTIC COUNTY ALARM, INC.,	:	
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon review, the Commissioner concurs that dismissal of this matter is warranted by petitioners' failure to pursue their claim subsequent to the Administrative Law Judge's August 8, 1997 ruling[1] on their application for emergent relief.

Accordingly, for the reasons expressed therein, the Initial Decision is adopted as the final decision in this matter.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Issue: 10/29/03

Date of Mailing: 10/29/03

[1] Adopted by the Commissioner on August 15, 1997.

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Commissioner decisions are deemed filed three days after the date of mailing to the parties.

617-03

SEAN BENSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY	:	DECISION
	:	
RESPONDENT.	:	

October 31, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 03110-03

AGENCY DKT. NO. 310-7/01

SEAN BENSON,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,

Respondent.

Sanford R. Oxfeld, Esq. for petitioner (Oxfeld, Cohen, LLC, attorneys)

Mary E. Hennessy-Shotter, Esq., for respondent (Murray and Murray, attorneys)

Record Closed: September 5, 2003 Decided: September 11, 2003

BEFORE **THOMAS E. CLANCY**, ALAJ:

This matter was transmitted to the Office of Administrative Law (OAL) on March 19, 2003, for resolution as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F1 to -13.

During the pendency of the case at the Office of Administrative Law, the parties settled their differences as provided in the attached Settlement Agreement.

Having reviewed the contents of the attached Settlement Agreement, I **FIND**: (a) that they are consistent with the law, (b) that they fully dispose of all issues in controversy, and (c) that they were voluntarily entered into by the parties.

Accordingly, I **CONCLUDE** that the attached Settlement Agreement meets the requirements of *N.J.A.C.* 1:1-19.1(d) and I hereby **APPROVE** same. In conjunction therewith, I **ORDER** that the parties comply with its contents and that these proceedings be (and are hereby) **TERMINATED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

9/11/03
DATE

Thomas E. Clancy
THOMAS E. CLANCY, ALAJ

Receipt Acknowledged:

9/16/03
DATE

M. Kathleen Duncan (Ea)
DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 22 2003
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

da

SETTLEMENT AGREEMENT
Between
THE ELIZABETH BOARD OF EDUCATION
and
SEAN BENSON

1. This Agreement is being entered into between the Elizabeth Board of Education ("Board") and Sean Benson ("Benson") to resolve the litigation pending between them before the Commissioner of Education, Agency Docket No. 310-7/01 and O.A.L. Docket No. EDUOR 03110-03N and all grievances filed by Mr. Benson against the Board of Education, as well as any litigation that could have been brought.

2. The Board agrees to pay Mr. Benson's for twelve (12) sick days representing days deducted from his sick bank which shall be paid at his salary for the 2000-2001 school year minus standard and ordinary deductions.

3. Mr. Benson agrees to withdraw his case before the Commissioner of Education, Agency Docket No. 310-7/01 and O.A.L. Docket No. EDUOR 03110-03N

4. Neither party makes any admission in the settlement of this case.

5. Mr. Benson acknowledges that this Agreement is in settlement of disputed issues of fact and law, that he has had the right and opportunity to discuss all aspects of this Agreement with his legal counsel prior to entering into it and that he has availed himself of this right, that he has carefully read and fully understands all of the provisions of this Agreement, and that he is entering into this Agreement knowingly and voluntarily in exchange for good and valuable consideration.

6. In consideration for this Agreement, Benson irrevocably and unconditionally releases the Board, and any employee and/or official of the Board, from any and all charges, complaints, claims, liabilities, obligations, promises, agreements, causes of action, rights, costs, losses, debts and expenses of any nature whatsoever, known or unknown, which Benson, his heirs, executors, administrators, successors and assigns ever had, now have or

hereafter can, shall or may have (either directly, indirectly, derivatively or in any other representative capacity) by reason of any matter, fact or cause whatsoever from the beginning of time to the date of this Agreement, including without limitation, all claims arising under Title VII of the Civil Rights Act of 1964, the Equal Pay Act, the New Jersey Law Against Discrimination Act, the New Jersey Conscientious Employee Protection Act, the Civil Rights Act of 1866, 42 U.S.C. §1983, The Americans with Disabilities Act, Title 18A of the New Jersey Statutes, Title 6 and 6A of the New Jersey Administrative Code, all claims arising under the public policy of the State of New Jersey, all tortious claims (including intentional infliction of emotional distress and inducing breach of contract) and all other federal, state and local labor and anti-discrimination laws, the common law and any other purported restriction on the Board's employment related decisions.

7. In consideration of this Agreement, the Board releases Mr. Benson from any claims the Board may have against his.

8. Each party hereto represents that, in executing this Agreement, such party has not relied and does not rely upon any representation or statement of any other party not set forth herein with regard to the subject matter, basis or effect of this Agreement or otherwise.

9. This Agreement sets forth the entire agreement among the parties hereto. This Agreement supersedes all prior agreements and understandings concerning the subject matter hereof, and it may not be changed orally but may be changed only in a writing signed by all parties. This Agreement shall be interpreted in accordance with New Jersey law.

10. Mr. Benson has voluntarily and without coercion entered into this Agreement.

11. The parties agree that this Agreement must be approved by the Administrative Law Judge and the Commissioner of Education. The Board of Education will make payment to Mr. Benson upon the approval of this Agreement by the Commissioner of Education.

IN WITNESS WHEREOF, the parties have executed this Settlement Agreement as of the date set forth below.

For the Elizabeth Board of Education :

THE MURRAY LAW FIRM, LLC

Mary E. Hennessy-Shotter

By: Mary E. Hennessy-Shotter

Dated: 9/5/03

For Sean Benson

OXFELD COHEN, LLC

By: Sanford Oxfeld, Esq.

Dated: 9-2-03

Sean Benson

Dated: 8/26/03

OAL DKT. NO. EDU 03110-03
AGENCY DKT. NO. 310-7/01

SEAN BENSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY	:	DECISION
RESPONDENT.	:	

The record, Settlement Agreement and Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1 have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 10/31/03

Date of Mailing: 10/31/03

618-03

P.C., on behalf of minor child, P.A.E.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PEQUANNOCK, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

October 31, 2003

OAL DKT. NO. EDU 9719-02
AGENCY DKT. NO. 258-8/02

P.C., on behalf of minor child, P.A.E.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PEQUANNOCK, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and advisement of failure to appear transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4, along with copies of notifications sent to the parties by OAL on June 12, 2003, providing thirteen (13) days to submit an explanation for such nonappearance, have been reviewed. There being no explanation filed by petitioner within the time specified,[1] this matter is no longer deemed to be a contested matter before the Commissioner[2] and is hereby dismissed with prejudice.[3]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 10/31/03

Date of Mailing: 10/31/03

[1] On September 19, 2003, petitioner filed a letter stating that she did not appear at the June 12 hearing because she did not know that she had to appear and that she could not afford to pay tuition.

[2] In its Answer to the Petition of Appeal, the Board filed a counterclaim for tuition for the days of P.A.E.'s ineligible attendance. Accordingly, the Board was requested to notify the Director of the Bureau of Controversies as to whether it wished to pursue its counterclaim for tuition in light of petitioner's failure to appear at hearing. By letter of August 31, 2003, the Board responded by stating:

> [W]hen Petitioner did not appear in the case and removed P.A.E. from the District, it was the intention of the Board that the matter, including its counterclaim, be dismissed. Accordingly, please enter the dismissal of this matter upon the record.

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*

619-03

619-03

T.A., on behalf of minor child, R.A.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

November 3, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 01360-03
AGENCY DKT. NO. 311-10/02

T.A., ON BEHALF OF MINOR CHILD, R.A,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,
Respondent.

No appearance by or on behalf of petitioner

Anthony D'Elia, Esq., for respondent (Chasan, Leyner, Bariso & Lamparello, attorneys)

Record Closed: September 25, 2003 Decided: September 25, 2003

BEFORE **ELINOR R. REINER,** ALJ:

On or about October 2, 2002, petitioner, T.A., filed a petition of appeal with the Commissioner of Education, challenging respondent's residency determination in regard to his brother, R.A. On November 22, 2002, respondent filed its answer seeking dismissal of the petition and counterclaiming for tuition for the period of ineligible attendance. On January 31, 2003, the Department of Education, Bureau of Controversies and Disputes, transmitted this matter to the Office of Administrative Law

(OAL) as a contested case for a hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

This matter was assigned to the undersigned judge on February 28, 2003, and a telephone prehearing conference held on April 8, 2003. At that time, the issues were isolated, and a hearing was scheduled for August 5, 2003 at the OAL. In addition to the hearing schedule set forth in the prehearing order, notice of the time and place of hearing were sent to both T.A. and counsel for respondent reiterating the date, time and place of the hearing.

On August 5, 2003, counsel for respondent appeared. No appearance was made by or on behalf of T.A. Counsel for respondent attempted to reach T.A. at the telephone number he had listed for T.A. and was informed that it was the wrong number. Counsel for respondent called information and received a different telephone number. However, when he telephoned that number there was no answer. No appearance was made by T.A., although the court and counsel for respondent waited one hour for him to appear. Further, the court has not received any other information or contacts from T.A. since the date of the scheduled hearing. Thus, T.A.'s petition will be **DISMISSED.**

With respect to the counterclaim by respondent for tuition owed by T.A., counsel for respondent provided the affidavit of Karen Perkins, Business Administrator and Board Secretary for respondent. The affidavit was sent to T.A. by counsel for respondent. T.A. filed no response or objection to it.

Perkins' affidavit indicates that as Business Administrator, she is responsible for providing annual reports to the New Jersey Department of Education regarding the total annual per pupil costs for respondent. She had been requested as part of respondent's request for tuition in this matter to review the business records utilized by her office to compute the annual per pupil costs for the local school district. Her affidavit indicates that R.A. was enrolled in respondent school district from October 4, 2002 to the present, August 20, 2003, the date of the affidavit. She stated that the annual per pupil cost for each minor child for that period of time at Clifton High School was $7,509.00 per year. She computed the cost for R.A.'s attendance of 159 days to be $6,633.48. T.A. has not

filed a response to Perkins' affidavit filed on August 25, 2003 and sent to T.A. by counsel for respondent by letter dated September 3, 2003.

Based on the foregoing, petitioner has failed to prove that respondent's residency determination in regard to R.A. was improper. Thus, it remains undisputed that T.A. did not meet the requisite family or economic hardship which would allow R.A. to attend respondent school district free of charge, pursuant to *N.J.S.A.* 18A:38-1b(1).

Based on the affidavit submitted, I **CONCLUDE** that R.A. was improperly enrolled in the Clifton School system between October 4, 2002 and the present. I further **CONCLUDE** that the proper tuition reimbursement for that period of time (159 days) is $6,633.48.

Thus, it is **ORDERED** that petitioner's appeal is **DISMISSED.** It is further **ORDERED** that tuition reimbursement in the amount of $6,633.48 be paid to respondent school district.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 25, 2003
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

September 25, 2003
DATE

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

SEP 2 9 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

da

EXHIBIT LIST

For Respondent:

R-1 Affidavit of Karen Perkins dated August 20, 2003

OAL DKT. NO. EDU 01360-03
AGENCY DKT. NO. 311-10/02

T.A., on behalf of minor child, R.A.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties filed no exceptions to the Initial Decision.

Upon his full and independent review, the Commissioner concurs with the Administrative Law Judge that petitioner's appeal here is appropriately dismissed for failure to prosecute and the Board's counterclaim for tuition is appropriately granted.

Accordingly, petitioner is directed to compensate the Board in the amount of $6,633.48 for the period of his child's ineligible attendance in the Board's schools. The instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 11|03|03

Date of Mailing: 11|03|03

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

621-03

621-03

JOSEPH LOPEZ, :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE CITY OF BRIDGETON, CUMBERLAND COUNTY, :

DECISION

RESPONDENT. :

:

SYNOPSIS

Petitioner, nontenured campus police officer, alleged the Board improperly denied him back pay pursuant to *N.J.S.A.* 18A:6-8.3, when he was suspended without pay on November 14, 2000, prior to and during his period of indictment which occurred in January 2001. The charge of child endangerment was later dismissed. The Board questioned the timeliness of the petition.

The ALJ concluded that petitioner's request for relief was timely filed and that he should be awarded back pay with compensation from the first day of his suspension. The ALJ found that petitioner was involved in an unfortunate family matter, for which he was totally exonerated in October 2001. Moreover, the ALJ found that there was no evidence offered by the Board that petitioner should have remained suspended in the absence of criminal charges. The ALJ concluded that withholding back pay and benefits, under the circumstances herein, was not justified.

The Commissioner adopted the findings and determination in the Initial Decision with modification. *Citing Busler*, the Commissioner noted that there is no basis under education law to award back pay regardless of the disposition of the criminal indictment. The Commissioner, however, directed the Board to compensate petitioner for all back pay and emoluments due from November 14, 2000 until the date of his indictment in January 2001.

November 6, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6786-02

AGENCY DKT. NO. 244-8/02

JOSEPH LOPEZ,

Petitioner,

v.

BOARD OF EDUCATION OF THE

CITY OF BRIDGETON, CUMBERLAND COUNTY,

Respondent.

Cristen D'Arrigo, Esquire for petitioner (D'Arrigo & D'Arrigo, attorneys)

A. Paul Kienzle, Esquire, for respondent (Casarow, Kienzle, & Raczenbek, attorneys)

Record Closed: September 12, 2003 Decided: October 3, 2003

BEFORE **W. TODD MILLER,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The New Jersey Department of Education Bureau of Controversies received a petition for relief on August 7, 2002. Respondent filed an answer to the petition on August 23, 2002. The matter was transmitted to the Office of Administrative Law (OAL) on October 11, 2002. The Director of the OAL assigned the undersigned to hear this matter pursuant to *N.J.S.A.* 52:14F-5o.

The matter was scheduled for hearing on May 15, 2003. The May date was adjourned and the matter rescheduled for July 18, 2003. Respondent requested that the July 18, 2003, date be adjourned. During the July 17, 2003, telephone conference, all parties agreed to submit a stipulation of facts and legal argument, in lieu of a evidentiary hearing. The schedule was confirmed in writing on July 29, 2003. (C-1). The stipulation of facts was due on August 18, 2003, and respondent's opposition brief was due to be filed on like date. Petitioner had already filed a detailed legal memorandum with the Commissioner of Education upon filing its petition.

Petitioner prepared a stipulation of facts and submitted it to respondent on or about July 18, 2003. (C-2, C-3, C-5). Respondent did not respond or object to the proposed stipulation. (C-4). On September 8, 2003, this ALJ advised respondent that:

> Pursuant to my letter/order of July 29, 2003, respondent was to have filed its opposition brief and executed stipulation of facts by August 18, 2003. See letter attached. Respondent has failed to file an opposition brief or an executed stipulation of facts. No request for an extension has been received.
>
> This matter was scheduled for trial on May 15, 2003 and July 18, 2003. Both dates were adjourned at the request of the respondent. The purpose my July 29, 2003 letter, which followed a conference call arrange by me, was to avoid any further delay in hearing and deciding this matter. I made that clear during the conference call on July 17, 2003. The parties agreed that this matter could be decided summarily. Petitioner had already filed an extensive brief with the petition. I accepted that brief in support of petitioner's motion for a determination.
>
> I am mindful that this matter was filed with the Commissioner of Education on August 7, 2002. It was transmitted to the OAL on October 11, 2002. Two trial dates been adjourned and a briefing schedule ignored. No extension has been requested. Enough time has passed and petitioner is entitled to have his case decided in an efficient and timely manner.
>
> Therefore, be advised that I am accepting the stipulation of facts submitted to the court by petitioner on August 13, 2003. I will close the record on September 12, 2003. I will then decide this matter based upon the papers filed with the court at the close of business on September 12, 2003.
>
> (C-8).

As of September 12, 2003, respondent did not respond, object or otherwise seek an extension to file anything in this matter. Accordingly, the stipulation was accepted as filed and

the record closed on September 12, 2003. I note respondent did not file any additional papers through October 3, 2003.

STATEMENT OF STIPULATED FACTS:

At all times relevant to this proceeding, the petitioner, Joseph Lopez, (hereinafter referred to as the "Petitioner") was employed by the Bridgeton Board of Education (hereinafter referred to as the "B.B.O.E.") as a Campus Police Officer.

In October of 2000, the B.B.O.E. suspended the Petitioner subsequent to his arrest on October 6, 2000, under charges of 2nd degree child endangerment.

The arrest was predicated upon an accusation made by the Petitioner's daughter who was at that time a student at the middle school where the Petitioner was employed.

On or about November 14, 2000, the B.B.O.E. issued a suspension without pay to the Petitioner, even though the Petitioner had not yet been indicted on the charges.

On or about November 30, 2000, the Petitioner sent a written objection to the Board of Education concerning his suspension without pay.

The Petitioner was indicted in January 2001, on the insistence that the Cumberland County Prosecutor either prosecute or dismiss the charges against the Petitioner.

The Petitioner contended that the charges were the result of an on-going custody dispute between him and his former wife who is the mother of the child who made the statements that were the basis of the accusation. The child had been in the custody of Petitioner for 8 years prior to his arrest. Furthermore, the child had, a year earlier, made a known false accusation similar to that which supported this charge. Furthermore, the physical evidence contradicted the assertions made by the girl.

In June of 2001, plea negotiations were conducted and the Prosecutor made an offer to amend the charges to 4th degree and admit the Petitioner to PTI with a subsequent dismissal within 30 days. Petitioner rejected the plea after discussions with the B.B.O.E. on the impact of any plea to his future employment and back pay and sought a trial on the merits of the case.

The indictment against the petitioner was dismissed by the Gloucester County Superior Court in November of 2001, on motion of the defendant. The Court considered the nature of the indictment and the evidence offered by the State and found *inter alia* that the indictment was unsupported by credible evidence and had been improperly obtained.

The dismissal WAS NOT as a result of PTI and the motion for dismissal was actively opposed by the County Prosecutor.

There are no charges against the Petitioner and no action for termination has been brought by the B.B.O.E.

The B.B.O.E. reinstated the Petitioner to his former position in November of 2001.

On December 7, 2001, Petitioner by letter from counsel to the B.B.O.E. solicitor, made a request for information on how to proceed to request back pay from the B.B.O.E. As part of that request, counsel requested a hearing before the School Board and that the solicitor of the B.B.O.E. instruct him as to any necessary procedures to be followed in making said request for back pay.

On December 10, 2001, the solicitor responded by claiming that the discussions that had taken place concerning the plea had provided for no back pay.

On January 10, 2002, the Petitioner responded to the solicitor's letter of December 10, 2001 by reminding the solicitor that the plea had been rejected by the Petitioner precisely because of the conditions placed on his return to employment by the B.B.O.E., if he had accepted the plea. Furthermore, the charges against the Petitioner were dismissed on its merits by the court without the benefit of plea bargain or P.T.I.

On January 15, 2002, the solicitor wrote and indicated that no back pay would be forthcoming and invited a response from the Petitioner. No hearing had been held and the Petitioner was not afforded an opportunity to appear or otherwise present his claim to the B.B.O.E. The letter did not reference any meeting by the board of Education on the matter and the letter was not consistent with the content and format of other notices that had been issued by the Board of Education. There was no resolution denying the request for back pay, nor was any notice of denial issued to the Petitioner from the School Board.

On January 30, 2002, Petitioner again wrote to the solicitor and again requested back pay predicated upon certain case law that had developed in the preceding 6 months and asked for a response on that request in light of these cases.

Thereafter, during a telephone conversation between counsel and the solicitor, the solicitor requested that counsel for the Petitioner provide a copy of the Supreme Court case cited in the January 30th letter of the Petitioner. A copy of that opinion and other related cases were hand delivered to the solicitor in February, 2002. Several telephone calls over the succeeding months indicated that the solicitor had not had an opportunity to review the material and could not therefore respond.

No response was ever provided by the B.B.O.E. to the letter of January 30, 2002, nor the material that was dropped off thereafter. No hearing or notice of denial was issued by the B.B.O.E.

Thereafter, having received no response from the B.B.O.E., the Petitioner filed this action before the Commissioner.

See, Stipulation of Facts (C-5).

LEGAL ANALYSIS

The matter at hand involves the interpretation of *N.J.S.A.* 18A:6-8.3 and whether it provides for the payment of back pay and other benefits where a school board employee is vindicated of criminal charges. Petitioner is a campus police officer for the district. Petitioner was suspended without pay effective November 14, 2000. He was exonerated of all charges on October 21, 2001. Petitioner seeks all back pay and benefits from the date of his suspension to the date of his reinstatement. The applicable statute is covering campus police is *N.J.S.A.* 18A:6-8.3 and provides:

> Any employee or officer of a board of education in this State who is suspended from his employment, office or position, other than by reason of indictment, pending any investigation, hearing or trial or any appeal therefrom, shall receive his full pay or salary during such period of suspension, except that in the event of charges against such employee or officer brought before the board of education or the Commissioner of Education pursuant to law, such suspension may be with or without pay or salary as provided in chapter 6 of which this section is a supplement.

Petitioner contends that his right to back pay is contained in the School Laws under *N.J.S.A.* 18A:6-8.3. In support of that contention, the Petitioner relies upon the case of *Griffin v. Board of Education of the City of Paterson*, 93 *N.J.A.R.* 2d (EDU) 882 (Decided November 12, 1992; *affm'd,* October 19, 1993) and *Driggins, v. Board of Education of the City of Newark*, 93 *N.J.A.R.* 2d (EDU) (Decided February 27, 1992; *affm'd,* April 9, 1992) as well as *Beatty v. Newton Bd. Of Ed.*, 1991 *S.L.D.* (Comm'r. June 25, 1991), and *State of New Jersey, Department of Corrections v. International Federation of Professional and Technical Engineers, Local 195*, 27 *NJPER* P 32109, Docket No. A-20-2000 decided July 12, 2001.

Petitioner relies upon the Initial Decision in *Griffin v. Board of Education of the City of Paterson, supra.* Therein the ALJ cited *Beatty, supra.* and stated:

> "It is reasonable to conclude that there is no express statutory right to back pay subsequent to an acquittal. Notwithstanding, in a recent case involving the question of whether a suspended teacher should receive back pay following acquittal of criminal charges, the Commissioner held that 'fundamental fairness' dictated that the teacher be granted back pay, including sick pay and vacation pay,

in light of the fact that a trial by jury yielded a verdict of not guilty on an indictment. *Beatty v. Newton Bd. Of Ed.*, 1991 S.L.D. (Comm'r. June 25, 1991)"

The Administrative Law Judge then went on to find:

"Notwithstanding the absence of specific statutory language, the Commissioner believes that in weighing the equities of this matter, fundamental fairness dictates that petitioner be granted back pay for the period of his unpaid suspension given that a trial by jury yielded a verdict of not guilty on the indictment which provided the basis for his suspension without pay under *N.J.S.A.* 18A:6-8.3. **At the present time, petitioner has not been found guilty of any wrongdoing and the indictment upon which the suspension is based has been disposed of in his favor**; therefore, it is concluded that as a matter of equity, back pay is warranted under the circumstances..."

In the present matter, the legal arguments offered by petitioner were unopposed by respondent. (*See*, procedural history, *supra.*). Notwithstanding the arguments by petitioner are unopposed, they still must be evaluated in accordance with the applicable law governing education. Notably, *N.J.S.A.* 18A:6-14 provides that should the criminal charge be dismissed, the person shall be reinstated immediately with full pay from the first day of such suspension. Arguably, this section applies exclusively to tenured teachers. However, petitioner makes the argument that the statute (*N.J.S.A.* 18A:6-8.3) covering all employees is silent on the issue of back pay. But, the language in *N.J.S.A.* 18A:6-14 suggests that granting back pay is permissible for employees of the district who are exonerated.

Petitioner was criminally charged with child endangerment. *N.J.S.A.* 2C:24-4(a). The indictment against petitioner was based upon questionable or even specious accusations. "The charges were the result of an on-going custody dispute between [petitioner] and his former wife who is the mother of the child who made the statements that were the basis of the accusation. The child had been in the custody of Petitioner for 8 years prior to his arrest. Furthermore, the child had, a year earlier, made a known false accusation similar to that which supported this charge. Furthermore, the physical evidence contradicted the assertions made by the girl." (C-5). The indictment was dismissed on motion before the criminal trial Judge. (C-6). The Court concluded that the allegations were baseless or unsupported. Moreover, the Superior Court

Judge's Decision reveals that the entire incident was influence by an ongoing custody dispute and involved matters associated child discipline. Specifically, Hon. John Tomasello, JSC stated:

> Should the discipline have produced a favorable change in the child's behavior, it would have been highly justified. All of the evidence available to the State indicates that if there was any contact between the defendant and the alleged victim, it did not rise to the level required for criminal prosecution. Thus, it can be seen that the State did not offer sufficient proofs of this element of the offense to obtain an indictment.
>
> The need to discipline children arises both as a matter of morality, the protection of one's neighbor from the misbehavior-or-worse-of one's offspring, and as a matter of legal compulsion. See: definition of "neglect" at *N.J.S.A.* 9:6-1, "failure to do or permit to be done any act necessary for the child's physical or moral well-being," and various parental responsibility laws.
>
> There are increasing demands on parents to see that their children are law abiding, and they are given precious few sources to do so by the State. One of them is the right to use physical force in discipline. *N.J.S.A.* 2C:3-8.
>
> The State may well argue that this is a trial issue. However, it is more than that, because this grand jury was not properly charged with regard to the law and could well have indicted based on the statements of criminality. It is highly inappropriate to fail to charge the grand jury with definitions of criminality, as it may lead to an indictment that is not otherwise obtainable, as here. Thus, the Court must dismiss the indictment on either theory. (C-6).

In the matter at bar, I **FIND** that petitioner, a school employee, was involved in an unfortunate contentious family matter. An immediate suspension appeared to be justified given the nature of the allegations and pending charges. However, as of October 12, 2001, petitioner was totally exonerated of the charge. There has been no evidence offered by the district that petitioner should have remained suspended, even in the absence of criminal charges. The record is barren of any evidence that petitioner acted wrongfully or was a risk to students. In essence, petitioner did nothing wrong if measured by a criminal or civil standard. The allegation of any wrongdoing was dismissed as baseless. In fact petitioner asserts that "Mr. Lopez was arrested because of an overzealous prosecutor who pursued a cause of action on untrue assertions in the face of evidence that contradicted the compliant by an adolescent seeking to shed the parental yoke of her father in favor of a permissive lifestyle wit her mother who never enjoyed the custody the child." (Petitioner's brief at page 10). Apparently, the criminal trial Judge agreed. In the

spectrum of possible outcomes, a pretrial dismissal of an indictment is about the best possible vindication. In view of the aforementioned, the district reinstated petitioner but refused to do so with back pay and other benefits. Had petitioner been culpable in a civil sense, applied for Pretrial Intervention, accepted a plea agreement or presented some other concern to the district, then withholding back pay would be plausible. However, none of the aforementioned occurred.

Therefore, I **CONCLUDE** that petitioner must be awarded all of his back pay, vacation time, benefits, pension credit and any other benefits from the first day of such suspension. *Griffin, supra., N.J.S.A.* 18A:6-8.3; *N.J.S.A.* 18A:6-14. To suspend a school employee, without pay, because they were involved in a contentious family matter resulting in criminal charges is reasonable. However, if they are fully exonerated, as in this case, it is unreasonable to not fully reinstate the teacher with all rights and emoluments. The districts failure to do so does not comport with "fundamental fairness" as expressed in *Griffin*, *Beatty, supra*. This type of action could have a chilling effect upon school board employees involved in difficult family matters. It may impact or deter necessary child discipline for fear losing one's wages and benefits. Mere "trumped up charges" and the fear of the related consequences, including a suspension with no right to recover back pay, could negatively impact important family matters and decisions. The threat of filing charges could disrupt the process of resolving family matters. The present matter is a clear indication of just how family matters can carelessly spiral out of control and spill over in a way that seriously affects the family unit's financial well being. I **CONCLUDE** that withholding back pay and benefits, under the circumstances presented in this case, is simply not justified.

Finally, petitioner addressed the timeliness of his request for relief. *N.J.A.C.* 6A:3-1.3. The regulation requires that a petition for relief be filed with the Commissioner "no later than 90 days from the date of the notice of a final order, ruling or other action by the district board of education...." *N.J.A.C.* 6A:3-1.3. Petitioner argues that his request for relief was timely because the district never issued a final order, resolution or decision. The charges against petitioner were dismissed by the Superior Court on October 21, 2001. The Order and Decision were mailed to petitioner on December 17, 2001. Back pay negotiations between counsel for the district and petitioner ensued but did not yield a final order or decision from the board of education. There were extensive negotiations between counsel but no formal board action was taken. (C-7).

Alternatively, petitioner was not served with notice of any formal decision or order of the board. Accordingly, petitioner argues that its action was timely.

I **FIND** and **CONCLUDE** that petitioner's request for relief was filed timely in accordance with *N.J.A.C.* 6A:3-1.3. There was nothing presented by respondent that could be construed as a final order, resolution or decision by the Bridgeton Board of Education. Hence, petitioner did not fail to act in a timely manner absent notice of (and proper service) a final action, resolution or decision by the Bridgeton Board of Education.

CONCLUSION AND ORDER

For the reasons set forth above, it is hereby **ORDERED** that petitioner's request for relief is hereby **GRANTED.** I **CONCLUDE** and **ORDER** that petitioner be awarded all of his back pay, plus interest, vacation time, benefits, pension credit and any other benefits from the first day of such suspension subject to mitigation for any earnings, wages or unemployment benefits gained by petitioner during the relevant period.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

10-3-03
DATE

W. TODD MILLER, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

10-3-03
DATE

Mailed to Parties:

OCT 8 2003

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

APPENDIX

Documents In Evidence

By the ALJ:

C-1 Letter of ALJ Miller, July 29, 2003

C-2 Letter of Cris D'Arrigo, Esq., August 13, 2003

C-3 Letter of Cris D'Arrigo, Esq., July 18, 2003

C-4 Letter of Cris D'Arrigo, Esq., August 26, 2003

C-5 Stipulation of Facts

C-6 Opinion, Hon. John Tomasello, JSC, October 21, 2001

C-7 Letter of A. Paul Kienzle, Esq. January 15, 2002

C-8 Letter of ALJ Miller, September 8, 2003

OAL DKT. NO. EDU 6786-02
AGENCY DKT. NO. 244-8/02

JOSEPH LOPEZ,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF BRIDGETON, CUMBERLAND COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions.

Upon careful review of the record in this matter, and assuming, *arguendo,* that this matter was timely filed, *N.J.A.C.* 6A:3-1.3(d), the Commissioner is compelled to modify the legal conclusion of the Administrative Law Judge.

Initially, the Commissioner notes that the pertinent statute provides that:

> Any employee or officer of a board of education in this State who is suspended from his employment, office or position, other than by reason of indictment, pending any investigation, hearing or trial or any appeal therefrom, shall receive his full pay or salary during such period of suspension, except that in the event of charges against such employee or officer brought before the board of education or the Commissioner of Education pursuant to law, such suspension may be with or without pay or salary as provided in chapter 6 [18A:6] of which this section is a supplement.[1] *N.J.S.A.* 18A:6-8.3.

[1] It is undisputed that petitioner is a campus police officer and, as such, is not a tenured employee. The exception noted herein, then, is not applicable.

It is clear from the undisputed facts in this matter, that, contrary to the plain language in statute, the Board suspended petitioner *without pay* on November 14, 2000, although he was *not indicted* until January 2001.[2]

Notably, however, the statute is silent on the issue of back pay subsequent to the disposition of a criminal indictment. In this connection, the Commissioner has recently declared, and the State Board has affirmed, that there is no basis under education law to award back pay *regardless of the disposition of the criminal indictment. Robert Busler v. Board of Education of the City of East Orange, Essex County*, decided August 30, 2001, *aff'd* State Board of Education February 6, 2002. *See, also, Pawlak v. Board of Education of the Borough of Hopatcong, Sussex County*, 1988 *S.L.D.* 154. Thus, although petitioner attempts to distinguish *Busler* as "not relevant to this case because the defendant in that action availed himself of the PTI program as a way of avoiding the prosecution for which he was indicted" (Petitioner's Memorandum of Law at 8-9), the Commissioner does not find the holding in *Busler* to be so limited.

Accordingly, the Initial Decision is modified as set forth herein. The Board is hereby directed to compensate petitioner for all back pay and emoluments due from November 14, 2000 until the date of his indictment in January 2001.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 11|06|03
Date of Mailing: 11|06|03

[2] The Superior Court Judge's decision states that "On or about January 10, 2001 the matter was presented to the Cumberland County Grand Jury on a single count of 2nd degree child endangerment." (Exhibit C-6)

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

622-03

SILVER FOX LEARNING CENTER, INC., ET AL.,	:	
PETITIONERS,	:	
V.	:	
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY; DR. ANNA DE MOLLI, ASSISTANT SUPERINTENDENT OF THE PATERSON PUBLIC SCHOOL DISTRICT; NEW JERSEY STATE DEPARTMENT OF HUMAN SERVICES; WILLIAM LIBRERA, NEW JERSEY COMMISSIONER OF EDUCATION; THE CITY OF PATERSON; AND FELIX ESPOSITO, IN HIS CAPACITY AS PATERSON CODE ENFORCEMENT OFFICIAL,	:	COMMISSIONER OF EDUCATION
	:	DECISION
RESPONDENTS.	:	SYNOPSIS
	:	

Petitioning early childhood education center sought funding for *Abbott* services it allegedly provided to the District from September 4, 2001 through January 31, 2002. The District contended the center was not functioning or contracted as an approved *Abbott* provider during the period in question.

The ALJ found that, even though the issues in this matter involve a contract dispute, since the resolution of these issues was grounded in the regulations governing the establishment of *Abbott* preschools, they are proper issues to be determined by the Commissioner. In light of the testimony of the witnesses and the record in evidence, the ALJ found that the center failed to sustain the burden of proving that it was in compliance with the regulatory requirements for an approved "Abbott" preschool from September 2001 through January 2002, notwithstanding the absence of a contract. Petition was dismissed.

The Commissioner concurred with the ALJ that petitioners had failed to demonstrate by a preponderance of the evidence that the center was providing authorized and verifiable subcontractor *Abbott* preschool services during the time in question. The Commissioner agreed that the center was not functioning as a *de facto Abbott* preschool prior to its execution of a contract with the District. Moreover, the Commissioner found that petitioners failed in their burden of proof to establish the accuracy of their claims that they were compliant with *Abbott* guidelines. The petition was dismissed.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 1014-03

AGENCY DKT. NO. 368-11/02

SILVER FOX LEARNING CENTER, ET AL.,

Petitioner,

v.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, NEW JERSEY DEPARTMENT OF HUMAN SERVICES, COMMISSIONER OF EDUCATION, CITY OF PATERSON, ET AL.,

Respondent.

Ronald T. Nagle, Esq., appearing for Petitioner

Jack Gillman, Esq., appearing for Respondent
(Hanly & Ryglicki, attorneys)

Record Closed: June 3, 2003 Decided: June 27, 2003

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

STATEMENT OF THE CASEAND PROCEDURAL HISTORY

In this case, Petitioner, Silver Fox Learning Center, an Early Childhood Education Center seeks funding for "*Abbott*" services allegedly provided to eligible three

and four year olds residing within the District, from September 4, 2001 through January 31, 2002. Respondent District asserts center was not functioning or contracted as an approved "*Abbott*" provider during the period at issue.

This matter was transferred by order of the Honorable Burrell I. Humphrey from the Superior Court of New Jersey on September 18, 2002, with direction that it be heard and decided on an expedited basis. In the matter before the Commissioner, the City of Paterson, the individual Respondent DeMolli, were dismissed as parties to the matter before the Commissioner.

The Department of Human Services did not file an answer because, pursuant to a consent agreement, if the Center is found to have a valid "*Abbott*" contract with the District for the period at issue, it will fund the services for which it is responsible.

On January 6, 2003, the Department of Education transmitted the matter to the Office of Administrative Law (OAL) for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13. The scheduling of this matter was hampered by severe weather conditions and heavy caseload with statutorily imposed deadlines. It was ultimately scheduled to be heard on June 2, 3 & 5, 2003.

FINDINGS OF FACT

Based on the evidence presented at the hearing as well as on the opportunity to observe the witnesses and assess their credibility, I make the following findings of fact, which are essentially undisputed, in this matter.

1. Silver Fox Learning Center (hereinafter "Silver Fox"), a non-profit corporation located in Paterson, New Jersey, was formed to provide early childhood education in accordance with the Supreme Court directives in *Abbott v. Burke*, 153 *N.J.* 480 (1998) (hereinafter "*Abbott V*").

2. *Abbott V* requires the Commissioner of Education to make funds available to poor districts to provide educational services and facilities to three and four year olds in designated school districts.

3. The State-Operated School District of the City of Paterson (hereinafter "Paterson") is one of these districts.

4. Construction of Silver Fox began in Paterson in the Spring of 2001.

5. Silver Fox was opened for the start of the 2001 school year in September 2001.

6. The Silver Fox Board of Trustees was created on November 9, 2001.

7. Silver Fox currently has enrolled 45 students, who are each provided one hot meal and one cold meal per day pursuant to federal guidelines. The hours of operation are between 7:30 a.m. and 6:00 p.m., Monday through Friday, as required by *Abbott V, supra*. The services are provided free to the residents of Paterson but should be paid portionally by Paterson and the New Jersey Department of Human Services (hereinafter "DHS").

8. Silver Fox has not received any funding from either source for the time period from September 4, 2001 through January 31, 2002.

9. Silver Fox has been unable to pay all of its vendors and has not made lease payments and certain required tax payments.

10. Silver Fox was required to borrow money to pay operating expenses and salaries which resulted in a regular pay check.

11. Silver Fox's lack of funding has also resulted in the incursion of fines and penalties from the State and Federal taxing authorities.

12. Silver Fox executed an "Abbott Preschool Educational Contract" (hereinafter "the contract") with Paterson on February 4, 2002.

ANALYSIS AND CONCLUSION

Because the petition in the opening statements of counsel sounded in theories of breach of contract, unjust enrichment and equitable estoppel, I raised the issue of the Commissioner's jurisdiction to hear and decide the matter.

For the reasons set forth below, I **CONCLUDE** that the Commissioner has jurisdiction to determine whether Silver Fox is entitled to funds as a provider of early childhood education for services rendered prior to the execution of the contract with the State-Operated School District of Paterson.

The Commissioner of Education has "fundamental and indispensable" jurisdiction pursuant to *N.J.S.A.* 18A:6-9, which provides, in relevant part, "[t]he commissioner shall have jurisdiction to hear and determine . . . all controversies and disputes arising under the school laws."[1] *N.J.S.A.* 18A:6-9; see, *Balsley v. N. Hunterdon Bd. of Educ.,* 117 *N.J.* 434, 438 (1990); *Hinfrey v. Matawan Regional Bd. of Educ.,* 77 *N.J.* 514, 525 (1978). The courts have "repeatedly reaffirmed the great breadth" of this power, yet it is not limitless. *Id.* at 524. Where a controversy does not arise under the school laws, it is outside the Commissioner's jurisdiction even though it may pertain to school personnel. *East Brunswick Bd. of Educ. v. Twp. Council,* 48 *N.J.* 94, 102 (1966).

Generally, contractual disputes are excepted from the Commissioner's jurisdiction because an interpretation of contractual language, rather than school law, is

[1] *N.J.S.A.* 18A:6-9 provides in its entirety:

> The commissioner shall have jurisdiction to hear and determine, without cost to the parties, all controversies and disputes arising under the school laws, excepting those governing higher education, or under the rules of the state board or of the commissioner. For the purposes of this Title, controversies and disputes concerning the conduct of school elections shall not be deemed to arise under the school laws.

necessary to determine the outcome of the claim, and the expertise of the agency is not needed. The courts have affirmed this lack of jurisdiction over contractual disputes. *See Picogna v. Bd. of Educ. of Cherry Hill Twp.*, 249 *N.J. Super.* 332, 335 (App. Div. 1991) (no jurisdiction over contract claim of non-tenured school employee because no interpretation of school laws is required); *South Orange-Maplewood Educ. Ass'n. v. Bd. of Educ. of South Orange*, 146 *N.J. Super.* 457, 463 (App. Div. 1977) (no jurisdiction where dispute involved interpretation of sabbatical leave provisions of agreement and no statutory interpretation was required); *Newark Teachers Union v. Bd. of Educ. of Newark,* 149 *N.J. Super.* 367, 372 (Ch. Div. 1977) (no need to defer to administrative expertise since the only question properly before the court is one of contract interpretation). However, the courts have also considered circumstances that resulted in a determination to split jurisdiction between the court and agency. In *Archway Programs, Inc., v. Pemberton Township BOE,* 352 *N.J. Super.* 420 (App. Div. 2002), the court stated:

> The basic proposition that no administrative officer or agency, absent a specific grant of legislative authority, is empowered to decide questions of law, such as those arising in contract actions, applies to the Commissioner of Education even in the context of his plenary authority to decide controversies and disputes arising under the school laws. The Commissioner's authority is not exclusive where particular statutes provide alternate routes for issue resolution ... or where the matter involves a question of law outside the purview of the school laws.
>
> [*Id.* at 426 (citations omitted).]

Finally, a dispute involving both contractual and statutory interpretations has been found to be within the jurisdiction of the Commissioner. See *New Jersey Educ. Ass'n. v. Trenton, Bd. of Educ.,* 92 *N.J.A.R.* 2d (EDU) 481, 489 (incidental interpretation of the contract that is necessary to resolve education claims is within the Commissioner's jurisdiction); *Kohn v. Bd. of Educ., City of Vineland*, EDU 8705-00, Initial Decision, (July 26, 2001), *adopted,* Comm'r. (Sept. 14, 2001) <http://lawlibrary.rutgers.edu/oal/search.html> (since superintendents are tenured for

the term of their contract, violation of the contract may be a violation of school laws and as such is within the Commissioner's jurisdiction).

The matter herein involves an *Abbott* district, the subject of numerous decisions rendered by our Supreme Court. In *Abbott V,* the Court direct:

> the Commissioner to exercise his power under *N.J.S.A.* 18A:7F-6b and –16 to require all *Abbott* districts to provide... pre-school for three- and four-year olds. ... In directing the implementation of pre-school programs in the *Abbott* schools, the Commissioner must ensure that such programs are adequately funded...
>
> [*Abbott, supra* 153 *N.J.* at 508.]

The Court went on to hold:

> We recognize that disputes will occur in the administration of ... these reforms. Those disputes will involve issues arising from the implementation, extension, or modification of existing programs, ... the allocation of budgeted funds, the need for additional funding ... *Such disputes shall be considered "controversies" arising under the School Laws. N.J.S.A.* 18A:7A-1 to 7F-34.
>
> [*Id.* at 526 (emphasis added).]

N.J.A.C. 6A:24-9.1 to –9.6, which governs appeals of *Abbott* district reforms states:

> An aggrieved applicant for Department authorization to improve or amend an existing program, adopt a supplemental program or service, implement a required secondary program, build or renovate a school facility or seek additional *Abbott v. Burke* State aid may *appeal to the Commissioner* in accordance with the provisions of this subchapter.

[*N.J.A.C.* 6A:24-9.1 (emphasis added).]

The current dispute is seeking a determination of whether payment of funds to Silver Fox is appropriate. Such a determination requires an initial analysis of whether Silver Fox was operating an approved preschool learning center as of September 1, 2001. If not, was Silver Fox operating in compliance with the regulation so as to be a *de facto Abbott* preschool? If so, is funding permissible for such a program without an executed a contract with the *Abbott* district? The resolution of these issues is grounded in the regulations governing the establishment of "*Abbott*" preschools; thus, they are proper issues to be determined by the Commissioner.

Petitioner asserts that Silver Fox relied on actions and representations of Respondent, Paterson School District and proceeded to borrow and expend money to initiate a model preschool *Abbott* program based on those representations. Analysis of the testimony, however, reveals that whatever representations may have been made were vague hearsay statements made to Carol Ann Gauthier, the Silver Fox representative at least from the inception of the program until some time in October or November 2001, or to Laverne Davis, the first Director of Silver Fox, neither of whom testified. Although, pursuant to the rules of this forum, hearsay may be admissible, the testimony regarding the representatives made by Respondent to Gauthier and Davis are recounted accounts to Mr. Ambrosio and Dr. Powers. They are, therefore, even less reliable in addition to which there is no corroborative evidence to validate this testimony.

Moreover, the testimony of Respondent's witnesses places the circumstances under which the representations were made in the context of budget development for the next school year, *i.e.,* the discussions which took place between Petitioner and Respondent in the Fall of 2001 were in contemplation of the next school year; moreover, the budget funds for the 2001-02 school year had been committed in the Fall of 2000.

Based on the foregoing, as well as the further testimony of Respondent's witnesses that, at the time in question, Respondent did not consider them an "*Abbott*" preschool because Petitioner was not a member of the Paterson preschool collaborative and, thus, were not monitored by Respondent, I **FIND** that Petitioner was not an approved "*Abbott*" preschool during the time in question.

Turning next to the issue of whether Silver Fox was *de facto* operating an *Abbott* preschool program, in compliance with the regulatory requirements, from September 2001 to January 2002, notwithstanding the absence of a contract, an examination of the regulatory requirements is appropriate. The regulations require the Board to cooperate with or utilize a licensed child care provider whenever practical to implement required early childhood education programs; such cooperative efforts shall not duplicate programs or services otherwise available in the community.

The relevant regulations provide minimum standards which the licensed day care provider must meet in order to provide preschool services to children in *Abbott* districts. *N.J.A.C.* 6A:24-3.3(c) et seq. Analysis of the testimony presented by Petitioner discloses first that Silver Fox received a temporary approval to operate a child care center from the Department of Human Services on September 19, 2001. (P-5). The approval expires 30 days from the date of issuance. According to the testimony of Dr. Powers, President of the Board of Trustees, the temporary license was continuing at the time of hearing.

Although Dr. Powers and Mr. Ambrosio, who is also a member of the Board of Trustees, testified at great length to their compliance with the requirements of the regulations, much of their testimony was conclusory rather than specific. Moreover, that which offered specific details was unsupported by documentation. For example, Mr. Ambrosio testified that he has personal knowledge of the facility's compliance with all requirements and that he spent a great deal of time making sure they were in compliance. However, it was not clear whether he was testifying whether he meant compliance with the contract or compliance with the regulatory provision. In any case,

the testimony offered on such issues as whether they were in compliance with the regulation was evasive and vague at best.

Although it is clear from some of the documentation that the facility was in compliance with some of the regulations, there are omissions on other points. For example, it is clear that there was at least one teacher for every 15 children and that class size did not exceed 15 children as required by *N.J.A.C.* 6A:24-3.3(c)1. However, the following section of the regulation requires that the programs provided meets the department's early childhood program expectations linked to the core curriculum content standards and integrated with the Whole School Reform models utilized in the district. There is no indication in the record, other than Dr. Powers' testimony that the program planners wished to design a program to exceed the minimum standards that Silver Fox was in compliance with this regulation. In addition, there is nothing in the record which reflects the Board of Trustees imposed an obligation upon the existing teachers who lacked academic credentials to make progress toward a Bachelor's degree and a teacher of preschool through grade three endorsement by September 2004, as required by the regulations.

Based on the foregoing I **FIND** that Petitioner has failed to sustain the burden of proving that Silver Fox was in compliance with the regulatory requirements for an approved "*Abbott*" preschool during the period from September 1, 2001 to January 31, 2002, notwithstanding the absence of a contract. Accordingly, I further **FIND**, therefore, it is unnecessary to reach the issue of whether funding is permissible for such a program since I have found that Petitioner has failed to prove compliance. Accordingly, I **CONCLUDE** that this petition should be dismissed with prejudice.

ORDER

I hereby **ORDER** that this petition be and hereby is **DISMISSED WITH PREJUDICE.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 27, 2003
DATE

Maria Mancini La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

June 27, 2003
DATE

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JUN 30 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

jb

APPENDIX

Witnesses

John J. Ambrosio

Dr. Harry L. Powers

Corradina Fronte

Dr. Anna DeMolli

Exhibits

For Petitioner:

- P-1 Invitation
- P-2 Picture of Sign
- P-3 Certificate of Inc, (Non Profit)
- P-4 By Laws of Silver Fox
- P-5 Statement of Approval to Operate a Child Care Center
- P-6 Letter from Dr. Powers to Dr. Duroy, undated
- P-7 Program Requirements Manual 2000-01
- P-8 Silver Fox Parent Handbook
- P-9 Employment Contract
- P-10 Employment Contract
- P-11 Record Book
- P-12 Lease
- P-13 Silver Fox Balance Sheet Detail
- P-14 Contract between Paterson Public Schools and Silver Fox
- P-15 Silver Fox Balance Sheet
- P-16 Certification of Carlotta Blakely

For Respondent:

- R-1 Tuition Payments September 2001 – June 2002
- R-2 Minutes of Meeting, November 9, 2001
- R-3 Letter from Ms. Davis to Dr. DeMolli, December 17, 2001
- R-4 Letter from Ms. Davis to Dr. DeMolli, January 9, 2002

OAL DKT. NO. EDU 1014-03
AGENCY DKT. NO. 368-11/02

SILVER FOX LEARNING CENTER, INC., ET AL.,	:	
PETITIONERS,	:	
V.	:	
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY; DR. ANNA DE MOLLI, ASSISTANT SUPERINTENDENT OF THE PATERSON PUBLIC SCHOOL DISTRICT;[1] NEW JERSEY STATE DEPARTMENT OF HUMAN SERVICES; WILLIAM LIBRERA, NEW JERSEY COMMISSIONER OF EDUCATION;[2] THE CITY OF PATERSON; AND FELIX ESPOSITO, IN HIS CAPACITY AS PATERSON CODE ENFORCEMENT OFFICIAL,[3]	:	COMMISSIONER OF EDUCATION DECISION
RESPONDENTS.	:	

The record of this matter, including hearing transcripts, and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioners' exceptions and the District's reply thereto were filed in accordance with the provisions of *N.J.A.C.* 1:1-18.4, and were fully considered by the Commissioner in reaching his determination herein.

Initially, petitioners except to the Administrative Law Judge's (ALJ) finding that the Commissioner has jurisdiction to decide this matter, asserting that, in directing the parties to

[1] On November 22, 2002, the parties submitted a Stipulation of Dismissal, without costs against either party and without prejudice, with respect to Dr. Anna DeMolli as a respondent.

[2] A Consent Order of Settlement between petitioners and State respondents, the New Jersey State Department of Human Services and the Commissioner of Education, was entered on June 4, 2003, providing that, if Silver Fox Learning Center, Inc., is found to have a valid "*Abbott*" contract with the Paterson School District for the period at issue, the Department of Human Services will fund the services for which it is responsible.

[3] Prior to the Superior Court's transmittal of this matter to the Commissioner, the City of Paterson and Felix Esposito were dismissed by the Court as respondents in this matter, without prejudice, as the result of a settlement agreement.

submit briefs as to whether the Trial Court/Commissioner has jurisdiction to decide this case, the "Trial Court" rightly perceived this matter as a breach of contract action that alleged other common law causes of action. (Petitioners' Exceptions at 4) Pointing to *Archway Programs, Inc. v. Pemberton Township Board of Education*, 352 *N.J. Super.* 420, 432, 426 (App. Div. 2002), petitioners acknowledge that the Appellate Division held that the Commissioner had primary jurisdiction in addressing the claims of the parties in the *Archway* matter, including petitioner's breach of contract and other asserted claims of unjust enrichment or quantum merit in that matter, but petitioners herein assert that the Appellate Division also found that, absent a specific grant of legislative authority, the Commissioner, even in the context of his plenary authority to decide controversies and disputes arising under the school laws, is not empowered to decide questions of law, such as those arising in contract disputes. (*Id.* at 4-5) Thus, petitioners submit, they are entitled to have their "strong common law claims," which were not addressed or disposed of by the ALJ's decision, decided by the Superior Court. (*Id.* at 5)

Petitioners also argue, *inter alia*, that the ALJ's findings that: 1) Silver Fox Learning Center, Inc. (Silver Fox) was open from the start of the school year; 2) Silver Fox was formed to provide *Abbott*[4] educational services; 3) the lack of funding from September 4, 2001 through January 31, 2002 caused Silver Fox many problems; and 4) a contract was entered into between the Board and Silver Fox, do not support the ALJ's ultimate conclusion that Silver Fox should not be funded for the period in question because it was not compliant with the *Abbott* guidelines. (*Id.* at 6) These "material inconsistencies," petitioners' proclaim, call for the rejection of the Initial Decision. (*Ibid.*) Petitioners further assert that the ALJ's conclusion that

[4] On May 21, 1998, the Supreme Court of the State of New Jersey issued its decision in *Abbott v. Burke*, 153 *N.J.* 480 (1998) (*Abbott V*) containing, among its mandates, the requirement that the Commissioner of Education "exercise his power under *N.J.S.A.* 18A:7F-6b and -16 to require all *Abbott* districts to provide half-day pre-school for three-and four-year olds." (at 508) The Court further clarified the requirements of *Abbott V* as to early childhood education and required Department of Human Services (DHS) licensed child care providers to meet enhanced standards in its decision in *Abbott v. Burke*, 163 *N.J.* 95 (2000) (*Abbott VI*). In response, the State Board adopted regulations requiring local boards of education, in cooperation with DHS licensed child care providers, to provide full-day, full-year early childhood education programs by the 2001-2002 school year. *See N.J.A.C.* 6A:24-3.3(a).

Silver Fox should not be funded for the period in question is also directly at odds with the objective facts and evidence in the record, *i.e.*, Silver Fox's possession of a sign that is given only to schools that are part of the District's collaborative, and the content of the Philosophy Statement appearing in the parent handbook stating Silver Fox's goals to meet or exceed the educational and professional guidelines required of it. (*Id.* at 7-8) Citing to the transcripts, petitioners posit that Silver Fox was compliant with the other *Abbott* guidelines in all other relevant respects in that:

1. Silver Fox had a license from the Division of Youth and Family Services;
2. Silver Fox had certified teachers with experience in other *Abbott* schools;
3. Silver Fox had classrooms of 15 students with a teacher and a teacher's aide;
4. Silver Fox had separate contracts with its teachers and teacher's aides;
5. Silver Fox had performed background checks on its staff;
6. Dr. Harry Powers, President of the Board of Directors of Silver Fox, testified that a curriculum was developed that was exemplary;
7. Silver Fox had professional development procedures in place for its teachers;
8. Silver Fox had a certified School Board Administrator working on its budget between September 2001 and January 2002. (*Id.* at 9-10)

Additionally, petitioners aver that the District did not rebut the testimony of petitioners' witnesses, Dr. Powers and John Ambrosio, who testified that no one from the Paterson School District challenged Silver Fox's compliance with the *Abbott* guidelines at any time during the period from September 1, 2001 to January 30, 2002. (*Id.* at 10)

Moreover, petitioners claim that the ALJ failed to consider any of the three causes of action raised in the petition, *i.e.*, breach of contract, unjust enrichment and equitable estoppel. (*Id.* at 11) With respect to the allegations of breach of contract, petitioners aver that the express language of the contract requires Silver Fox to be open from September 1, 2001 through June 30, 2002, and that District's Database Management Specialist Corey Fronte's explanation

that her failure to change the mandated opening date in the contract was an oversight is "simply not believable in light of Ms. Fronte's expressed ability to make changes to the form [of the] Contract and the fact that she changed several critical dates in the Contract." (*Id.* at 12) *Citing In re Miller's Estate*, 90 *N.J.* 210 (1982) and *Kearney & Trecker Corp. v. Master Engraving Co., Inc.*, 234 *N.J. Super.* 466 (Law Div. 1988), petitioners claim that any ambiguity in the contract is to be construed against the District as the party who drafted it. (*Ibid.*) Additionally, pointing to *Dontzin v. Myer*, 301 *N.J. Super.* 501, 507 (App. Div. 1997) and *Burley v. Prudential Ins. Co. of America,* 251 *N.J. Super* 493, 500 (App. Div. 1991), *inter alia*, petitioners posit that Section I of the contract is specific, while Section III of the contract is general[5] and that it is well-settled that specific terms of a contract have control over general terms. (*Id.* at 12-13)

With respect to petitioners' claim of unjust enrichment, petitioner avers that the District was well aware of Silver Fox's status as an *Abbott* school, that Assistant Superintendent DeMolli had first-hand knowledge that Silver Fox was open as of September 4, 2001, and that the District benefited from the provision of *Abbott* services by Silver Fox during the period at issue. (*Id.* at 13) In that the Abbott services provided by Silver Fox fulfilled the mandate imposed on the District by the Commissioner to provide full-day, full-year early childhood education services, petitioners assert that the District has been unjustly enriched at Silver Fox's expense. (*Id.* at 14)

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[5] In pertinent part, Section I of the contract states:

> The Provider shall provide a full-day, full-year early childhood educational program to children residing in the Paterson Public Schools District commencing September 1, 2001 and ending June 30, 2002***. (Exhibit P-14 at 2)

Section III(A) of the contract states:

> The Term of this Agreement shall be from February 1, 2002 to August 31, 2002. (Exhibit P-14 at 4)

Turning to petitioners' argument that the District should be precluded from denying payment based on the doctrine of equitable estoppel, petitioners claim that: 1) Silver Fox notified the District that it was opening an *Abbott* school; 2) the Assistant Superintendent attended the Silver Fox opening ceremonies in September 2001; 3) Silver Fox was given a sign by the District that represented to the citizens of Paterson that it was a "Participating" *Abbott* school; and Carlotta Blakely, an aide to Assistant Superintendent DeMolli, testified that she expressly told Dr. DeMolli that Silver Fox was enrolling students as an *Abbott* school. (*Id.* at 15) If Silver Fox was not considered an *Abbott* school as the District claims, petitioners submit, with the District's knowledge that Silver Fox was operating as an *Abbott* school, "it is both appalling and astonishing" that Dr. DeMolli, who oversees the District's *Abbott* schools, did not feel an obligation to advise the parents of Silver Fox's students that Silver Fox was not an *Abbott* school, nor did she ask Silver Fox to shut down as an *Abbott* school. (*Id.* at 14-17) Since the District allowed Silver Fox to open as an *Abbott* school, never notified Silver Fox that it was not considered to be an *Abbott* school, never notified Silver Fox that it was not compliant with the *Abbott* or District requirements and never notified Silver Fox that it would not be funded for the Fall of 2001-2002, petitioners assert that the District should be equitably estopped from denying payment for the period from September 1, 2001 through January 31, 2002. (*Id.* at 17-18)

In reply, the District claims that, although Silver Fox did operate prior to February 1, 2002, when it became authorized by written contract with the District to provide *Abbott* pre-school services to Paterson children, it did so without authorization by the District. (Respondent's Reply Exceptions at 2) The District avers that, since it did not authorize Silver Fox to operate as an *Abbott* preschool prior to February 1, 2002, it did not monitor the center nor budget for payment to Silver Fox. (*Ibid.*) The reason Silver Fox did not become part of the Paterson collaborative until February 2002, the District asserts, is that it was not properly managed. (*Ibid.*) The District further proffers that when the District became aware of Silver

Fox's situation in the Fall of 2001 during budget planning for the 2002-2003 school year, it worked with Silver Fox to develop a budget that would allow the District to contract with Silver Fox mid-year for 2001-2002. (*Ibid.*) That contract, the District argues, was within the District's budget for that year and specified the period of time of the contract and also specified the dollar amount. (*Ibid.*) Additionally, the District submits that there are no funds set aside or available for an *Abbott* preschool to operate on its own without approval from the District or the State. (*Ibid.*)

The District explains that when the Silver Fox contract was prepared to reflect mid-year commencement of services the standard Department of Education form was used and all of the dates were adjusted to reflect the mid-year commencement, except for the provision that delineates the responsibility for DHS wrap around and supplemental day services, which was not changed due to an oversight. (*Id.* at 3) The District claims that the incorrect date makes no sense in the context of the entire agreement and was properly explained as a clerical error. (*Ibid.*)

With respect to petitioners' claim that it had a Paterson *Abbott* Preschool banner, the District avers that it does not know how Silver Fox acquired the banner because Silver Fox was not authorized to provide contracted services until February 1, 2002, and that a banner is no substitute for a contract. (*Ibid.*) The District expresses its agreement with the ALJ's finding that "there was no clear and convincing evidence that Silver Fox was providing authorized and verifiable subcontractor Abbott preschool services." (*Ibid.*) The District also submits that the only testimony offered by Silver Fox was that of a developer of the project, who is also a member of the Board, and a consultant who serves as Board President, and that neither of these two individuals possessed first-hand knowledge of the day-to-day operations of Silver Fox. (*Id.* at 4)

With respect to the Commissioner's jurisdiction to hear this matter, the District relies on *Archway, supra,* and argues: 1) that it is both permissible and appropriate for the Commissioner to decide if an educational provider may claim reimbursement for a period in which there is no contract, and 2) that the within matter is under the primary jurisdiction of the Commissioner to decide whether "the services purportedly provided, but never proven to be provided, are subject to comprehensive early childhood guidelines." (*Ibid.*)

Turning to the question of whether Silver Fox was an approved *Abbott* preschool during the period in question, the District points out that the only two individuals who provided testimony on behalf of Silver Fox executed "Resolutions" stating that they had absolutely no participation in the affairs of Silver Fox prior to November 9, 2001. (*Id.* at 5) Thus, the District claims, Silver Fox relied upon witnesses who could not supply the necessary proofs and that petitioners could not prove, after the fact, that all the necessary requirements, *i.e,* teacher qualifications, class sizes, attendance and the like had been met. (*Ibid.*)

Moreover, the District argues that, although Silver Fox may have been formed in 2001 and may have opened in September 2001, it was not an *Abbott* preschool until the District agreed to contract for services with it, commencing February 1, 2002. (*Id.* at 6) Although petitioners claim to have common law claims, the District avers that, as in *Archway, supra,* petitioners have failed to meet the initial hurdles regarding entitlement for these claims to be considered in that such claims can proceed to a court only if petitioners can meet their burden of proving that Silver Fox met the regulatory requirements for the period in question. (*Ibid.*) The District concludes that there is no need for further proceedings in that primary jurisdiction rests with the Commissioner. The District, therefore, concludes that Silver Fox is not entitled to funding for September 2001 through January 2002 because Silver Fox did not meet all of the regulatory requirements and because it did not have a contract. (*Ibid.*)

Upon a thorough and independent review of the record, the Initial Decision, the transcripts, the exceptions and the reply thereto filed in this matter, the Commissioner concurs with the ALJ that petitioners have failed to sustain their burden of proving that Silver Fox Learning Center, Inc., was in compliance with the regulatory requirements to be considered an approved *Abbott* preschool during the period from September 1, 2001 through January 31, 2002.

With respect to the Commissioner's jurisdiction to determine whether Silver Fox in entitled to receive funds for its early childhood education program prior to the execution of a contract with the District, the Commissioner points out that it is well-settled that jurisdiction to hear and determine all controversies and disputes arising under the school laws rests with the Commissioner of Education. *See N.J.S.A.* 18A:6-9; *Balsley, supra*; and *Hinfey, supra.* As noted by the ALJ, generally, contractual disputes are not within the Commissioner's jurisdiction. However, there are circumstances where the jurisdiction to hear a matter is split between the Commissioner and the courts and where a contractual dispute requires an interpretation of the underlying school law. *See Archway, supra; New Jersey Educ. Ass'n, supra; and Kohn, supra.* In the instant matter, a determination is required as to whether Silver Fox was operating an approved *Abbott* preschool as of September 1, 2001, and, if not, whether Silver Fox was operating in compliance with regulations so as to be considered as operating a *de facto Abbott* preschool, notwithstanding the fact that a contract for preschool services was not executed with the District until February 4, 2002.

The Supreme Court in *Abbott V, supra,* directed the Commissioner to require that all *Abbott* school districts provide preschool education for three- and four-year-olds. The resolution of whether Silver Fox was operating an approved *Abbott* preschool or, if not, was operating a *de facto Abbott* preschool during the period in question is grounded in the implementing regulations governing the establishment of *Abbott* preschools. As such, the Commissioner has jurisdiction to make this determination. Moreover, the Court in *Abbott V*

recognized the possibility of disputes arising with the implementation of its directed preschool requirement and addressed this issue, as follows:

> We recognize that disputes will occur in the administration of public education in the era ushered in by these reforms. Those disputes will involve issues arising from the implementation, extension, or modification of existing programs, the need for additional supplemental programs, the allocation of budgeted funds, the need for additional funding, and the implementation of the standards and plans for the provision of capital improvements and related educational facilities. Such disputes shall be considered "controversies" arising under the School Laws. *N.J.S.A.* 18A:7A-1 to 7F-34. *Abbott V* at 526.

For the reasons expressed above, therefore, the Commissioner concludes that the issues herein are proper issues to be decided by the Commissioner. In so concluding, the Commissioner points out that, notwithstanding petitioners' stated objections in their exceptions to the ALJ's conclusion that the Commissioner has jurisdiction in this matter, petitioners refer to the above quotation from *Abbott V* at 526 in response to the ALJ's request that the parties brief the issue of jurisdiction, and state that "[p]etitioner submits that the source of this Court's jurisdiction comes from *Abbott* itself." (Petitioners' Post-Trial Brief at 7) *Citing Archway, supra,* in support of its claim that the Court (OAL)[6] has jurisdiction to decide the matter, and arguing that the "City"[7] should not be permitted to argue that the Commissioner does not have jurisdiction over this matter, petitioners further state:

> Petitioner submits that it would be in bad faith now to allow the City to argue that this Court does not have jurisdiction.
>
> This case has been tried to a conclusion. The Petitioner has spent its time and has incurred legal fees to try this case. In the event that it is now forced to re-try the case in the Trial Court, it asks this

[6] Although petitioners repeatedly refer to OAL as a "Court," in fact, the OAL is a quasi-judicial forum established to provide hearings and proposed findings to New Jersey's administrative agency heads who are charged with final decision-making authority.

[7] Although petitioners refer to arguments anticipated by the "City," the sole remaining respondent in this matter at the time petitioners' post-hearing brief was submitted was the Paterson School District. A Settlement Agreement was executed between petitioners and the City of Paterson at Superior Court prior to this matter's transmittal to the Commissioner by that Court. *See* footnote 3.

> Court to award its attorney's fees and costs associated with the prosecution of this matter before the Commissioner and in this Court. (*Id.* at 9)

Next, the Commissioner turns to the question of whether petitioners have met their burden of proving that, during the period of September 1, 2001 through January 31, 2002, Silver Fox was an approved *Abbott* preschool or was operating in compliance with *Abbott* early childhood regulations so as to be considered a *de facto Abbott* preschool, and if so, whether funding is permissible. It is undisputed that it was the *intent* of the founders of Silver Fox to establish an *Abbott* preschool, that Silver Fox held its grand opening on September 6, 2001, that classes began on September 10, 2001, and that there was not an executed contract between the District and Silver Fox at the time of opening, nor until some five months later. Notwithstanding the founders' intent that Silver Fox would be an *Abbott* preschool upon opening in September, however, upon a thorough review of the record, the Commissioner concludes that Silver Fox was not operating as an *Abbott* preschool nor operating in compliance with *Abbott* early childhood regulations so as to be considered a *de facto Abbott* preschool during the period in question, but, rather, during the period from September 1, 2001 through January 31, 2002, Silver Fox can best be described as a work in progress towards becoming an *Abbott* preschool.

In this regard, the Commissioner points out that, since its opening in September 2001, Silver Fox has been operating under a series of Temporary Certificates of Occupancy (CO) issued for a period of 30 days, and, at the time of the hearing at OAL, Silver Fox was still operating on temporary CO's. (Tr. 6/2/2003 at 43) Moreover, with respect to the license to operate a Child Care Center, the Board President, Dr. Powers, testified at hearing that:

> Q And do you know at the time of opening or shortly thereafter whether or not Silver Fox obtained a license from the State?
>
> A We were in the process. The thing that we understood from Doctor DeMali's (sic) office, from the State Department of Education, from Human Services, the reason that we

couldn't get a full license was because of the CO, and we anticipated getting the CO on a weekly basis.***

Q Well, when you say you didn't have a license, did you have a temporary license?

A Yes, we had a temporary license.

Q Was that, the temporary license continues through today?

A Correct.
(Tr. 6/2/03 at 75-76)

Thus, Silver Fox was experiencing difficulty in getting all the approvals in place necessary to keep the school open as a Child Care Center, a threshold prerequisite for becoming an *Abbott* preschool as such approvals, were, and apparently still are, being issued on a month-to-month basis.[8]

Notwithstanding the claim by Silver Fox that its financial problems were a result of not being compensated as an *Abbott* preschool, the Commissioner finds that the failure to meet all of the criteria for establishing an *Abbott* preschool can be attributed squarely to its founders. By undated letter, Silver Fox advised the Paterson School District of its intent to participate in the Paterson Early Childhood Education Collaborative. (Exhibit P-6, in evidence) However, there is nothing in the record, absent third-party hearsay, to substantiate that there was any attempt by Silver Fox, prior to the school's opening in September 2001, to contract with the Paterson School District so as to establish the required relationship with the District to become an *Abbott* preschool. Under the auspices of founder Carol Ann Gauthier, Silver Fox began experiencing financial difficulties shortly after opening. The Charter Foundation of New Jersey, Inc., was responsible, under an August 14, 2001 Letter of Agreement between the Charter Foundation of New Jersey, Inc. and the Silver Fox Learning Center, for the fiscal management of the school and for performance of certain fiscal services. (Exhibit R-2, in evidence) As Board

[8] The record contains a copy of the initial Approval to Operate a Child Care Center for serving children ages 2 1/2-6 years of age from the Department of Human Services, issued September 19, 2001. The Approval indicates that it expires 30 days from the issuance date. (Exhibit P-5, in evidence)

member Ambrosio testified, Carol Ann Gauthier, a founder of Silver Fox and also a trustee for the Charter Foundation of New Jersey, Inc., initially managed the financial affairs of Silver Fox, but when she began to write checks with insufficient funds:

> We--one of the other things we did after we--we got the CPA to give us an audit, opened up the new account, told the bank not to honor any checks from the old Silver Fox account, which was Ms. Gothie's (sic) signature, and then, we proceeded to fire Ms. Gothie (sic)—not have her resign. She was fired for cause." (Tr. 6/2/03 at 32)

> So, I think that she got swept up in the problem of not knowing how to handle the situation, and therefore, got indicted by the prosecutor because of -- not our school, because we didn't file charges against her, but Hovey filed charges against her with his school, and it had to do with checks that were cashed she claimed were owed her, and she was a signature on a check. So, that was simultaneous to this all happening when we fired her for cause. And the cause that we fired her for was mismanagement of the school--school funds, not the school. (Tr. 6/2/03 at 33)

Prior to November 9, 2001, Silver Fox was still operating under the auspices of the Charter Foundation of New Jersey, Inc. The Record does not reflect when Carol Ann Gauthier was removed for "mismanagement of school funds." It is noted, however, that, when the Board of Directors of Silver Fox was formed on November 9, 2001, Ms. Gauthier was still affiliated with Silver Fox as a nonvoting Board member. (Exhibit R-2, in evidence) The minutes of that meeting, as amended on November 16, 2001, state that:

> The stated purpose of the meeting was to constitute an official Board for the Silver Fox Learning Center, isolate the activities of Silver Fox Learning Center from all other entities and to clarify the relationship between the Silver Fox Learning Center, New Jersey Charter School Foundation, 236 Ellison Street LLC and Silver Fox LLC. (Minutes of Meeting, November 9, 2001, R-2, in evidence)

Additionally, as late as December 17, 2001, in a letter to Paterson Assistant Superintendent DeMolli, Silver Fox's Director, Laverne Davis, acknowledges that Ms. Gauthier was responsible for the financial problems at Silver Fox, stating "Dr. DeMolli, at present, we are operating

without any funds of any kind due to poor planning by Ms. Carolann Gautier (sic) ***." (Exhibit R-3, in evidence)

Moreover, during its first five months in existence, in addition to experiencing initial mismanagement of its funds, operating without a signed contract with the Paterson School District, operating under temporary CO's and temporary approvals from DHS, Silver Fox was still in the process of forming its Board of Director's[9] and obtaining appropriate insurance. In this regard, the Commissioner observes that the standard Department of Education contract form utilized for contracting for the provision of *Abbott* preschool services requires the contracted Child Care Center to carry General Liability Insurance of $3 million and Comprehensive Automobile Liability Insurance of $2 million. If the required insurance is not in effect, the District may refuse to make payment of any further monies until such times as the provider reinstates the insurance. (Paterson Public Schools Abbott Preschool Educational Program Contract 2001-2002 School Year, Exhibit P-14, in evidence) When queried as to when Silver Fox obtained insurance compliant with the terms of an *Abbott* preschool contract, Board Member Ambrosio testified that: "Silver Fox had no money to purchase insurance at all for the first half of the year" (Tr. 6/3/03 at 41) and, subsequently, testified that he didn't know for sure when Silver Fox became insured, that "you'd have to find out from Bolinger [the insurer]." (Tr. 6/3/03 at 41-42) The minutes of the Silver Fox Learning Center's Board meeting of January 9, 2002 indicate that some four months after opening, Silver Fox was attempting to secure insurance and provide the required certification documentation. The minutes reflect, *inter alia*, that: 1) "[r]elevant documentation pertaining to certification is being submitted as required;" 2) "T. Ambrosio is following through to obtain liability insurance;" and 3) "L. Davis will check

[9] The January 9, 2001 Board minutes contain a "Resolution" (R-2) stating that, prior to November 9, 2001 there was no formal Board of Directors of Silver Fox.

companies for health benefit quotations***."[10] (Exhibit R-2, in evidence) Thus, during the first five months of its operation, Silver Fox was operating without a signed contract for the provision of *Abbott* preschool services, was operating under temporary CO's and temporary approvals from the Department of Human Services to operate a Child Care Center, experienced initial mismanagement of its funds, did not establish a Board of Directors for the school until November 9, 2001, and in January 2002 was still attempting to resolve its insurance issues so as to fulfill the contract provisions required as a provider of *Abbott* preschool services for the Paterson School District.

Moreover, notwithstanding petitioners' claim that Silver Fox was compliant with *Abbott* guidelines in other respects during the period in question, *i.e.,* that Silver Fox used certified teachers with experience in other *Abbott* schools; that Silver Fox had classes of 15 students with a teacher and a teacher's aide; that Silver Fox had a curriculum that was exemplary; that Silver Fox had professional development procedures in place for its teachers; that Silver Fox offered health services as the year progressed (Tr. 6/2/03 at 111); and that Silver Fox had a certified School Board Administrator working on its budget between September 2001 and January 2002 (Petitioners' Exceptions at 9-10), the Commissioner finds that petitioners have failed in their burden of proof to establish the accuracy of these claims. Silver Fox provided no witnesses with first-hand knowledge of the day-to-day operations of the school and did not provide adequate documentation to support its claims that its teachers were properly certified and that classes were comprised of Paterson residents and had the appropriate teacher-pupil ratio. With respect to whether Silver Fox's curriculum was consistent with that required to be considered an *Abbott* preschool, it is notable that petitioners did not submit any documentation of the curriculum content and whether it was consistent with requirements, but offered only the

[10] Silver Fox acknowledges that it did not provide its employees with health benefits from September 2001 through January 2002 due to financial difficulties.

unsupported testimony of Board President Powers that "[w]e developed a curriculum, an instructional modality that was exemplary." (Tr. 6/02/03 at 75)

Finally, the Commissioner finds that petitioners have failed to establish that Silver Fox had the required relationship with the Paterson School District during the period September 1, 2001 through January 31, 2002 so as to become an *Abbott* preschool. As stated above, Silver Fox did not execute a contract with the Paterson School District until February 1, 2002. Petitioners claim that a relationship existed between Silver Fox and the Paterson School District prior to that time and offer as proofs of that relationship an undated letter of Silver Fox's intent to participate in the Paterson Early Childhood Education Cooperative, the possession of a banner given only to *Abbott* preschools, the attendance at Silver Fox's grand opening of Paterson School District staff assigned to monitor *Abbott* preschools, and a site visit by one of the staff members assigned to monitor Abbott preschools.

With respect to petitioners' claim that the banner was given only to *Abbott* preschools, and that possession of the banner alone proves that the Paterson School District considered Silver Fox to be an *Abbott* preschool, the Commissioner disagrees, pointing out that, although the District cannot explain how Silver Fox came into the possession of the banner, the banner itself is not specific as to Silver Fox and there are a number of possible explanations as to how Silver Fox obtained the banner, a recruitment tool to encourage parents to enroll their children in *a* Participating Preschool Center in the Paterson School District, as follows:

ATTENTION PATERSON PARENTS
Free Full Day Preschool Program
For 3 and 4 Year Old Children
REGISTER NOW!
Visit a Participating Preschool Center
973-321-0544
Dr. Edwin Duroy
State District Superintendent
(Exhibit P-2, in evidence)

Moreover, the Commissioner finds that petitioners have failed to adequately document how Silver Fox came into possession of the banner, claiming that the banner was given to Ms. Gauthier, who did not testify at hearing, by some unnamed staff member of the Paterson School District at some unknown time.

Turning to the Grand Opening invitation, the Commissioner also observes that there is nothing in the invitation itself that indicates that Silver Fox is an *Abbott* preschool or that Silver Fox is affiliated in any manner with the Paterson School District. The invitation simply states:

> You're Invited
> Thursday, September 6th, 2001
> at 12 Noon
> To the dedication of
> Silver Fox Learning Center
> By the
> Charter Foundation of New Jersey, Inc.
> R.S.V.P. – September 4th at 973-278-8428
> (Exhibit P-1, in evidence)

Thus, attendance at the grand opening by Paterson School District staff does not lead to a conclusion that the District considered Silver Fox to be an *Abbott* preschool. Nor can the Commissioner conclude from the proofs presented that a site visit to Silver Fox by a District staff member constitutes the monitoring and reporting required of an *Abbott* preschool.

Accordingly, for the reasons set forth above, the Commissioner concludes that the preponderance of the evidence does not establish that Silver Fox was providing authorized and verifiable subcontractor *Abbott* preschool services during the period September 1, 2001 through January 31, 2002 so as to entitle it to *Abbott* preschool funding during that period. It was presumptuous for Silver Fox to have assumed that, without an executed contract with the Paterson School District, simply by notifying the District of its intent to join the Paterson Early Childhood Education Collaborative and then proceeding to open a child care center under the auspices of the Department of Human Services that Silver Fox was automatically an *Abbott*

preschool. To the extent that petitioners made such assumption, they did so at their own peril. Given the Commissioner's ultimate conclusion that Silver Fox Learning Center, Inc., was not functioning as a *de facto Abbott* preschool prior to its execution of a contract with the Paterson School District, it is unnecessary to reach to the issue of whether funding is permissible for a *de facto Abbott* preschool program operating without an executed contract with an *Abbott* district, or to reach to petitioners' claims of unjust enrichment and equitable estoppel. To the extent petitioners' assert other contractual claims, the Commissioner notes that he lacks jurisdiction to consider these claims. Moreover, the court which transferred this matter to the Commissioner did not retain jurisdiction[11] and, therefore, there is no mechanism for the Commissioner to return this matter to the court.

Accordingly, the Initial Decision of the OAL is adopted for the reasons articulated herein and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.[12]

COMMISSIONER OF EDUCATION

Date of Decision: 11/6/03

Date of Mailing: 11/6/03

[11] See *Archway, supra,* at 432.

[12]This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

623-03

IN THE MATTER OF RONALD UDY, :

DAVID A. EWART AND FRANK B. FRAZIER, :

WOODSTOWN-PILESGROVE BOARD OF : COMMISSIONER OF EDUCATION

EDUCATION, SALEM COUNTY. : DECISION

:

SYNOPSIS

In consolidated matters, the School Ethics Commission determined that respondent Board members violated *N.J.S.A.* 18A:12-24.1 *et seq.* After considering the nature of the charges, the Commission found that Respondent Udy violated *N.J.S.A* 18A:12-24.1(a), (c), (d) and (f) of the Code of Ethics and Respondents Ewart and Frazier violated *N.J.S.A.* 1A:12-24.1(a) and (f) of the Code of Ethics when they overruled the recommendation of the superintendent not to renew the District's former Supervisor of Guidance, C.L., who did not have the requisite certification for such position, and when they voted to create a new administrative position for C.L. without the recommendation of the superintendent, surrendering their independent judgment to supporters of C.L. The Commission recommended removal for Udy and censure for Ewart and Frazier.

Upon review of the record, the Deputy Commissioner, to whom this matter has been delegated for review pursuant to *N.J.S.A.* 18A:4-33, and whose decision was restricted solely to a review of the Commission's recommended penalties, concurred with the Commission's recommendations of removal for Udy and censure for Ewart and Frazier. The Deputy Commissioner, however, in light of comments raising the troubling allegation of procedural errors in these consolidated matters, determined to stay the implementation of the penalties ordered, pending respondents' timely appeal to the State Board of Education.

November 10, 2003

IN THE MATTER	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
OF	:	
	:	**Docket No. C20-03/C21-03**
RONALD UDY, DAVID A. EWART and FRANK B. FRAZIER	:	**CONSOLIDATED DECISION**
WOODSTOWN-PILESGROVE BOARD OF EDUCATION	:	
SALEM COUNTY	:	

PROCEDURAL HISTORY

The above matter arises from a complaint filed by Woodstown-Pilesgrove Board of Education (Board) member John W. Morrison on May 2, 2003 alleging that fellow Board members Ronald Udy, David A. Ewart and Frank B. Frazier violated the School Ethics Act, N.J.S.A. 18A:12-21 et seq. Complainant also named Matthew Nowicki in the complaint, but withdrew his complaint against him. First, the complainant alleges that Mr. Udy, Mr. Ewart and Mr. Frazier violated N.J.S.A. 18A:12-24.1(a) of the Code of Ethics for School Board Members when they overruled the recommendation of the superintendent to not renew the District's former Supervisor of Guidance (C.L.) and voted to retain C.L. for the same position. Second, the complaint alleges that Mr. Udy, Mr. Ewart and Mr. Frazier violated N.J.S.A. 18A:12-24.1(a), (c), (d) and (f) when they voted to create a new administrative position for C.L. without the recommendation of the superintendent. Third, the complainant alleges that the respondents surrendered their independent judgment to supporters of C.L. in violation of N.J.S.A. 18A:12-24.1(f).

Mr. Udy and Mr. Ewart filed answers to the complaint through their counsel, John D. Jordan, Esquire, on June 13, 2003. Mr. Frazier filed a separate answer on June 3, 2003. In their answers, the respondents admit that they voted in favor of rehiring C.L. for the same position for which the superintendent recommended her non-renewal and voted to create a new administrative position for C.L. The respondents assert that it was in the best interest of the District to keep C.L. in the school system and that they had the legal right to take such action.

The Commission invited the parties to its August 26, 2003 meeting to present witnesses and testimony to aid in the Commission's investigation. Mr. Udy and Mr. Ewart were represented by Mr. Jordan. Mr. Frazier and the complainant appeared *pro se*. The Commission also heard testimony from board secretary, Susanne Fox; superintendent of schools, Michael Schreiner; and board members, Karen Malos and Patricia Parazewski. After hearing testimony, the Commission voted at its public meeting that Mr. Udy's conduct was in violation of the Code of Ethics, N.J.S.A. 18A:12-24.1(a), (c), (d) and (f). The Commission found the conduct of Mr. Ewart and Mr. Frazier to be in violation of N.J.S.A. 18A:12-24.1 (a) and (f) of the Code of Ethics.

FACTS

The Commission found the following facts to be undisputed.

At all times relevant to the allegations in the complaint, Mr. Udy, Mr. Ewart and Mr. Frazier were members of the Woodstown-Pilesgrove Board of Education. Mr. Udy was elected vice-president of the Board in 2002 and has worked 32 years in the District, serving as superintendent of schools, high school principal and teacher. Mr. Ewart has intermittently served on the Board, with more than 6 years of experience, and is currently serving as the Board president. Mr. Frazier is currently a member of the Board.

In 1999, the Board filled the position of Supervisor of Guidance. C.L. held a teaching certificate and supervisor certification from the State of New Jersey, but did not hold certification for the position of Director of Student Personnel Services. C.L. was hired by the Board with the understanding that she would obtain the aforementioned certifications. In January, 2000, the job title for the position of Supervisor of Guidance was changed to Director of Guidance and C.L. was "flagged" by the New Jersey Department of Education (NJDOE) for not having the necessary certification for the Director of Guidance position. The Board subsequently changed the title back to Supervisor of Guidance. No further "flags" were issued by the NJDOE.

A letter, dated January 17, 2001, to C.L. from the Pennsylvania Department of Education indicated:

> We have carefully reviewed and evaluated your application and accompanying credentials using certification Standards and Regulations of the State Board of Education of Pennsylvania, Chapter 49 Certification of Professional Personnel. Based upon the information you have submitted, the evaluation reveals that you have not met the requirements for the certificated [of Pupil Personnel Services].

The Superintendent received a letter, dated September 6, 2001, from the New Jersey Department of Education stating that in order for C.L. to qualify to serve as a Director of Student Personnel Services, C.L. would need to present a regular New Jersey Student Personnel Services endorsement. At the Board meeting of April 4, 2002, the superintendent recommended the non-renewal of C.L. in the position of Supervisor of Guidance and indicated that C.L. did not possess the required certification.

On April 22, 2002, the Superintendent issued a letter of non-renewal to C.L. On May 15, 2002, a hearing was held on the matter, at the request of C.L., who provided a letter dated February 26, 2001, from the Associate Dean for the Center for Education at Widener University. The letter indicated that C.L. had completed the course requirements for certification as Pupil Personnel Services Supervisor. The Board solicitor attended the hearing and advised the Board

of N.J.A.C. 6:11-11.10 regarding the Director of Personnel Services certification, which provides in pertinent part:

> (a) This endorsement is required for any person who is assigned as a director, administrator or supervisor of guidance and student personnel services of a school system, including the supervision of educational activities in areas related to and within the guidance program.
>
> (b) The requirements are:
>
> > 2. A standard New Jersey student personnel services certificate or its equivalent...

During the May 15, 2002 Board meeting, Mr. Udy made a motion to retain C.L. as the Supervisor of Guidance. The motion was defeated by 5-6 vote. Mr. Udy, Mr. Ewart and Mr. Frazier voted in favor of retaining C.L.

At the request of the Board president, the county superintendent confirmed, in his letter of May 30, 2002, that any person in the position of Supervisor or Director of Guidance is required to hold the required certifications for Director of Student Personnel Services. At its meeting of June 4, 2002, the Board approved, by 10-1 vote, a resolution encouraging C.L. to gain the Student Personnel Services Certification and encouraged the superintendent to leave open the Supervisor of Guidance position for one year, to give CL the opportunity to obtain the required certifications.

During the Board's meeting of June 6, 2002, Mr. Udy made a motion to create a new administrative position for C.L. The Superintendent was not present at the meeting to make a recommendation to create the position, but did write a letter to the Board members indicating that she had reviewed Mr. Udy's proposal and was supportive of it. The motion was defeated by 5-6 vote. Mr. Udy, Mr. Ewart and Mr. Frazier voted in favor of the creation of a new position for C.L.

After C.L.'s non-renewal, her supporters organized to recall the Board president and vice-president. Board member, Patricia Parazewski, testified that during the public session of the Board's meeting of May 15, 2002, she saw Mr. Udy call Margaret Scholl, a member of the recall committee who was sitting across the room, on his cell phone to tell her that the Board had defeated his motion to retain C.L. for the position of Supervisor of Guidance. Ms. Parazewski indicated that she did not hear Mr. Udy's conversation, but read his lips. Mr. Udy denied the allegation.

There is no information to show that C.L. obtained the necessary certification for Student Personnel Services from the State of New Jersey, or that she completed the necessary coursework to obtain the certification

ANALYSIS

Complainants allege that Mr. Udy, Mr. Ewart and Mr. Frazier overruled the recommendation of the superintendent and voted to rehire C.L. in violation of N.J.S.A. 18A:12-24.1(a). The Commission notes that in complaints alleging a violation of the Code of Ethics, the complainant has the burden of proving factually that the respondent's conduct is in violation of the Act.

Section 24.1(a) provides in pertinent part:

> I will uphold and enforce all laws, rules and regulations of the State Board of Education, and court orders pertaining to schools.

The Commission notes that the respondents were advised by the Board solicitor of the legal requirements under N.J.A.C. 6:11-11.10(a) and (b)(2), which mandate that Supervisors of Guidance hold a certification in Director of Student Personnel Services or Student Personnel Services. The Commission also recognizes the notification from the New Jersey Department of Education advising the superintendent of schools that C.L. did not hold the requisite certification. There is no information to show that C.L obtained the proper certifications. Mr. Udy, Mr. Ewart and Mr. Frazier argue that their decision to vote in favor of retaining C.L. was in the best interest of the District. The Commission disagrees. Although the Department of Education may not have "flagged" C.L. at the onset of her employment as Supervisor of Guidance, the law is clear. Under the aforementioned Department regulations, persons who hold the position of Supervisor or Director of Guidance must hold the Student Personnel Services certificate. Therefore, the Commission finds that Mr. Udy, Mr. Ewart and Mr. Frazier failed to enforce the regulations of the State Board of Education and violated N.J.S.A. 18A:12-24.1(a).

Complainant also alleges that Mr. Udy, Mr. Ewart and Mr. Frazier voted to create a new position without the recommendation of the superintendent in violation of N.J.S.A. 18A:12-24.1(a), (c), (d) and (f).

The Commission has found that the respondents violated N.J.S.A. 18A:12-24.1(a) for failing to adhere to the law and voting to retain C.L. Similarly, the Commission finds that Mr. Udy, Mr. Ewart and Mr. Frazier did not adhere to the law when they voted to create a new position for C.L., despite the requirement of N.J.A.C. 6:11-11.10(a) and (b)(2). Therefore, the Commission finds that Mr. Udy, Mr. Ewart and Mr. Frazier violated N.J.S.A. 18A:12-24.1(a).

Section 24.1(c) provides:

> I will confine my board action to policy making, planning, and appraisal, and I will help to frame policies and plans only after the board has consulted those who will be affected by them.

The Commission finds that Mr. Udy's motions to retain C.L and to create a new position for her when there was no evidence that C.L. did hold the required certification, went beyond his duty of policy making, planning and appraisal.

Section 24.1(d) of the Code of Ethics provides:

> I will carry out my responsibility, not to administer the schools, but, together with my fellow board members, to see that they are well run.

Based upon Mr. Udy's extensive experience, serving in the District for 32 years and holding such positions as the superintendent of schools, it is presumed that he knows the laws pertaining to the schools. The Commission finds that Mr. Udy attempted to undermine the authority of the superintendent and circumvent the requirements under N.J.A.C. 6:11-11.10 when he made the aforementioned motions. Therefore, the Commission finds that Mr. Udy administered the schools in violation of N.J.S.A. 18A:12-24.1(d).

Section 24.1(f) states:

> I will refuse to surrender my independent judgment to special interest or partisan political groups or to use the schools for personal gain or for the gain of friends.

The Commission finds that Mr. Udy, Mr. Ewart and Mr. Frazier violated N.J.S.A. 18A:12-24.1(f) when they voted to retain C.L. as Supervisor of Guidance and voted to create a new position for her, although there was information to demonstrate that she had not gained the necessary certification and no evidence to show that she had completed the necessary coursework to obtain the certification for the position. The Commission finds that the facts lead one to conclude that this was done for C.L.'s gain, because she was a friend.

However, the Commission finds insufficient proof that Mr. Udy, Mr. Ewart and Mr. Frazier surrendered their independent judgment to the supporters of C.L. in violation of the second prong of N.J.S.A. 18A:12-24.1(f). Since it does find that all three respondents violated the first part of the section, the Commission finds a violation of N.J.S.A. 18A12-24.1(f).

DECISION

For the foregoing reasons, the Commission finds that Mr. Udy violated N.J.S.A. 18A:12-24.1(a), (c), (d) and (f) of the Code of Ethics and Mr. Ewart and Mr. Frazier violated N.J.S.A. 18A:12-24.1(a) and (f).

PENALTY

Based on the findings set forth above, demonstrating that Respondents violated the Code of Ethics for Board Members, the Commission recommends that the Commissioner of Education impose a penalty of censure regarding Mr. Ewart and Mr. Frazier. The Commission further recommends to the Commissioner the penalty of removal from office for Mr. Udy.

This decision, having been adopted by the Commission, shall now be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction only, pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, the respondent may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Paul C. Garbarini

Paul C. Garbarini
Chairperson

Resolution Adopting Decision – C20/21-03

Whereas, the School Ethics Commission has considered the pleadings filed by the parties, the documents submitted in support thereof; and the testimony, and,

Whereas, the Commission found that Ronald Udy violated N.J.S.A. 18A:12-24.1(a), (c), (d) and (f) and David A. Ewart and Frank B. Frazier violated N.J.S.A. 18A:12-24.1(a) and (f) of the Code of Ethics For School Board Members; and

Whereas, the Commission believes that the penalty of removal is the appropriate sanction for Mr. Udy and the penalty of censure is appropriate for Mr. Ewart and Mr. Frazier;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter finding the respondents in violation of the Code of Ethics and recommends that the Commissioner of Education impose the aforementioned penalties.

Paul C. Garbarini, Chairman

I hereby certify that the School
Ethics Commission adopted this decision
at its public meeting on September 23, 2003.

Lisa James-Beavers
Executive Director

AGENCY DKT. NO. 346-9/03

IN THE MATTER OF RONALD UDY,	:	
DAVID A. EWART AND FRANK B. FRAZIER,	:	
WOODSTOWN-PILESGROVE BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION, SALEM COUNTY.	:	DECISION
	:	

The record of this consolidated matter and the decision of the School Ethics Commission ("Commission") finding that Mr. Udy, Mr. Ewart and Mr. Frazier violated the Code of Ethics found at *N.J.S.A.* 18A:12-24.1 *et seq.* have been reviewed. Therein, the Commission found that Mr. Udy violated *N.J.S.A.* 18A:12-24.1(a), (c), (d) and (f) of the Code of Ethics and that Mr. Ewart and Mr. Frazier violated *N.J.S.A.* 18A:12-24.1(a) and (f) of the Code of Ethics. The Commission recommended a penalty of removal for Mr. Udy, and censure for Mr. Ewart and Mr. Frazier. Upon issuance of the decision of the Commission, respondents were provided 13 days from the mailing of the decision to file written comments on the recommended penalty for the Commissioner's consideration.

Comments were filed on behalf of Mr. Udy and Mr. Ewart,[1] who primarily contend that they were denied due process in this matter. Respondents explain that the current matter was commenced by the filing of two complaints by John W. Morrison. Letters to

[1] On October 14, 2003, the Bureau of Controversies and Disputes received a letter from counsel for Mr. Udy and Mr. Ewart which made reference to "exceptions" that were filed on October 3, 2003. However, since there was no record of that filing with the Bureau, counsel was asked to forward another copy, which was received on October 16, 2003. Additionally, counsel's correspondence of October 14th appended a letter in support of the comments/exceptions. However, the Deputy Commissioner notes that in his review of a Commission decision, he is bound by the facts found by the Commission, as well as the Commission's determination that the facts constituted a violation of the Code of Ethics. Since it is his role to act upon the Commission's recommendation regarding sanction based upon the record it transmits to him, together with any written comments regarding the Commission's recommended penalty that may be filed by a party to the matter, the additional evidence could not be considered.

respondents dated May 8, 2003 from the School Ethics Commission provided notice of the complaints and also acknowledged that the complaints alleged violations of the School Ethics Act, *N.J.S.A.* 18A:12-21 *et seq.* (Respondent Udy's and Ewart's Comments at 1-2)

Subsequent to the filing of their Answers, respondents were notified, by letters dated June 30, 2003, that, at the upcoming meeting scheduled for July 22, 2003, the Commission may take one of several actions; that is, the Commission "may table the matter and ask for additional information and/or advice, the Commission may dismiss the matter or the Commission may determine that probable cause exists." (*Id.* at 2) Thereafter, the meeting scheduled for July 22, 2003 was adjourned and rescheduled for August 26, 2003.

Respondents Udy and Ewart assert that, based on the aforementioned communications, "the litigants, including the Petitioner proceeded with the understanding that the August 26, 2003 meeting was to determine the existence of probable cause." (*Ibid.*) After that meeting, however, respondents report they were informed that the Commission found violations in both cases. Respondents Udy and Ewart, therefore, argue:

> The Commission did not proceed in accordance with the Administrative Code. Accordingly, the Respondents have been deprived of a meaningful opportunity to be heard with regard to the allegations made against them. Since the Complaints alleged violations of the School Ethics Act, the Respondents had the right to expect that their case would be heard in accordance with the provisions of *N.J.A.C. 6A:28-1.14* if the Commission found probable cause. That procedure was clearly communicated to the Respondents by the Commission through the letter of its Executive Director dated June 30, 2003. There is no fairness in advising parties that they are attending a probable cause hearing, and then informing them, after the hearing, that they have been found guilty. (*Ibid.*)

Moreover, Udy and Ewart find it implausible that the Commission could, on this record, conclude that there were no facts in dispute. However, assuming, *arguendo*, that the

district. Under these circumstances, even a reprimand is a harsh result. (*Ibid.*)

Mr. Frazier submitted written comments which also addressed the Commission's findings and conclusions. With respect to the recommended sanctions, Mr. Frazier merely stated, "Mr. Udy is no more responsible then [*sic*] I am and should NOT be removed from the board. We all played an equal part and we should all be charged accordingly.***" (emphasis in text) (Frazier's Comments at 2)

Mr. Morrison, the complainant in this matter, submitted written comments, as well.[4] He acknowledges that there are "some minor errors in the Decision," (Morrison Comments at 1), but asserts that the Commission has drawn appropriate conclusions and recommended appropriate sanctions. (*Ibid.*)

Initially, the Deputy Commissioner, to whom this matter has been delegated for review pursuant to *N.J.S.A.* 18A:4-33, emphasizes that pursuant to *N.J.S.A.* 18A:12-29(c), the Commission's determination as to violation of the Act or Code of Ethics *is not reviewable by him.* Only the School Ethics Commission may determine whether a violation of the School Ethics Act or Code of Ethics has occurred. The Commissioner's jurisdiction is limited to reviewing the sanction to be imposed following a finding of a violation by the School Ethics Commission. Therefore, this decision is restricted solely to a review of the recommended penalties for the respondents and its implementation and *cannot* reach in substance to the weaknesses in either procedure or content which were alleged by the respondents.

[4] Although complainants do not have standing to participate in proceedings held in accordance with alleged School Ethics Act violations, see, *In the Matter of Frank Pannucci, Board of Education of the Township of Brick, Ocean County,* State Board Decision March 1, 2000, slip opinion at 6-9, this decision was issued as a Code of Ethics violation. As such, the pertinent regulations provide that a complainant "has the burden to prove factually a violation under the Code of Ethics," *N.J.A.C.* 6A:28-1.13(b), and therefore, may be fairly considered a participant in this matter.

Commission did so find, respondents maintain that it was then obliged to notify them of their right to submit written statements setting forth the reasons they should not be found in violation of the Act, as provided in regulation. (*Id.* at 3) *N.J.A.C.* 6A:28-1.14.[2] Respondents reason that the Commission's failure to afford them due process has harmed their respective reputations and, in Mr. Udy's case, will serve to disenfranchise "the significant majority of residents" who voted for him. (*Id.* at 2) Respondents also take exception to the factual errors contained in the Commission's decision which, they argue, demonstrate that the process used by the Commission "was defective and that its decision is unreliable." (*Id.* at 3)[3]

On the issue of their respective penalties, although Respondents Udy and Ewart maintain that they did not violate either the Code of Ethics or the School Ethics Act, they urge the Commissioner to consider "the whole dispute, the merits of the positions advanced by the parties, the reasons for the actions of the Respondents and the extensive and distinguished service of the Respondents to their community." (*Id.* at 7) They continue:

> With regard to the proposal to rehire C.L., the respondents did nothing different than [*sic*] three predecessor Boards of Education. The proposal to fill the vacant position of Assistant Principal was supported by the Superintendent and would have helped to supply the District's need for administrative staff. The Respondents have advanced plausible reasons to support their understanding that their votes were not only legal, but in the best interests of the school

[2] As a demonstration of the harm that followed from these procedural errors, respondents note that the Commission found, at page 3 of its decision, that Mr. Udy made a call to Ms. Scheule, a member of the recall committee, on his cell phone during a public session of the Board's meeting on May 15, 2002. Respondents contend, however, that they had no notice that Mr. Morrison intended to introduce such evidence and, therefore, Mr. Udy had no opportunity to rebut the allegation. "Of course," respondents reason, "had the August 26th meeting proceeded as a probable cause hearing, there would be no harm in allowing the testimony." (*Id.* at 5)

[3] Respondents detail the following errors: Mr. Udy worked in the District for 14 years, rather than 32, as stated by the Commission (*id.* at 3); with respect to Mr. Udy's second motion, there are no facts on the record to support a finding that a "new position" was created, but, rather, the Assistant High School Principal position had existed for years and was merely vacant (*id.* at 5); the certification required for the Assistant Principal position is different from that required for Supervisor of Guidance and C.L., indeed, possessed the proper certification to be an Assistant Principal (*id.* at 5-6); and this record does not support a finding that Mr. Udy attempted to undermine the authority of the Superintendent when he made the two motions. (*Id.* at 6)

Consequently, the Deputy Commissioner is constrained to accept the Commission's recommendations that censure is the appropriate penalty in this matter for Mr. Ewart and Mr. Frazier for violating *N.J.S.A.* 18A:12-24.1(a) and (f) of the Code of Ethics, and that removal is the appropriate penalty for Mr. Udy, for violating *N.J.S.A.* 18A:12-24.1(a), (c), (d) and (f) of the Code of Ethics. However, in light of comments raising the troubling allegation of procedural errors in these consolidated matters, the Deputy Commissioner determines *to stay implementation of the respective penalties ordered herein*, pending respondents' timely appeal to the State Board of Education. If no appeal is filed pursuant to *N.J.A.C.* 6A:4-1.1 *et seq*, the penalties ordered herein shall be effectuated immediately.

IT IS SO ORDERED.

DEPUTY COMMISSIONER OF EDUCATION

Date of Decision: 11/10/03

Date of Mailing: 11/10/03

624-03

IN THE MATTER OF THE TENURE	:	
HEARING OF DONALD HAMMARY,	:	
SCHOOL DISTRICT OF THE	:	COMMISSIONER OF EDUCATION
CITY OF ASBURY PARK, MONMOUTH	:	DECISION ON REMAND
COUNTY.	:	

SYNOPSIS

The Board filed tenure charges of unbecoming conduct and other just cause against respondent special education teacher/guidance counselor for three incidents involving racial remarks, profanity, failure to counsel students and use of excessive force to discipline a student.

At the OAL, the parties agreed to a settlement. The Commissioner rejected the settlement, as it did not comport with the *Cardonick* standards for settling tenure matters in that it failed to set forth the nature of the charges and the circumstances justifying settlement, and failed to reflect respondent's understanding that the matter would be referred to the Board of Examiners for possible revocation of his certificates. The matter was remanded to OAL for further proceedings. The matter proceeded to hearing.

Following 20 days of testimony, the ALJ found that the Board's witnesses were more credible than respondent and most of his witnesses. The ALJ concluded that the Board had proven its charges of unbecoming conduct against respondent and had demonstrated his unfitness to be a teacher. The ALJ ordered respondent terminated from his employment.

In light of the record and the credibility determinations of the ALJ, the Deputy Commissioner, to whom this matter was delegated pursuant to *N.J.S.A.* 18A:4-33, adopted the Initial Decision as his own and ordered respondent dismissed from his tenured position as of the date of this decision. The Deputy Commissioner directed that a copy of this decision be transmitted to the State Board of Examiners for action as it deems appropriate.

November 10, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 803-02

AGENCY REF. NO. 327-8/01

IN THE MATTER OF THE TENURE HEARING OF DONALD HAMMARY, BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY.

Mark H. Zitomer, Esq.; **Carol R. Smeltzer**, Esq.; and **Nicholas Celso, III,** Esq., for petitioner (Schwartz Simon Edelstein Celso & Kessler, attorneys)

Kevin E. Daniels, Esq., for respondent (Daniels & Davis, attorneys)

Record Closed: August 13, 2003 Decided: September 24, 2003

BEFORE **ROBERT S. MILLER,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This is a teacher tenure proceeding under *N.J.S.A.* 18A:6-10 to –18. Petitioner ("Board of Education" or "Board") brought three charges of unbecoming conduct and/or just cause for dismissal against Donald Hammary ("respondent"). The incidents that comprised two of the charges are alleged to have occurred on November 10, 1999; the third incident is alleged to have occurred on May 4, 2001. Specifically, petitioner accuses respondent of uttering offensive racial

remarks during a classroom presentation on November 10, 1999; failing to counsel children on November 10, 1999; and uttering profanity and using excessive force to discipline a student on May 4, 2001.

On September 14, 2001, the Commissioner of Education transmitted the matter to the Office of Administrative Law for determination as a contested case under the Administrative Procedure Act. On January 4, 2002 the parties entered into a stipulation of settlement, whereby respondent agreed to resign from his position of teacher-guidance counselor and to surrender all of his New Jersey teaching and guidance counselor certificates to the State Board of Examiners. On January 9, 2002 I issued an initial decision approving the settlement and filed it with the Commissioner.

On February 25, 2002 the Commissioner rejected the settlement and remanded the matter to the Office of Administrative Law for expansion of the record and revision of documents, consistent with the concerns set forth in his decision. He further ordered that if the parties were unable or unwilling to reach an accord consistent with his order, the matter should proceed to hearing.

The hearing began on June 25, 2002 and, after 20 days of testimony, concluded on April 11, 2003. The record closed upon submission of reply briefs.

There are no significant legal issues in this case. All of the issues are factual. Some of the facts in this matter, however, are not contested. They are as follows.

UNDISPUTED FACTS

1. The Board of Education of the City of Asbury Park is a body politic and corporate, organized and existing by virtue of the laws of the State of New Jersey, *N.J.S.A.* 18A:11-1, which is entrusted with maintaining and overseeing the public schools of the Asbury Park School District.
2. Respondent is the holder of a standard Teacher of Social Studies certificate issued by the New Jersey State Board of Examiners in February 1981, as well as the

holder of a standard Teacher of the Handicapped certificate issued by the New Jersey State Board of Examiners in October 1983, and a standard Student Personnel Services (Guidance) certificate issued by the New Jersey State Board of Examiners in June 1986.

3. Respondent earned an Associates Degree in Education from Brookdale Community College, a Bachelor's degree from Rutgers University, and a Master's degree in Counseling from Trenton State College.

4. Prior to commencing his employment with the Board as a special education teacher on or about January 2, 1996, respondent had served as a guidance counselor at the North Main Street School, a public elementary school located in Pleasantville, New Jersey.

5. On or about January 2, 1998, respondent was transferred by the Board from the position of special education teacher to the position of guidance counselor for the Bradley Elementary School ("Bradley"), which is his current assignment.

6. Respondent was the only guidance counselor assigned to Bradley.

7. Respondent has acquired tenure in the District.

8. On or about July 27, 2001, Dr. Antonio N. Lewis, Superintendent of Schools, filed sworn tenure charges of unbecoming conduct and/or other just cause against respondent, together with a sworn statement of evidence in support of the charges, with Cecilia Tucker Brown, Acting Board Secretary.

9. On August 16, 2001, after considering the sworn tenure charges and sworn statement of evidence against respondent, together with the submission filed on his behalf, the Board determined to certify the charges to the Commissioner of Education, pursuant to *N.J.S.A.* 18A:6-10 *et seq.*

10. On or about August 17, 2001, the sworn tenure charges, together with a certificate of determination and certificate of service, were filed by the Board with the Commissioner of Education, and respondent was simultaneously served with the tenure charges, statement of evidence, certificate of determination and certificate of service, pursuant to *N.J.A.C.* 6A:3-5.1 *et seq.*

11. On or about September 5, 2001, an Answer was filed on behalf of respondent, denying each of the sworn tenure charges.

12. The tenure matter was thereafter transmitted by the Commissioner of Education to the Office of Administrative Law as a contested case.

ISSUES

1. Credibility

Because the issues here are factual, a determination of the credibility of the witnesses who testified on behalf of petitioner and on behalf of respondent is vital.

I find that petitioner's witnesses were far more credible than respondent and most of his witnesses. [1]

I do so primarily because I carefully observed and listened to all of the witnesses and made notes of my impressions. For example, one of the key witnesses for petitioner was Joseph Romano, former Principal of Bradley. I noted that he was an "excellent witness: careful – articulate – sincere – fair – responsive – convincing – credible." Another important witness was Pamela Parker, employed as a secretary and parent coordinator at Bradley. I noted that she was "quiet – careful – thoughtful – responsive." A third key witness, Amanda Napolitani, saw what occurred on May 4, 2001 in the main office of Bradley; I found her to be thoroughly credible, noting that she was "sincere – responsive – alert – candid – sensitive – articulate – intelligent." I made similar observations of *all* of petitioner's witnesses.

My impressions of respondent and his witnesses, on the other hand, was quite different. For example, I noted during respondent's testimony that he rambled, was often unresponsive and argumentative, and frequently answered "I don't remember" or "I don't recall." I also noted that his answers sometimes were "almost incoherent" and that sometimes he appeared "confused." Another of respondent's witnesses was Harold Cooper, a schoolbus driver and a long-time friend of respondent, who said that on May 4, 2001, as he was driving his bus past Bradley, he witnessed a confrontation between respondent and a student (K.R.) and overheard a verbal exchange between the two of them. I was not impressed with Mr. Cooper, finding it hard to

[1] There were several witnesses called by respondent whose testimony in important respects supported *petitioner's* contentions and or contradicted respondent's claims. These included Barbara Lawrence, Leroy Hayes, Ann Monteparo, and Denise White. In my judgment, these witnesses *were* believable.

believe that *while driving his school bus* at some undisclosed distance from the scene, he actually overheard a conversation between respondent and the student.

Furthermore, petitioner was able to produce rebuttal testimony quite damaging to respondent's credibility. For example, on direct examination respondent contended that many of petitioner's key witnesses - - such teachers as Laura Duffy, Barbara Liedl, Nancy Nolan and Amanda Napolitani - - were biased against him. He declared that he had been told by another teacher, Esther Kelso, that they had circulated a petition critical of him and seeking his removal. On rebuttal, however, Mrs. Kelso flatly denied that allegation.

In sum, for the reasons just stated, I believe petitioner's version of what occurred on November 10, 1999 and on May 4, 2001 and disbelieve respondent's. Thus, my findings of fact on the critical factual disagreements are much closer to petitioner's version of what transpired than to respondent's.

2. Respondent's November 10, 1999 Presentation on Racism

1. For the 1999-2000 school year, respondent was assigned as the guidance counselor at Bradley.
2. One of respondent's responsibilities for the 1999-2000 school year was to give presentations to classes on subjects such as conflict resolution.
3. During the 1998-99 school year, as well as at the beginning of the 1999-2000 school year, several teachers complained to Mr. Romano, the Principal of Bradley, regarding respondent's presentations to their classes.
4. These teachers advised Mr. Romano that after respondent gave a presentation, they were left wondering what the presentation was supposed to have been about. They also advised Mr. Romano that they would need to spend two or three lessons answering the questions their students had regarding each of respondent's presentations.
5. On the afternoon of November 10, 1999, respondent made a presentation on the subject of racism to the third grade class of Ms. Laura Duffy.
6. Education on racism is an important topic in the Asbury Park community.

7. Ms. Duffy's third grade class was comprised of students between the ages of seven and eight years old.

8. Respondent gave Ms. Duffy little or no advance notice of his intention to make a presentation to her class on November 10, 1999.

9. Ms. Duffy was present for respondent's entire presentation, as was Mr. Romano.

10. Prior to November 10, 1999, Mr. Romano had given respondent some educational materials, including a book, about racism, in order to assist him in his in-class presentations.

11. Respondent's presentation to Ms. Duffy's third grade class was itself racist in tone and content. He said, verbatim or in effect: "If a white man had an affair with a black lady, they would have a black child. If a white man had an affair with a Spanish lady, they would have a black child." He also declared: "So the real reason we have racism is because of the white race. They don't want to be depurified."

12. Respondent then wrote comments to the above effect on the chalkboard.

13. After respondent completed his presentation to Ms. Duffy's class, he left the classroom.

14. The students in Ms. Duffy's class were left "dumbfounded" and/or confused as a result of respondent's presentation.

15. Mr. Romano documented his concerns regarding the November 10, 1999 presentation in a memorandum to respondent dated November 16, 1999.

16. Mr. Romano offered respondent a copy of the memorandum and asked respondent to sign a receipt that he had received a copy.

17. Respondent refused receipt of the memorandum, and refused to acknowledge that he had received it or that it had been offered to him.

3.

Respondent's Alleged Failure to Counsel Students on November 10, 1999

1. Respondent was the only counselor assigned to Bradley for the 1999-2000 school year.

2. His primary job responsibility for the 1999-2000 school year was to counsel students.

3. Mr. Romano was concerned about what he considered respondent's failure to counsel students during the 1998-99 and 1999-2000 school years.

4. Ordinarily, the counseling of students was supposed to take place in respondent's office.

5. Sometime in late 1998 or early 1999 respondent was instructed by Romano to submit a schedule to him on a weekly basis, setting forth the names of the students he would counsel the following week and the times of each counseling session.

6. Prior to preparing this schedule, respondent was told by Romano to meet with the classroom teachers to develop convenient times for the upcoming week's counseling sessions.

7. Prior to the week commencing November 8, 1999, respondent submitted a schedule to Romano, setting forth the names of the students he would counsel on November 8, 9, 10, 11 and 12, as well as the time each of these counseling session would occur.

8. On the morning of November 10, 1999, respondent reported for work as usual.

9. Ordinarily, if respondent did not go to the classrooms of the students and escort them to his office, the students did not go to his office on their own and would not receive counseling.

10. In light of various complaints that had been made to Romano by teaching staff members regarding respondent's failure to counsel their students, Romano decided on November 10, 1999 that he would conduct an observation of respondent's counseling sessions.

11. Mr. Romano did not advise respondent in advance that he would be conducting this observation, not did he advise respondent of the observation as it was taking place.

12. About 10 a.m. on November 10, 1999, Romano stationed himself at a desk immediately outside respondent's office and remained there until 1 p.m.

13. From where Romano was stationed, he could see whether any students entered or left respondent's office.

14. During this three-hour period, Romano had respondent's program schedule with him.

15. According to the schedule (which had been submitted by respondent to Romano) respondent was to counsel ten students in the three-hour period from 10:00 a.m. to 1:00 p.m. on November 10, 1999.

16. From 10:00 a.m. to 10:30 a.m., respondent was to counsel students D.E. and D.G.

17. From 10:30 a.m. to 11:00 a.m., respondent was to counsel students K.R. and B.D.

18. Respondent's schedule indicated that he was to take a half-hour for lunch from 11:00 a.m. to 11:30 a.m.

19. From 11:30 a.m. to 12:00 p.m., respondent was to counsel students P.C. and M.C.

20. From 12:00 p.m. to 12:30 p.m., respondent was to counsel students T.C. and M.D.

21. From 12:30 p.m. to 1:00 p.m., respondent was to counsel students S.L. and J.L.

22. Respondent did not counsel any students between the hours of 10:00 a.m. to 1:00 p.m. on November 10, 1999.

23. None of the students whom respondent was to counsel on November 10, 1999 were absent from school that day.

24. During the period from 10:00 a.m. to 1:00 p.m. on November 10, 1999, Mr. Romano made the following observations:

"10:00 A.M. I arrived for observation of counseling session for D.E. and D.G. (Ms. Vivino's 5th grade).

10:01 A.M. No students arrived. Mr. Hammary left his room.

10:30 A.M. Mr. Hammary still has not returned. Two pupils K.R. and B.D. (Ms. Tacy's Sp. Ed. class) did not arrive.

10:40 A.M. Mr. Hammary returns with no students.

10:41 A.M. Mr. Hammary leaves again.

10:45 A.M. Mr. Hammary returns with no students.

10:46 A.M. Mr. Hammary leaves – still no children have arrived. His scheduled lunch is 11:00 A.M. to 11:30 A.M.

11:30 A.M. Two children have been scheduled P.C. and M.C. (Ms. Lockley's 2nd grade). These children do not arrive.

11:51 A.M. Mr. Hammary returns.

12:00 P.M. Two children have been scheduled, T.C. and M.D. . . . These pupils do not arrive.

12:30 P.M. Two children have been scheduled, S.L. and J.L. (Mr. Hamilton's 1st grade). These pupils do not arrive."

25. During this three-hour period, Romano prepared detailed notes of respondent's activities, which were later put into the form of a typewritten memorandum to respondent.

26. At no point during this three (3) hour period did respondent explain to Romano why he was not performing his counseling duties, nor did respondent advise Romano of any emergency occurring in the school building during those hours which would have required his attention, although he had ample opportunity to do so.

27. As the Principal, Mr. Romano would very probably have been aware of any crisis situation occurring in the school building on November 10, 1999.

28. Mr. Romano was not aware of any crisis having occurred in Ms. Tacy's class on November 10, 1999.

29. Mr. Romano did not assign or direct respondent to tend to any crisis in Ms. Tacy's class on November 10, 1999.

30. Ms. Tacy's classroom, where respondent claims he was during this three (3) hour period, was located on the same floor as respondent's office, approximately 60 to 70 feet away.

31. Mr. Romano subsequently spoke to at least two of the teachers whose students were supposed to have been counseled on November 10, 1999; these teachers told him that respondent had not counseled their students on that date.

32. Respondent does not deny that he failed to counsel any students on the day in question.

4.

Respondent's Alleged Verbal and Physical Abuse of Student K.R.

1. On November 16, 2000, the Board adopted a policy prohibiting corporal punishment and governing the manner in which disruptive students, including elementary school students, were to be disciplined.
2. The Board's policy governing the discipline of disruptive students does not permit staff to use force to discipline disruptive students, except in self-defense or to prevent harm to the student or to others. "Using force" means trying to control the student without hurting him.
3. During the 2000-01 school year, K.R., a male student, attended fifth grade at Bradley Elementary School.
4. During the 2000-01 school year, K.R. was eleven (11) years old.
5. During the 2000-01 school year, the education and discipline of K.R. were governed by K.R.'s Individual Education Program ("IEP"), since K.R. is a classified student.
6. K.R.'s classification is "emotionally disturbed."
7. A student who is classified as emotionally disturbed is unable to meet his educational responsibilities in the same manner as a regular education child.
8. Prior to the 2000-01 school year, respondent served as the guidance counselor of K.R.
9. In his capacity as K.R.'s guidance counselor, respondent should have been familiar with K.R.'s disability and special needs.
10. On and before May 4, 2001, respondent had access to K.R.'s I.E.P.
11. K.R.'s I.E.P. set forth detailed procedures to be followed in disciplining him.
12. The proper methods for disciplining K.R., as set forth in his I.E.P., did not include engaging in any physical force.
13. Emotionally disturbed students should not be disciplined by being yelled at, cursed at, or physically assaulted.

14. Yelling, cursing at, and/or using physical force towards an emotionally disturbed student is improper and is likely to cause the student's misbehavior to escalate.

15. As a certificated guidance counselor and special education teacher, respondent knew, or should have known, that acting in a confrontational manner with K.R. would cause him to become upset and angry, and would serve no useful purpose.

16. On the afternoon of May 4, 2001, respondent was assigned to dismissal duty.

17. On that afternoon, at dismissal time (around 2:15 pm), K.R. left his class in the trailer which was used as a classroom for "emotionally dysfunctional" children.

18. Respondent observed student K.R. in the Bradley Elementary School yard.

19. K.R. was walking towards the alleyway behind the trailer where a commotion, apparently a fight or confrontation, between two students was taking place.

20. Respondent directed K.R. to turn around and to go home.

21. K.R. disregarded the directive of respondent and continued walking towards the alleyway.

22. Respondent then approached K.R. and attempted to black K.R.'s path with his body.

23. K.R. cursed at respondent, calling him a "black motherfucker" ("M.....F....."), and tried to run around him.

24. Respondent tried to restrain K.R., and some pushing and shoving between the two of them ensued. Particularly, respondent forcibly shoved or pushed K.R.

25. During this time, respondent angrily and loudly said to K.R.: "Who are you calling a black M.....F.....?" and other words to the same effect.

26. K.R. was frightened, and ran into the school building, proceeding through the school gymnasium, and into the main office.

27. Respondent pursued K.R., walking at a very rapid pace.

28. K.R. ran into the main office from the gym area. He was visibly upset, shaking, crying and afraid.

29. He saw his teacher, Barbara Lawrence, standing at the counter and in a trembling voice exclaimed "Mrs. Lawrence! Mrs. Lawrence!" When she asked him "what's the matter?" he replied: "I'm having a problem with Mr. Hammary. He choked me." She told him to stay next to her.

30. At that point, respondent burst into the office. He seemed upset and angry. In a loud voice he said: "you're not going to call me a M.....F..... bitch," or words to that effect.

31. Upon seeing and hearing respondent, K.R. left Mrs. Lawrence's side and ran through the swinging gates leading into the inner office behind the counter. He was apparently attempting to get to the office of Enoch Peters, the Principal of Bradley at that time.

32. Respondent pursued K.R. through the gates, loudly uttering profanities. On a "loudness" scale of one to ten (with 10 being the loudest), respondent's voice was at or close to ten.

33. Just after going through the gates, K.R. tripped and fell to the floor. Respondent leaned over him, grabbed him by the collar with both hands and pulled him off the floor.

34. When K.R. was on his feet, respondent pushed him against the fax machine and/or a wall of the inner office.

35. During this entire incident, K.R. was not resisting, kicking at respondent, or talking back to respondent, except to say "leave me alone."

36. Among those present at this time were several teachers, staff, parents, and other students. The office was "crowded" with people.

37. Two of the teachers present, Ester Kelso and Barbara Lawrence, attempted to get respondent to calm down but were at first unsuccessful. Mrs. Kelso tried to intervene by grabbing respondent's arm, but he pushed her hand away.

38. About that time, Vice-Principal Denise White, hearing a loud commotion, came out of a closed-door conference room located in the inner portion of the main office. She saw K.R. on the floor with respondent standing over

him. She remembered that respondent was angry and was speaking loudly. She and Mrs. Kelso asked respondent to calm down and to step back, which he did. Mrs. White also instructed one of the secretaries to page the Principal, Enoch Peters.

39. When Mr. Peters, who was on dismissal duty in front of the building, heard his name being called over the intercom, he hurried inside the building and proceeded toward the main office. As he approached the office, he encountered respondent. Respondent was walking with his head lowered and apparently talking to himself. Respondent looked angry. He kept repeating the phrase: "I'm not gonna be too many more M....F....."

40. Since Mr. Peters did not know what respondent was talking about, he asked respondent to come with him into his office to discuss the situation. When Peters and respondent entered the office they discovered K.R. sitting in the office with tears in his eyes. He obviously had been crying.

41. When respondent saw K.R. he yelled at him: "I told you that I'd tell Mr. Peters that I am not going to be too many more M.....F...ers," or words to that effect.

42. K.R. replied: "You choked me."

43. At that point, Peters asked respondent to leave the office, which he did, and Peters spoke with K.R. about what had happened.

44. Subsequently, Peters reported the incident to Dr. Antonio Lewis, Superintendent of Schools, and to the Institutional Abuse Unit of the Division of Youth and Family Services.

45. An investigator for the Division of Youth and Family Services conducted a thorough examination of the May 4, 2001 incident and concluded that respondent *had* physically abused K.R. on that date.

RESPONDENT'S CONTENTIONS

In essence, respondent contended that Mr. Romano was biased against him and imposed onerous and unreasonable demands on him. At first he said that he did not remember whether he counseled any students on November 10, 1999; later in his testimony, he admitted that he had

not, but he said that the reason was because he had been asked to be on security detail, particularly to breakup fights, in the classroom of one of the teachers (Ms. Tacy).

With respect to the racism lecture, respondent first seemed to deny having given a talk to Ms. Duffy's class on November 10, 1999, but then claimed that at the request of Mr. Romano, he had done so. He admitted making reference to affairs between white women and Hispanic, Asian, and black men but said he did so in response to a comment by a child ("grandma said that racism is because of the white race") and, further, denied saying anything to the effect that racism is the fault of the white race. He said he did not intend to put down anyone's race or to humiliate anyone. He denied writing anything on the chalkboard. And he maintained that the children understood what he was saying and "clapped" at the end of his presentation.

With respect to the incident of May 4, 2001, respondent testified that in addition to his other duties, he was a member of the "A Team," the security detail at Bradley. Around 2:15 p.m. on May 4, he was on duty in the schoolyard outside the main building during dismissal time. He saw a group of about ten children standing around and watching two girls hollering at each other. Respondent tried to disburse them, shouting "let's go! let's go!" He then saw K.R. - - who had a reputation for being a bully, using profanity, fighting, and resisting authority - - chasing a younger child. He told K.R. to go home. K.R. began to walk away but then reversed himself and came towards respondent. He pushed respondent hard with his shoulder and then "bumrushed" him. Respondent denied pushing K.R., knocking him down, or even putting his hands on him. However, K.R. fell down and called respondent a "M.....F....." He got up walked past respondent, called him a "bald M.....F....." and ran into the school. Respondent pursued him, walking rapidly. As he approached the office respondent saw K.R. inside, standing near some teachers. Respondent entered the office and looked around for K.R. He saw him on the floor of the inner office. He walked over to K.R., who began kicking him. At that point respondent shouted: "Now call me a 'M.....F.....'" About that time, Mr. Peters arrived and asked what had happened. Respondent said that K.R. had called him a "black M.....F....."

5. Penalty

The law in tenure proceedings is well-settled. Tenured teaching staff members shall not be "dismissed or reduced in compensation except for inefficiency, incapacity, unbecoming conduct, or other just cause." *N.J.S.A.* 18A:6-10. Further, this section of the statute provides that a tenured teaching staff member cannot be dismissed unless tenure charges are filed against the staff member by the local board of education and a hearing on the charges is conducted by the Commissioner of Education. The local board of education has the burden of proving tenure charges by a preponderance of the credible evidence. *In re Polk License Revocation,* 90 *N.J.* 550, 560 (1982) and *I/M/O Tenure Hearing of Marrero,* 97 *N.J.A.R.*2D (EDU) 104, *aff'd* State Bd. Of Education, 97 *N.J.A.R.* 2d (EDU) 319.

Having found for petitioner on the three substantive charges, the only remaining issue is that of penalty. On this issue also, established case law leaves little, if any doubt, that dismissal is the only appropriate sanction under the circumstances here.

See, e.g., in the Matter of the Tenure Hearing of Campbell 93 *N.J.A.R.*2d (EDU) 196, *adopted* Comm'r, 93 *N.J.A.R.*2d (EDU) 604, *aff'd* App. Div., 95 *N.J.A.R.*2d (EDU) 211, *cert. denied,* 142 *N.J.* 518 (1995), wherein the Appellate Division upheld the determinations of the State Board of Education, Commissioner of Education and Administrative Law Judge that *Campbell* should be removed from his tenured teaching position, in part based on racist comments made by him to seventh and eighth grade students. *I/M/O Tenure Hearing of Campbell,* 93 *N.J.A.R.*2d (EDU) 196, *adopted* Comm'r, 93 *N.J.A.R.*2d (EDU) 604, *aff'd* App. Div., 95 *N.J.A.R.*2d (EDU) 211, 212, *cert. denied*, 142 *N.J.* 518 (1995). In this case, the Administrative Law Judge properly pointed out:

> "Respondent's offensive remarks were made in a public school classroom setting, at a time when positive self-attitudes are to be nurtured in pupils regardless of race, creed, color or sex . . . . [The students] were individually and collectively subjected to stereo typical, race-based remarks by respondent which resulted in feelings of hopelessness, anxiety, frustration and anger by the

> pupils. This is hardly the nature of positive self-attitudes to be nurtured in a public school classroom." [*Ibid.*]

In affirming, *per curiam*, the Appellate Division stated that classroom speech denigrating a particular race "need not be tolerated by a school which, to the extent it fails to restrict such speech, is thereby allied with it." *Id.* at 212.

The Commissioner of Education has consistently held that inappropriate touching of a student by a teacher constitutes unbecoming conduct requiring dismissal. Teachers must not grab, push, choke or shove their pupils for any reason. *I/M/O of the Tenure Hearing of Campbell, supra. See* also *I/M/O the Tenure Hearing of Harrell,* 93 *N.J.A.R.*2d. (EDU) 387, 405, *adopted*, Comm'r. 93 *N.J.A.R.*2d at 405, *aff'd*, App. Div. 95 *N.J.A.R.*2d (EDU) 137 [affirming dismissal of tenured gym teacher who had been physically aggressive (grabbing, striking, and kicking) with his students]. The Administrative Law Judge properly observed: "In a society which is becoming ever more violent, it is essential that teachers be exemplars of problem solving that does not resort to physical aggression."

To the same effect, *see,* among many other cases, *I/M/O the Tenure Hearing of Kendle* , EDU 54-02, Initial Decision, (September 27, 2002), *adopted*, Comm'r. (November 6, 2002); *In re Tenure Hearing of Tiefenbacher, East Orange,* App. Div. *remand* to St. Bd., 83 *S.L.D.* 1648, St. Bd. decision on remand, 84 *S.L.D.* 2043, *aff'd* App. Div. A-594-84T6 (December 30,1985) (teacher pushed fifth grade student against a cabinet or blackboard and against a metal desk); *I/M/O Tenure Hearing of Juanita Zielenski*, 1977 *S.L.D.* 786, 794, (use of profanity by teacher toward student constitutes unbecoming conduct requiring dismissal, even if not coupled with violence towards the student); and *I/M/O Tenure Hearing of Catherine Cooper*, EDU 6550-00, Initial Decision, (February 2,2001), *adopted*, Comm'r. (March 22, 2001) (teacher's conduct demonstrated her insensitivity toward her emotionally disturbed students, thus warranting dismissal).

As the Commissioner properly noted in *I/M/O Tenure Hearing of Anthony Ashley*, EDU 1916-02, Initial Decision, (September 20, 2002), *adopted*, Comm'r. (December 6, 2002), *aff'd*, St. Bd. Educ. (May 13, 2003):

> "While the Commissioner understands the exasperations and frustrations that often accompany the teacher's functions, he *cannot condone resort to force and fear as appropriate procedures in dealing with pupils, even those whose recalcitrance appears to be open defiance . . . . Competent teachers never find it necessary to resort to physical force or violence to maintain discipline or compel obedience.*" [*Ibid.* (emphasis supplied)]

Moreover, petitioner's behavior with respect to K.R. violated the prohibition set forth in *N.J.S.A.* 18A:6-1: "No person employed or engaged in a school or educational institution . . . shall inflict or caused to be inflicted corporal punishment upon a pupil . . . ." The exceptions contained in that statute, such as self-defense and protection of persons and property, are not applicable in this case.

In sum, the conduct of respondent respecting the two incidents on November 10, 1999 and the incident of May 4, 2001 have, in my opinion, demonstrated his unfitness to be a teacher.

CONCLUSION AND ORDER

For the reasons expressed above, I **CONCLUDE** that petitioner has proven its charges against respondent of unbecoming conduct and that its decision to terminate his employment with the Board of Education should be **AFFIRMED.** It is so **ORDERED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 24, 2003
DATE

ROBERT S. MILLER, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

September 24, 2003
DATE

Mailed to Parties:
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

SEP 26 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

/tmp

APPENDIX

WITNESSES

For petitioner:

K.R.

Douglas Cobb

Nancy L. Nolan

Barbara Ellen Liedl

Enoch Peters

Joseph Romano

Laura Duffy

Elizabeth Waters-Amato

Amanda Napolitani

William J. Shana

Esther Kelso

For respondent:

Barbara Lawrence

Leroy Hayes

Denise White

Torren Jordan

Cynthia Denise Brooks-Clauser

Mary Morita Monteparo

Barry R. Baity

Milton Lewis

Doris Kelly

Barbara Lynn Cohen

Ruth E. Johnson

Harold Cooper

Edna Hunter

Donald Hammary

EXHIBITS

For petitioner:

P-1 Memorandum from Enoch Peters to Dr. Lewis re: investigation of allegation of physical abuse, dated 5/8/01

P-2 DYFS Referral Response Report, dated 5/11/01

P-3 Letter from Elizabeth Waters to Donald Hammary, dated 8/2/01

P-4 Letter from Elizabeth Waters to Donald Hammary, dated 8/10/01

P-5 DYFS Finding Report, dated 10/2/01

P-7 Letter from DYFS to Dr. Lewis, dated 10/11/01

P-8 Letter from DYFS to Mr. Hammary, dated 10/11/01

P-9 Letter from DYFS to Ms. Wanda Ricks, dated 10/11/01

P-10 Letter from DYFS to Michael Dowling, dated 10/11/01

P-11 Evaluation of Donald Hammary, dated 6/8/99

P-12 Memorandum from Joseph Romano to Donald Hammary re: failure to counsel students and presentation on racism, dated November 16, 1999

P-13 Evaluation of Donald Hammary, dated 11/23/99

P-14 Memorandum from Joseph Romano to Donald Hammary re: job duties, dated 2/11/00

P-15 Board Policy #3217 re: use of corporal punishment

P-16 Board Policy #5560 re: disruptive pupils

P-17 Board Policy #2260 re: affirmative action dated November 16, 2000

P-18 Board Policy #5750 re: equal educational opportunity

P-19 Board Policy #2260 re: affirmative action dated July 21, 1994

P-20 Memo dated 1/12/98 from Joseph V. Romano to Donald Hammary

For respondent:

R-1 Diagram of Main Office of Bradley School (drawn by Nancy Nolan)

R-2 Statement of Nancy Nolan dated 7/11/01

R-3 Statement of Nancy Nolan dated 5/16/01

R-4 Diagram of Main Office (drawn by Barbara Liedl)

R-5 Statement of Barbara Liedl dated 5/15/01

R-6 Statement of Barbara Liedl dated 6/22/01

R-7 Performance Appraisal for D. Hammary, 12/1/98 – 2/28/99

R-8 Memo dated 10/1/97 with attached Job Description

R-9 Performance Appraisal for Donald Hammary dated 12/15/00

R-10 Program Schedule

R-11 Appraisal of Donald Hammary dated 6/1/2000

R-12 Letter dated 7/9/99 from Supt. Of Schools Robert Mann to Donald Hammary

R-13 Letter dated 2/21/03 from Prendergest to D. Hammary

R-14 Work Schedule – Bradley School Counselor

R-15 Diagram of Main Office of Bradley School with adjacent Hallway, Entrance Doors, and Foyer drawn by Amanda Napolitani

R-16 Partial Personnel File of Donald Hammary

R-17 Summary Evaluation of Teaching Performance of Donald Hammary, School Year 1999-2000

R-18 In Class Lesson 10/5/99

R-19 Handwritten Note January 1-30 from Joseph V. Romano

R-20 Handwritten Note January 10-14 from Joseph V. Romano

R-21 Handwritten Note January 10-98 from Joseph V. Romano

R-22 Handwritten Note 5/4/98 from Joseph V. Romano

R-23 Handwritten Note 4/28/98 from Joseph V. Romano

R-24 Handwritten Note 4/23/98 from Joseph V. Romano

R-25 Handwritten Note 3/10/98 from Joseph V. Romano

R-26 Handwritten note dated 10/25 "from the desk of Mr. Smith"

R-27 Internet message entitled "AOL Anywhere"

R-28 Calendar – November 1999

R-29 Letter dated 7/31/01 from Dr. Rosenblatt to Joan York, Ph.D.

R-30 Letter (undated) from Joan York Ph.D. to Antonio Lewis

R-31 Memo dated 9/18/98 from Romano to Brooks, Jordan, Hammary, etc.

Joint:

J-1 Guidance Counselor Job Description adopted by Board of Education

J-2 Guidance Job Description

OAL DKT. NO. EDU 803-02
AGENCY DKT. NO. 327-8/01

IN THE MATTER OF THE TENURE	:	
HEARING OF DONALD HAMMARY,	:	
SCHOOL DISTRICT OF THE	:	COMMISSIONER OF EDUCATION
CITY OF ASBURY PARK, MONMOUTH	:	DECISION ON REMAND
COUNTY.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Respondent's exceptions and the Board's reply thereto are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4.

Respondent's exceptions primarily challenge the Administrative Law Judge's (ALJ) credibility determinations and factual findings, along with the ALJ's recommendation that respondent be terminated from his tenured position. As the Board notes in its reply, however, respondent has neither provided the Commissioner with copies of relevant portions of the hearing transcripts nor "made any effort to cite any portion of those transcripts which support his conclusory assertions that Judge Miller's credibility determinations were flawed." (Board's Reply at 2) Furthermore, the Board contends that the ALJ, who observed the witnesses firsthand, is in the best position to make credibility determinations. (*Id.* at 3)

Upon careful and independent review of the record in this matter, which included transcripts from only two of the 20 days of hearing in this matter,[1] and based upon the credibility assessments of the ALJ, *N.J.S.A.* 52:14B-10(c), the Deputy Commissioner, to whom this matter was delegated pursuant to *N.J.S.A.* 18A:4-33, concurs that petitioner has proven its charges of unbecoming conduct against respondent. As the Board correctly observes, the ALJ's credibility determination is

[1]The transcripts were from hearings held on June 25, 2002 and July 9, 2002 and included the testimony of only four of the 25 witnesses in this matter.

entitled to the Deputy Commissioner's deference. "The reason for this rule is that the administrative law judge, as a finder of fact, has the greatest opportunity to observe the demeanor of the involved witnesses, and, consequently, is better qualified to judge their credibility. *In the Matter of the Tenure Hearing of Tyler*, 236 *N.J. Super.* 478, 485 (App. Div.) *certif. denied*, 121 *N.J.* 615 [1990]." *In the Matter of the Tenure Hearing of Frank Roberts*, 96 *N.J.A.R.*2d (EDU) 549, 550. The Appellate Division affirmed this principle, underscoring that "[u]nder existing law, the [reviewing agency] must recognize and give due weight to the ALJ's unique position and ability to make demeanor based judgments." *Whasun Lee v. Board of Education of the Township of Holmdel*, Docket No. A-5978-98T2 (App. Div. 2000), slip op. at 14.[2] Like the ALJ, the Deputy Commissioner is satisfied, therefore, that the charges and proofs established herein reflect conduct which cannot be tolerated in a school setting, warranting respondent's loss of his tenured position.

Accordingly, the Initial Decision is adopted for the reasons expressed therein. Respondent is dismissed from his position as a tenured teacher as of the date of this decision. A copy of this decision will be transmitted to the State Board of Examiners for action as it deems appropriate, pursuant to *N.J.A.C.* 6:11-3.6.

IT IS SO ORDERED.[3]

DEPUTY COMMISSIONER OF EDUCATION

Date of Decision: 11/10/03

Date of Mailing: 11/10/03

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[2] The Court also noted *then* pending legislation providing that "the agency head may not reject or modify any findings of fact on the issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent and credible evidence in the record." (*Ibid. citing* A. 1484, 209th Leg., §10(b), later enacted as *P.L.* 2001, *c.* 5 and now codified at *N.J.S.A.* 52:14B-10(c))

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

625-03

WINSLOW TOWNSHIP EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WINSLOW, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

November 10, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SEVERING THE WINSLOW TOWNSHIP EDUCATION ASSOCIATION MATTER AND ACCEPTING STIPULATION OF DISMISSAL
OAL DKT. NO. EDU 114-02
AGENCY DKT. NO. 491-11/01

WINSLOW TOWNSHIP EDUCATION ASSOCATION,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WINSLOW, CAMDEN COUNTY,

Respondent.

Keith Waldman, Esq., for petitioners (Selikoff and Cohen, attorneys)

Vito A. Gagliardi, Esq. for respondents (Porzio, Bromberg & Newman, attorneys)

Record Closed: September 11, 2003 Decided: Septemberr 18, 2003

BEFORE **JOSEPH F. MARTONE,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners Lindenwold Education Association, Pine Hill Education Association and Winslow Township Education Association (the Education Associations), filed petitions in which they are challenging the alleged refusal of respondents Boards of Educations to honor and recognize the rights of petitioners' affected members as established by contract or past practice and enjoyed by them in their former school district. Petitioners allege that these actions and failures to act violate the Education laws and, in particular, *N.J.S.A.* 18A:13-64, and the administrative regulations promulgated thereunder. Petitioners are seeking a determination restoring to the affected members all of the terms and conditions of employment formerly enjoyed by them as employees of the former regional school district, and requesting the restoration of all back pay, benefits and emoluments of employment which they have lost to date as a result of respondents' actions and failures to act. These matters were transmitted to the Office of Administrative Law (OAL) on January 9, 2002, for hearing as contested cases. On April 30, 2002, these three matters were consolidated.

On March 1, 2002, petitioners filed unfair practice charges with the Public Employment Relations Commission (PERC) against the same three respondents. The unfair practice charges are captioned *Winslow Township Association and Winslow Township Board of Education*, PERC Dkt. No. C0-2002-235, *Lindenwold Ed. Association and Lindenwold Board of Ed.*, PERC Dkt. No. C0-2002-236; and *Pine Hill Ed. Association and Pine Hill Board of Education*, PERC Dkt. No. C0-2002-237.

By Order of Consolidation and Predominant Interest entered on October 21, 2002, I recommended that the three PERC matters be consolidated with the consolidated OAL matters, and by an Order entered by the Chair of the Public Employment Relations Commission on November 25, 2002, and by the Commissioner of Education on December 5, 2002, this recommendation was accepted.

Following numerous discussions between the parties and a number of telephone conferences with the ALJ, this matter originally captioned *Winslow Township Education*

Association vs. Board of Education of the Township of Winslow, OAL Dkt. No. EDU 114-02, Agency Dkt No. 491-11/01 and the unfair practice charge captioned *Winslow Township Association and Winslow Township Board of Education*, PERC Dkt. No. C0-2002-235, have been settled and resolved by and between the parties as the product of contract negotiations, and they have submitted a Joint Stipulation of Dismissal. In order to effectuate the dismissal it is necessary to sever these two matters from the remaining ongoing matters.

Therefore, it is **ORDERED** that the contested case originally captioned *Winslow Township Education Association vs. Board of Education of the Township of Winslow,* OAL Dkt. No. EDU 114-02, Agency Dkt No. 491-11/01 and the unfair practice charge captioned *Winslow Township Association and Winslow Township Board of Education*, PERC Dkt. No. C0-2002-235 are hereby **SEVERED** from the remaining ongoing cases in this matter. It is further **ORDERED** that the Joint Stipulation of Dismissal filed herein by the parties is hereby accepted, and this matter is hereby **DISMISSED**.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION.**

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** who by law is authorized to make the final decision on all issues within the scope of its predominant interest. If the **COMMSSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision on all of the issues within the scope of predominant interest shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Pursuant to *N.J.A.C.* 1:1-17.8, upon rendering its final decision the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** shall forward the record, including this recommended decision and its final decision, to the **CHAIRMAN OF THE PUBLIC EMPLOYMENT RELATIONS COMMISSIO**N which may subsequently render a final

decision on any remaining issues and consider any specific remedies which may be within its statutory grant of authority.

Upon transmitting the record, the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** shall, pursuant to *N.J.A.C.* 1:1-17.8(c) request an extension to permit the rendering of a final decision by the **CHAIRMAN OF THE PUBLIC EMPLOYMENT RELATIONS COMMISSION** within forty-five (45) days of the predominant agency decision. If the **CHAIRMAN OF THE PUBLIC EMPLOYMENT RELATIONS COMMISSION** does not render a final decision within the extended time, this recommended decision on the remaining issues and remedies shall become the final decision.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 18, 2003
DATE

JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

9-24-03
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 25 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

mph

SELIKOFF & COHEN, P.A.
307 Fellowship Road, Suite 314
Mt. Laurel, NJ 08054-1233
(856) 778-6055
Counsel for Petitioner,
Winslow Township Education Association

WINSLOW TOWNSHIP EDUCATION ASSOCIATION,

Petitioner,

v.

BOARD OF EDUCATION OF WINSLOW TOWNSHIP, CAMDEN COUNTY,

Respondent.

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

OAL DKT. NO. 114-02
AGENCY REF. NO. 491-11/01

JOINT STIPULATION OF DISMISSAL

It is hereby stipulated and agreed by and between the parties hereto, thorough their respective counsel, the matters in controversy having been amicably adjusted as the product of contract negotiations, the above cause may be dismissed with prejudice, each party to bear its own costs. The parties also consent (a) that this Joint Stipulation may be signed in counterparts, (b) that facsimiles of signatures will have the same force and effect as original signatures, and (c) that facsimiles of signatures may be submitted to the Office of Administrative Law.

SELIKOFF & COHEN, P.A.
Attorneys for Petitioner
Winslow Township
Education Association

BY: _____
KEITH WALDMAN

Dated: 2-29-3

PORZIO, BROMBERG & NEWMAN, P.C.
Attorneys for Respondent
Board of Education of
Winslow Township

BY: _____
VITO A. GAGLIARDI JR.

Dated: 9-10-03

OAL DKT. NO. EDU 114-02
AGENCY DKT. NO. 491-11/01 AND PERC DKT. NO. CO-2002-235

WINSLOW TOWNSHIP EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WINSLOW, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Joint Stipulation of Dismissal, and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1 and *N.J.A.C.* 1:1-17.8(b), have been reviewed. Upon review, the Commissioner of Education accepts the parties' Joint Stipulation of Dismissal on those issues within the scope of his jurisdiction and the matter is hereby dismissed as to its education law claims. Pursuant to *N.J.A.C.* 1:1-17.8(b) and (c), therefore, the Initial Decision and the full record herein shall be transmitted to the Public Employment Relations Commission, which may subsequently render a final decision on any remaining issues within its statutory grant of authority.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 11|10|03

Date of Mailing: 11|12|03

625-03

IN THE MATTER OF PAUL SCHAEDER, :

GOLDEN DOOR CHARTER SCHOOL, : COMMISSIONER OF EDUCATION

JERSEY CITY, HUDSON COUNTY. : DECISION

SYNOPSIS

The School Ethics Commission determined that respondent Board member violated *N.J.S.A.* 18A:12-24.1(c) and (d) by acting as a "one-member board" in terminating the Chief Academic Officer. The Commission further found that respondent violated *N.J.S.A.* 18A:12-24(b) in hiring a former Board member as technology coordinator without Board approval. The Commission recommended removal of respondent.

Upon review of the record, the Deputy Commissioner, to whom the matter was delegated pursuant to *N.J.S.A.* 18A:4-33 and whose decision was restricted by law solely to a review of the Commission's recommended penalty, concurred with the Commission's recommendation. Respondent was ordered removed as of the filing date of this decision.

November 10, 2003

IN THE MATTER	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
OF	:	
	:	**Docket #C03/C04/C06/C07/C12-03**
PAUL SCHAEDER,	:	
GOLDEN DOOR CHARTER SCHOOL	:	**DECISION**
HUDSON COUNTY	:	

PROCEDURAL HISTORY

This matter arises from five complaints filed against Mr. Paul Schaeder, Chairman of the Board of Trustees of the Golden Door Charter School, for violations of the School Ethics Act, N.J.S.A. 18A:12-21 et seq. Specifically, they alleged that he, without the consultation of the Board, forced the Chief Academic Officer to resign and that he appointed his former fellow trustee as a consultant within a month after he resigned from the Board. The complaints also raised various allegations that he misused his position in connection with the number of trustees on the Board, that he had police called to a public meeting on January 16, 2003 and that he discriminates against African-American parents and trustees.

Mr. Schaeder answered the complaints admitting that the Chief Academic Officer had been released from her duties and that a former trustee had been hired as a consultant, but denied having committed any violation of the School Ethics Act in connection with those matters. He denied the remainder of the allegations.

The five complaints were consolidated for hearing. The School Ethics Commission advised the parties that it would discuss this matter at its meeting of May 1, 2003. The parties were advised of their right to bring counsel and witnesses. All parties appeared with counsel and witnesses. The complainants were represented by Joseph Pojanowski, Esq. The respondent was represented by Richard West, Esq. The Commission heard testimony from most of the parties and witnesses. At its public meeting on May 27, 2003, the Commission voted to find probable cause to credit the allegations that Mr. Schaeder violated N.J.S.A. 18A:12-24.1(c) and (d) of the Code of Ethics for School Board Members in connection with the dismissal of the Chief Academic Officer and N.J.S.A. 18A:12-24(b) of the School Ethics Act in connection with the hiring of the Information Technology Consultant. The Commission dismissed the remainder of the charges, so they are not addressed herein.

Mr. Schaeder was given 30 days from the date of the decision to respond to the probable cause decision. He was advised that if he disagreed with the Commission's determination that the material facts were not in dispute, he could set forth each fact that he believed was in dispute and why the fact was material to resolution of this matter. The Commission received a timely response, which it considered at its meeting of August 26, 2003. After consideration of the issues raised in the response, the Commission voted at its public meeting to find Mr. Schaeder in

violation of N.J.S.A. 18A:12-24.1(c) and (d) of the Code of Ethics for School Board Members and N.J.S.A. 18A:12-24(b) of the prohibited acts in the School Ethics Act and recommend his removal from the Board of Trustees. The Commission adopted this decision at its meeting of September 23, 2003.

FACTS

The Golden Door Charter School is located in Jersey City, New Jersey. Approximately 500 students attend the school. When it was chartered, the charter provided that the school was to have between five and eleven trustees. At all times relevant to the allegations in the complaints, the school was operating with a three-member Board of Trustees. Apparently the by-laws were changed to allow for a three-member Board, but the changes were never approved by the Commissioner of Education. At the present time, the Board consists of seven members.

I. The Termination of the Chief Academic Officer

Karen Jones was hired in January 1999 as the director of the Golden Door Charter School. Her title at all times relevant to this complaint was Chief Academic Officer. Annette Johnson has been a member of the Board since 1999 and has a child in the school. Paul Schaeder is the Chairman of the Board of Trustees. Amal Manassah is also a member of the Board, having replaced Trustee Barry Fields in October 2002.

In March 2002, due to concerns with Ms. Jones' performance, an agreement was made to give Ms. Jones a 2½ month sabbatical. Ms. Johnson was aware of that agreement. Mr. Schaeder testified that Ms. Jones did not improve after she returned. He testified that he and Mr. Fields drew up an improvement plan and discussed it with her in the summer of 2002 and then in September 2002, Ms. Jones signed off on it.

On December 19, 2002, a regular meeting of the Board of Trustees was canceled. However, the three trustees did have a meeting for the purpose of discussing Karen Jones. The testimony of Trustee Annette Johnson was undisputed regarding this matter. Ms. Johnson testified that on December 19, 2002, she came to the school for what she thought was a meeting with Ms. Jones to evaluate her performance. However, two members from Foundations, Inc., Mr. Funston and Mr. Kurtz, were present. Foundations, Inc. is the consulting company utilized by the school. Mr. Schaeder and Ms. Manassah were also present with an attorney. Ms. Johnson was given a copy of a four-page severance agreement regarding the termination of Ms. Jones. Prior to that date, Mr. Schaeder had never indicated to her that he spoke with anyone to facilitate Ms. Jones' removal. Although Ms. Johnson admitted that the Board had discussed problems with Ms. Jones' performance, she was completely surprised by the action. Even more surprised was Ms. Jones because she thought she was only going to be evaluated at the meeting. She requested time to think it over. According to Mr. Funston, Ms. Jones was told that she could sign and rescind the agreement within six or seven days. She signed the agreement later the next day.

A bill from the School attorney sets forth that the attorney drafted the severance agreement and e-mailed it to the client on November 25, 2002. In December, prior to the December 19th meeting, Mr. Schaeder informed Ms. Manassah of the pending forced resignation. Mr. Schaeder testified that only two of the three board members were notified of the decision to terminate the employment of Ms. Jones because he did not trust Ms. Johnson to keep the matter confidential. Mr. Schaeder testified that Ms. Jones was told that she had 21 days to review the agreement and respond. The following day, Ms. Jones voluntarily executed the Agreement which, among other things, provided her with a 7-day period in which to revoke her signature. Ms. Jones' submitted a letter of resignation to the Board on December 20, 2002.

At a meeting of the Board of Trustees on January 16, 2002, all three members of the Board, including Annette Johnson, voted in favor of accepting the agreement after an executive session to discuss it.

Each of the complainants and their witnesses testified that the students and parents were very emotional about Ms. Jones' removal when they found out on December 20, 2002.

Mr. Schaeder appointed an administrator in the school, Brian Stiles, to replace Ms. Jones on December 20, 2002.

II. The Hiring of a Former Board Member as Information Technology Consultant

Barry Fields became a member of the Board with Ms. Johnson in 1999. In 2000, Mr. Fields began performing information technology services for the school without charging for his services. At the October 17, 2002 meeting of the Board of Trustees, the Board appointed a new board member. The minutes indicate that, after a search from a list of ten potential candidates for board membership, Chairman Schaeder invited Amal Manassah to join the Board. The Board interviewed her in executive session, then reentered public session and voted 3-0 to invite her to join the Board. The meeting minutes go on to set forth:

> Following Ms. Manassah joining the Board, Mr. Fields resigned and presented a proposal for Information and Technology Consultant. It was agreed the work Mr. Fields was performing for the school warranted him compensation. In compliance with the law, Mr. Fields chose to resign from the Board in order to receive compensation for his services.

Ms. Johnson testified that the proposal was tabled at that time. However, in the minutes, there is no motion or vote before adjournment of the meeting. There is no mention of the proposal at the November 21, 2002 meeting. The December 19, 2002 meeting is noted as cancelled despite the meeting of the three trustees on this date. Ms. Johnson recalled that on December 20, 2002, the Board talked with Mr. Fields regarding the proposal. However, by that time, it appears that he had already entered into an agreement with Mr. Schaeder and was paid $50.00 per hour for November and December.

A representative from Foundations, Inc. certified that this is well below the market rate for such services. Foundations, Inc. certified that it would charge $750.00 per day to provide such consultant services.

The Board of Trustees never approved the hiring or appointment of Barry Fields prior to his beginning employment with the District.

ANALYSIS

The Commission determined that there was probable cause to credit the allegations that Mr. Schaeder violated N.J.S.A. 18A:12-24.1(c) and (d) in connection with the termination of Ms. Karen Jones and that he violated N.J.S.A. 18A:12-24(b) in connection with the hiring of a former board member to serve as a consultant to the District. Mr. Schaeder raised several issues in response to the finding of probable cause and argued that the complaint should be dismissed. These will be addressed in turn.

I. The Termination of the Chief Academic Officer

In response to the Commission's finding of probable cause that he violated N.J.S.A. 18A:12-24.1(c) and (d) in connection with the termination of the Chief Academic Officer, Mr. Schaeder first argues that, as a member of a charter school board of trustees, he is not subject to the Code of Ethics for School Board Members, N.J.S.A. 18A:12-24.1. He cites N.J.S.A. 18A:36A-3 of the Charter School Program Act for the proposition that a charter school, although a public school, "is operated independently of a local board of education and is managed by a board of trustees." He argues that the Code of Ethics does not state that it applies to members of a charter school board of trustees; rather, it applies to "board members" as that term is defined in N.J.S.A. 18A:12-23. Although he acknowledges that the State Board promulgated regulation N.J.A.C. 6A:11-3.1, effective October 2, 2000, which provides that the members of a board of trustees of a charter school shall be "school officials" as defined in the School Ethics Act, he argues that the Code of Ethics was enacted after that in July 2001 and no regulation was promulgated that made members of a charter school board of trustees subject to the Code of Ethics for School Board Members.

The Commission finds that Mr. Schaeder's interpretation of the Code of Ethics obliterates the intent and purpose of the Code of Ethics and ignores a crucial provision of the Charter School Program Act, which provides:

> A charter school shall operate in accordance with its charter and the provisions of law and regulation which govern other public schools; except that, upon the request of the board of trustees of a charter school, the commissioner may exempt the school from State regulations concerning public schools, except those pertaining to assessment, testing, civil rights and student health and safety, the board of trustees satisfactorily demonstrates to the commissioner that the exemption will advance the educational goals and objectives of the school. [N.J.S.A. 18A:36A-11a]

Thus, from the initiation of charter schools in 1996, the Legislature envisioned that charter schools would be subject to all of the laws that govern other public schools. Their structure and management may be different, but the laws that govern them are the same. Charter schools may only be exempt from regulations and that is by request to the Commissioner of Education. They cannot be exempt from laws. Therefore, it is clear that the State Board, in promulgating N.J.A.C. 6A:11-3.1, was not making new law, but effectuating the above provision of the Charter School Program Act. In view of N.J.S.A. 18A:36A-11, there is no need for the State Board to revisit its regulation each time that the Legislature amends the School Ethics Act in order to clarify that the amendment applies to charter school trustees. It applies, in its entirety, to members of charter school boards of trustees.

For the foregoing reasons, the Commission concludes that Paul Schaeder, as a member of a charter school board of trustees, is subject to the Code of Ethics for School Board Members and declines to dismiss the charges that he violated N.J.S.A. 18A:12-24.1(c) and (d).

Mr. Schaeder next argues in response to the finding of probable cause that he did not violate the Code of Ethics because the majority of the Board supported the decision to terminate Ms. Jones and the entire board and Ms. Jones had been aware for many months prior to this action of the issues that prompted this decision.

The Commission found probable cause that Mr. Schaeder acted without board approval in executing the termination of Ms. Jones in violation of N.J.S.A. 18A:12-24.1(c) and (d) of the Code of Ethics.

N.J.S.A. 18A:12-24.1(c) provides:

> I will confine my board action to policy making, planning and appraisal, and I will help to frame policies and plans only after the board has consulted those who will be affected by them.

Mr. Schaeder argues that the Board was aware of issues concerning Ms. Jones' performance and voted to approve the severance agreement. He set forth that Ms. Jones voluntarily executed the Severance Agreement and General Release the day after it was presented to her although she was told that she had 21 days to consider it. Thereafter, she was provided with seven days to revoke her signature, but she did not revoke it. Rather, she provided a resignation letter to the Board. During its meeting of January 16, 2002, the Board, including Annette Johnson, voted in favor of accepting the agreement. Mr. Schaeder argues that Ms. Jones' letter to the Board of December 20, 2002 indicates that she had reason to know that her termination was forthcoming.

The Commission does not dispute that Mr. Schaeder had discussed with the other trustees that there were concerns about Ms. Jones' performance prior to her termination. However, the Commission notes that Ms. Manassah became a trustee in October 2002, just before this action took place. The Commission does not dispute Mr. Schaeder's argument that Ms. Johnson was

aware that there were issues concerning Ms. Jones' performance. However, knowing that there are concerns with an administrator's performance and firing that administrator are two different matters. Mr. Schaeder admitted that he did not include Ms. Johnson in the decision-making process on the Jones matter because he did not feel that he could trust her to keep it confidential. Under the Code of Ethics, one board member does not have the right to determine that another board member will be denied access to the same information as the other board members. Further, the evidence showed that, at a board meeting on January 16, 2003, Mr. Schaeder admitted that he initiated the paperwork regarding Ms. Jones' departure prior to the knowledge of any fellow board members. This was also confirmed by the bill from the board attorney dated February 21, 2003, listing the preparation of the severance agreement on November 25, 2002, well before any trustee was advised that termination was imminent. Trustee Manassah had just joined the Board in October 2002. Trustee Johnson testified that she only became aware of Ms. Jones' termination when she saw the severance agreement in December 2002. This testimony was unrefuted. Again, knowing that performance issues exist with an administrator is not the same as knowing that the administrator is going to be terminated. Ms. Johnson reasonably expected that an evaluation or review of a corrective action plan would precede presenting Ms. Jones with a severance agreement. Yet, Mr. Schaeder initiated the preparation of a severance agreement and only Mr. Schaeder and Ms. Manassah knew about its existence. Ms. Johnson was informed at the meeting with Ms. Jones that led to her termination.

The Commission finds that the termination of Ms. Jones was initiated and completed by Mr. Schaeder and he sought approval of the full board after the fact. Mr. Schaeder has not set forth any argument to change what the Commission found in its probable cause determination. The fact that Ms. Jones resigned after being terminated and all trustees eventually ratified the severance agreement is irrelevant to the suspect circumstances surrounding the termination. The circumstances defy all notions of fairness and respect owed to the Chief Academic Officer of a school. The Commission finds that Mr. Schaeder's conduct on such an important issue was in violation of N.J.S.A. 18A:12-24.1(c).

The Commission also found probable cause that Mr. Schaeder's conduct violated N.J.S.A. 18A:12-24.1(d) of the Code of Ethics. N.J.S.A. 18A:12-24.1(d) provides:

> I will carry out my responsibility, not to administer the schools, but, together with my fellow Board members, to see that they are well run.

As set forth above, Mr. Schaeder did not act in concert with his fellow Board members. He unilaterally decided that Ms. Jones should be terminated, as shown by the bill from the attorney, and admittedly kept a Board member uninformed who he believed would disagree with his decision and possibly inform Ms. Jones or her supporters. The Commission finds that, by so doing, Mr. Schaeder administered the schools instead of acting with his fellow Board members to see that the schools are well run in violation of N.J.S.A. 18A:12-24.1(d).

The Commission did not find probable cause that Mr. Schaeder's conduct violated N.J.S.A. 18A:12-22(a) and (b) because section 22 sets forth the Legislature's findings and declarations. Section 22(a) sets forth:

The Legislature finds and declares:

a. In our representative form of government it is essential that the conduct of members of local boards of education and local school administrators hold the respect and confidence of the people. These board members and administrators must avoid conduct which is in violation of their public trust or which creates a justifiable impression among the public that such trust is being violated.

Section 22 indicates the Legislature's purpose for the Act. While the Commission has said in prior decisions that Section 22 does not set forth a prohibited act that the Commission can charge a school official with violating, In the Matter of Wesley Smith, C28-97 (April 28, 1998), the Commission has cited to section 22 to support a charge. In the present case, the Commission believes that in finding Mr. Schaeder in violation of N.J.S.A. 18A:12-24.1(c) and (d), it is ensuring that the conduct of school officials does not violate the public trust as set forth in N.J.S.A. 18A:12-22(a).

II. Mr. Schaeder hired former Board member Barry Fields to be the School's Information Technology Consultant.

The Commission found probable cause that Mr. Schaeder used his position to secure unwarranted privileges, advantages or employment for Mr. Fields under N.J.S.A. 18A:12-24(b). The Commission found that the Board was never presented with a contract for Mr. Fields, but he was paid thousands of dollars. The Commission was not provided evidence that a contract was ever approved by the Board.

The minutes from the October 17, 2002 meeting at which Mr. Schaeder, Mr. Fields and Ms. Johnson were present as board members indicate that Chairman Schaeder invited Amal Manassah to join the Board. She was approved by a vote of 3-0. Mr. Fields then resigned and presented a proposal for him to become the Information and Technology Consultant. The minutes make it clear that Mr. Fields resigned from the Board for the purpose of being able to receive compensation for his services. He began receiving compensation for those services without any motion or vote by the Board. Mr. Schaeder admitted that Mr. Fields resigned from the Board to take on the job, but says he did so because the volunteer work was becoming a full-time job.

Mr. Schaeder's responds to the Commission's finding that he cannot be held personally responsible for the hiring of Barry Fields when he was just one member of a unanimous Board. Additionally, he argues that the employment was not unwarranted because, prior to his resignation from the Board, Mr. Fields had volunteered his expertise to aid the computer/technology programs of Golden Door. He said the consultant agreement with Mr. Fields cost much less than other consultants such as Foundations, Inc., which would charge $750.00 per day to provide similar services. He adds that the outside accountant for the Charter School recommended that this action be taken and he relied on the accountant's position.

The issue before the Commission is whether Mr. Schaeder used his position to secure unwarranted privileges, advantages or employment for Mr. Fields in violation of N.J.S.A. 18A:12-24(b). The Commission does not discount Mr. Schaeder's response, but his response seems to imply that at some point there was an actual vote on the matter at a public meeting. There was none. It also assumes that there was a contract entered into before Mr. Fields started to get paid. There was not. The Commission believes that the manner in which the hiring took place was the unwarranted privilege and advantage that Mr. Fields received as a former member of the Board, not the hiring itself, which was apparently recommended. The Commission holds Mr. Schaeder responsible for the manner in which Mr. Fields was hired because he was the Board President when the action took place. Ms. Manassah had just become a trustee minutes before the decision was made to make Mr. Fields a consultant. Thus, it is disingenuous to suggest that Ms. Manassah made an informed decision as to whether he should be hired. The full board did not make the decision. It is clear from the minutes that Mr. Fields and Mr. Schaeder made that decision. Further, the outside accountant may have recommended hiring Mr. Fields, but it did not recommend a stealth hiring and payment being made without a contract. The manner in which the hiring took place did not provide the public with any notice that there was a need to hire an Information Technology Consultant. Further, it did not give the public the opportunity to determine why Mr. Fields was preferred to any other provider of the service. The Commission reiterates from its probable cause determination that the information submitted by Foundations -- that other providers charge much more, should have been part of the public discussion of the issue, not presented in a closed hearing before the Commission. Therefore, the Commission finds that Mr. Schaeder used his position to secure an unwarranted privilege and advantage for Mr. Fields in violation of N.J.S.A. 18A:12-24(b).

DECISION

For the foregoing reasons, the Commission finds that Mr. Schaeder violated N.J.S.A. 18A:12-24.1(c) and (d) in connection with the termination of Ms. Jones and violated N.J.S.A. 18A:12-24(b) in connection with the hiring of former trustee Barry Fields.

The Commission considered Mr. Schaeder's response to the finding of probable cause that argued that the matters for which he is being disciplined were decisions of the full board, but the evidence showed the opposite. Regarding Ms. Jones, the Board's approval was sought only after Ms. Jones had been presented with the severance agreement. Regarding Mr. Fields, the Board's approval was never sought. Mr. Schaeder has acted as a one-member board and in so doing has violated the Code of Ethics and the standards of conduct expected of board members in general. The Commission finds his conduct to be so egregious that only the penalty of removal would be appropriate. Therefore, the Commission recommends that Paul Schaeder be removed from the Golden Door Charter School Board of Trustees.

Paul C. Garbarini

Paul C. Garbarini
Chairperson

Resolution Adopting Decision – C03/C04/C06/C07/C12-03

Whereas, the School Ethics Commission has considered the pleadings filed by the parties, the documents submitted in support thereof and the testimony presented; and

Whereas, at its meeting of August 26, 2003, the Commission found that Paul Schaeder violated N.J.S.A. 18A:12-24.1(c) and (d) and N.J.S.A. 18A:12-24(b) of the Act and recommended that the Commissioner of Education impose a sanction of removal; and

Whereas, the Commission requested that its staff prepare a decision consistent with the aforementioned conclusion; and

Whereas, at its meeting of September 23, 2003, the Commission reviewed the draft decision and agrees with the decision;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter and directs its staff to notify all parties to this action of the Commission's decision herein.

Paul C. Garbarini

Paul C. Garbarini, Chairperson

I hereby certify that this Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on September 23, 2003.

Lisa James-Beavers

Lisa James-Beavers
Executive Director

AGENCY DKT. NO. 348-9/03

IN THE MATTER OF PAUL SCHAEDER, :

GOLDEN DOOR CHARTER SCHOOL, : COMMISSIONER OF EDUCATION

JERSEY CITY, HUDSON COUNTY. : DECISION

The record of this matter, and the recommendation of the School Ethics Commission (Commission) that respondent be removed as a member of the Board of Trustees of the Golden Door Charter School, have been reviewed. Respondent filed timely comments on the Commission's decision, which have been duly considered herein.

This matter comes before the Commissioner pursuant to *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6A:3-9.1 to impose a sanction upon respondent, who serves as Chairman of the Board of Trustees. The Commission's recommended sanction is based on its finding that respondent violated *N.J.S.A.* 18A:12-24.1(c) and (d) by unilaterally effectuating the termination of the Charter School's Chief Academic Officer and then seeking Board approval after the fact, and on its further finding that he violated *N.J.S.A.* 18A:12-24(b) by hiring, without Board motion or vote, a Board trustee who resigned from the Board expressly for the purpose of receiving compensation for his formerly voluntary technological services.

In his comments, respondent initially contends that the Commission exceeded its statutory authority by making factual findings without transmitting the matter to the Office of Administrative Law (OAL) for the full evidentiary hearing to

which respondent is entitled under the School Ethics Act and the Administrative Procedure Act; he further contends that, even assuming that the Commission *did* have the authority to hear the matter itself after determining that no material facts were in dispute, it clearly erred in doing so herein. (Respondent's Comments at 1-4)[1] Respondent next contends that the Commission erred in its factfinding, ignoring testimony and certifications and making flawed credibility determinations, and overlooked the unusual and difficult circumstances with which respondent had to deal. (*Id.* at 4-6)

With respect specifically to the Commission's recommendation of removal, respondent argues that even if the Commission's findings were accepted, they still do not support the ultimate penalty of removal from the charter school Board of Trustees. All the Commission essentially found, respondent contends, was that respondent acted like a "one-member board" in taking actions he strongly believed to be in the school's best interest; the Commission did not find that he in any way benefited personally from his decisions, nor did it find that his objectives were improper or illegal in themselves. Respondent notes that his actions were supported by the majority of the Board of Trustees, which unanimously reelected him as Chairman in 1998, 2001 and most recently on August 28, 2003, and that, at the time of his actions, the school was undergoing a period of difficulty and transition requiring strong, decisive leadership. Respondent thus avers that removal from the Board of Trustees would be unfair to him—who at most did not understand the parameters of his authority and who has had no previous instances of Ethics Act violations—and contrary to the best interests of a charter

[1] Respondent submits, under cover of separate letter to the Commissioner, an example of the type of evidence he would bring to a full OAL hearing. However, in that applicable rules make no provision for the Commissioner to consider information outside the record, that submission is not considered herein.

school to which he has brought substantial improvement and stability, as well as to the will of its Board of Trustees and school community. (*Id.* at 4-9)

At the outset, the Deputy Commissioner, to whom the determination of this matter has been delegated pursuant to *N.J.S.A.* 18A:4-33, emphasizes that, in accordance with *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6A:3-9.1, only the School Ethics Commission may determine whether a violation of the School Ethics Act has occurred, and that the Commission's decision in that regard, including any underlying factfinding, discretionary procedural determinations and conclusions of law, is not reviewable herein. Rather, the Commissioner's jurisdiction is limited to review of any sanction the Commission may recommend based upon its decision that a school official has violated the Act.

Given the limitations of his review in this matter, and upon consideration of the record and respondent's arguments on exception, the Deputy Commissioner determines to accept the Commission's recommendation that respondent be removed as a member of the Golden Door Board of Trustees. In so ruling, the Deputy Commissioner is satisfied that the Commission, in recommending a penalty for the violations it found, considered both the nature of respondent's offense and his arguments as to why no penalty should be imposed, and he finds nothing in respondent's exceptions that would warrant disturbance of the Commission's judgment in concluding that respondent should be removed as a Trustee. Additionally, respondent's contention that the Commission lacked authority to hear this matter itself rather than refer it to the OAL is, in essence, a challenge to the facial validity of the Commission's procedural regulations (*N.J.A.C.* 6A:28-1.12), a challenge which is within the sole purview of the Appellate Division or

the Supreme Court. R. 2:2-3(a); s*ee, also, Pascucci v. Vagott,* 71 *N.J.* 40, 51-52 (1976); *Wendling v. N.J. Racing Com'n*, 279 *N.J. Super.* 477, 485 (App. Div. 1995). Furthermore, the Commission's finding, also protested by respondent, that no material facts were in dispute is a discretionary Commission determination authorized by *N.J.A.C.* 6A:28-1.12 and, as such, is not reviewable herein, but, rather, on appeal to the State Board of Education. Finally, although it is true that the Commission did not find respondent's actions illegal in themselves, the fact remains that it *could* not have made such a finding, since its authority is expressly limited to determination of School Ethics Act violations.[2]

Accordingly, IT IS hereby ORDERED that Paul Schaeder be removed from the Board of Trustees of the Golden Door Charter School, effective on the filing date of this decision, as a school official found to have violated the School Ethics Act.[3]

DEPUTY COMMISSIONER OF EDUCATION

Date of Decision: 11/10/03

Date of Mailing: 11/10/03

[2] For example, the Commission would lack authority to determine whether the hiring of a former Trustee was in violation of *N.J.S.A.* 18A:12-1.1, as raised during preliminary proceedings in this matter.

[3] This decision, as the Commissioner's final determination regarding penalty in this matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq., N.J.S.A.* 18A:12-29(d) and *N.J.A.C.* 6A:4-1.1 *et seq.* Commissioner decisions are deemed filed three days after the date of mailing to the parties.

625-03

SEARCH DAY PROGRAM, INC.,

PETITIONER,

V.

NEW JERSEY STATE DEPARTMENT OF EDUCATION,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning nonprofit private school for the handicapped challenged the Department's disallowing of certain costs totaling $122,077.52, that had been included in tuition calculations for its students.

The ALJ found that the Department's decision to disallow lump sum payments to the staff was correct, since these are prohibited by rule. In addition, the ALJ found that the Department's decision to disallow the salary paid to an uncertified speech instructor was correct, since it would be contrary to public policy to permit an uncertified teacher to instruct children in the State's schools. The ALJ ordered the Department's decisions affirmed.

The Commissioner concurred with the ALJ's Initial Decision. The petition was dismissed.

November 12, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 2446-00

AGENCY DKT. NO. 24-1/00

SEARCH DAY PROGRAM, INC.,

Petitioner,

v.

NEW JERSEY STATE DEPARTEMENT

OF EDUCATION, OFFICE OF COMPLIANCE

Respondent.

Michael J. Gross, Esq., and **Joann L. Lynch**, Esq., for petitioner (Kenney, Gross, Kovats, Campbell & Pruchnik, attorneys)

Allison Colsey Eck, Esq., for respondent (Peter C. Harvey, Attorney General of New Jersey)

Record Closed: August 22, 2003 Decided: September 30, 2003

BEFORE **ROBERT S. MILLER,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This is a hearing on the appeal of Search Day Program, Inc. ("petitioner" or "Search Day") from a decision of the Office of Compliance of the New Jersey State Department of Education ("respondent" or "the Department") disallowing certain costs totaling $122,077.52 that had been included in its calculations of tuition charges for its students.

On April 4, 2000, the instant matter was filed in the Office of Administrative Law for determination as a contested case pursuant to the New Jersey Administrative Procedure Act. An in-person prehearing and settlement conference was held on June 5, 2001. A stipulation of facts was filed on January 14, 2002. The case was scheduled for hearing on April 23, 2002, but I converted the hearing date into a case management conference and requested that counsel obtain and provide a substantial amount of additional information and data, details of which are set forth in a letter dated September 10, 2002 from Joann L. Lynch, Esq. to me. The hearing was held on October 22, 2002 and a videotaped deposition of the Department's expert witness (Roger Bell) was conducted on May 19, 2003. The record closed upon my receipt of the deposition transcript on August 22, 2003.

The essential facts in this case and not in dispute, having been stipulated by counsel prior to the hearing, and having been further established by the testimony of two witnesses (Lillian Hobson for petitioner and Roger Bell for respondent), as well as by the admission into evidence of financial records, contracts, certifications, and other documents.

Accordingly, I make the following

FINDINGS OF FACT

A. Background

1. Search Day, located in the Township of Ocean, County of Monmouth, was established in 1971 as a not-for-profit school that provides services for early elementary, middle elementary, and transitional children suffering from autism.
2. In addition to providing school for children with autism, Search Day provides an adult activity center and a group home for adult males with autism.
3. Search Day's school year runs from July 1 to June 30 of the following year.
4. During the six month from October 1997 until March 1998, Search Day experienced unusual turnover of administrative staff. In particular: (a) in October 1997 Nancy Radich resigned as business manager. She was replaced that same

month by Nellie Brumbaugh, C.P.A.; (b) in December 1997 Nellie Brumbaugh resigned as business manager; (c) in January 1998, Kenneth Appenzeller, Executive Director, tendered his resignation to become effective June 30, 1998; and (d) on or about March 1998, Lillian Hobson was hired as business manager.

5. During the period from December 1997 to March 6, 1998, routine financial transactions were handled by Search Day's bookkeeper, Jean Veltri.

6. On or about May 18, 1998, Katherine Solana was appointed to replace Kenneth Appenzeller as Executive Director.

B. The Lump Sum Payment

1. During the 1997-1998 school year and the school years preceding that year, Search Day had no salary schedule or guidelines in effect for its employees.

2. In June 1998, all full time employees of Search Day having an annual salary base received a lump sum payment equal to 9.28% of their annual salary. Part-time employees and others not having an annual salary base received a payment of $1.18 per hour multiplied by the number of hours worked during the fiscal year 1997-1998, also representing an increase in wages of about 9.28%. The total amount of money required for that payment was $113,536.96 (including payroll taxes).

3. The rationale for this lump sum payment was that Search Day's employees were underpaid compared to the other schools, public and private, in the county providing similar educational services, and that its employees had not received the increase in salary that had been "promised" to them in the Fall of 1997.

4. On or about December 7, 1998, the Department began an audit of Search Day's books and records. Among the "non-allowable" costs submitted by Search Day were (1) a $104,021.03 payment made to Search Day's employees in June 1998, and (2) the sum of $8,538.58 in salary and benefits paid to employee Lauren Nemeroff during the period from January 1998 through April 1998.

5. Except for newly hired employees, none of Search Day's staff had a written employment contract for the 1997-1998 school year. This situation was consistent

with the established practice at Search Day at that time, to wit, when a new employee was hired he/she received an employment contract which was not formally renewed in subsequent years, even though the employee continued to work for Search Day.

6. Search Day had no salary step guides, merit payment system or "contingent pay" system in place during the 1997-1998 school year.

7. A salary step guide for Search Day's employees was not established, approved and promulgated until February 1999.

8. In accordance with its usual practice, Search Day's employees had received an approximately 4% salary increase for the 1997-1998 school year.

9. The base salaries of Search Day's employees did not change immediately after the lump sum payment totaling $113,538.96 made to those employees in June 1998; rather, the base salaries of those employees remained the same until at least September 1998.

10. In or about September 1998 Search Day granted its employees a 4.5% (approximately) salary increase.

11. If Search Day had not made the $113,538.96 lump sum payment in June 1998, it would have had a surplus of $82,601.39 at the end of that month, which surplus it would have had to refund to those school districts which had sent its handicapped children to Search Day during the 1997-1998 school year.

12. Prior to the grant of the June 1998 lump sum payment, Search Day's Board of Directors neither passed a resolution nor took any other official action approving that payment.

C. Lauren Nemeroff

1. On or about January 8, 1998 Search Day hired one Lauren Nemeroff as a member of its teaching staff.

2. Ms. Nemeroff's title at the time of hire was "Speech Instructor." This is not a title or position recognized by the New Jersey State Department of Education.

3. Although Ms. Nemeroff held the requisite number of credits to qualify as a "Speech and Language Specialist," she had not received state certification for that position at the time she was hired.
4. Ms. Nemeroff's salary was $403.85 per week.
5. During the period from January to April 1998 Ms. Nemeroff was on probationary status.
6. Upon completion of her probationary status, on May 8, 1998 Search Day forwarded her credentials to the Office of the County Superintendent for permanent certification.
7. Shortly after May 8, 1998 certification was granted by the County Superintendent.
8. According to Lillian Hobson: "Had Nemeroff chosen to return for the 1998-1999 school year, she would have been promoted to the position of 'Speech and Language Specialist.'"[1] However, Nemeroff chose not to return for the 1998-1999 school year and was not employed by Search Day at the time of the Department audit.

ISSUES AND ANALYSIS

There are two basic issues in this case:

1. Did the Department correctly determine that the one-time payment in the amount of $113,538.96 made to Search Day's employees in June 1998 was a non-allowable cost, constituting "a payment or benefit in lieu of salary (bonus)," disallowable under former *N.J.A.C.* 6:20-4.4(a)35?

2. Was the salary of Lauren Nemeroff for the four-month period (January 1998-April 1998) properly disallowed because she did not posses the required certification at the time she was hired?

[1] "Speech and Language Specialist" is a title recognized by the Department of Education.

For the reasons to be expressed hereafter, I am of the opinion that both of these questions should be answered in the affirmative.

1. The Lump Sum Payment

Although the facts in the case of *Y.A.L.E. School, Inc. v. State of New Jersey, Department of Education,* App. Div., Dkt. # A-2607-92T2 (decided July 8, 1994) are not identical to those of the instant case, the legal principles enunciated in that case are applicable here. In *Y.A.L.E.*, the Appellate Division upheld the disallowance of the payments to teachers and administrators during the school year 1987-1988, which were made in the form of a "merit pay salary adjustment." The court declared:

> ". . . the payments are properly characterized as a bonus because they were 'in addition to the usual or expected.' They were not part of the salary guide, were determined after the end of the school year, and were subject to the total discretion of the administration. Contrary to petitioner's argument, these payments were less in the nature of a legal expectancy and more in the nature of a mere gratuity, to be bestowed upon such objects of the donor's bounty as the donor or his trustees may select." (citations omitted)

In his initial decision (OAL Dkt. No. EDU 3912-90) (decided July 31, 1992), Judge Reback declared:

> "In my judgment regardless of the application given to the payments made by Y.A.L.E. to its staff members in 1986-87 and 1987-88, those payments indeed constituted a bonus. The monies which were paid were not obligatory; that is, notwithstanding that a Y.A.L.E. official may have announced an intention to pay monies in the future, it was entirely discretionary. It need not have been given and even if it were, its distribution was dependent upon the exercise of the discretion of the school. Clearly, in addition, no employee had an entitlement to the receipt of the merit pay or was

> in possession of a legal contractual right to those monies should it have been withheld.

Judge Reback further stated: ". . . notwithstanding what might be described as the good faith intentions of Y.A.L.E. to reward its employees, Y.A.L.E.'s motivation cannot validate what is otherwise a patently invalid payment scheme . . . ."

I agree with the analysis of Deputy Attorney General Eck. In her Brief, she pointed out:

> "Petitioner's one-time payment to its employees in June of 1998 was a payment in lieu of salary, since it was made at the end of the school year, there was no contractual requirement to provide its employees with such a payment, there was no set amount promised to the employees, the employees' base salaries did not change after the payment, and in fact never incorporated a 9.28% increase in the succeeding year, and the payment was made at a time when the school had a surplus which it would otherwise be required to refund to the sending school districts."

Petitioner argues that the lump sum payment in June 1998 should be viewed as a retroactive salary adjustment, pursuant to the typical labor union negotiations for a new contract, *i.e.*, comparable to "any salary increase that is not paid immediately but delayed due to extended negotiations beyond the beginning of the work year. The employee receives a lump sum check which represents the entire increase retroactively to the beginning of the work year."

In my opinion, this argument is specious. Unlike negotiations in the typical labor-management arena, the Legislature has established a highly regulated system for the provision of services and facilities by private schools to handicapped children and for the amount of tuition that can be charged to sending districts. *See, N.J.S.A.* 18A:46-1 to *N.J.S.A.* 18A:46-46, in particular, *N.J.S.A.* 18A:46-21, which states: ". . . in no case shall the tuition rate exceed the actual cost per pupil as determined under rules prescribed by the Commissioner and approved by the State Board of Education." The Department has promulgated a detailed and complex set of regulations pursuant thereto. *See, N.J.A.C.* 6A:23-4.1 to *N.J.A.C.* 6A:23-4.15. Both under the

current regulations and the predecessor regulations (*N.J.A.C.* 6:20-4.1 to –4.11), if at the end of the school year there exists a "surplus," *i.e.*, an excess of income over costs and expenses, that surplus must be refunded to the sending school districts. It cannot be used for other purposes, such as granting a retroactive salary increase to school staff or administrators.

Search Day's counsel also argue that the *Y.A.L.E.* decision is inapposite because the court stressed the fact that "merit" increases in varying amounts were given to some employees but not to others and that this could be considered arbitrary, whereas in the instant case, the increase was given across the board to all employees. However, as earlier noted, the *Y.A.L.E.* court had other compelling reasons for its decision, all of which *are* applicable to the instant case.

2. Lauren Nemeroff

As I have earlier found, when hired, Ms. Nemeroff was given the title of "Speech Instructor." Ostensibly, she performed duties corresponding to that of a Speech and Language Specialist. Indeed, she was listed on at least one student's Individual Educational Plan as a Speech and Language Instructor.

However, "Speech Instructor" is a title not recognized by the Department. To act as a Speech and Language teacher, she needed a standard teaching certificate with the appropriate endorsement for speech. *N.J.A.C.* 6:11-5.2 and –6.2. During the first four months of her employment she did not possess that certificate.

Certification requirements establish a threshold for teaching staff members employed in the public (and private) school systems of New Jersey. As noted by the State Board of Education, the certification process is critical to assuring the provision of a thorough and efficient education. *Guttenberg Ed. Ass'n. v. Leo F. Klagholz, Comm'r of Educ.*, SB 11-98, State Bd. Decision (March 3, 1999). <http://www.state.nj.us/njded//legal/sboe/1999/ma/sb11-98.pdf.>

In my opinion it would be contrary to public policy to permit an uncertified teacher to instruct children in the State's schools.

Petitioner contends that despite her title, Ms. Nemeroff really performed the duties of an aide, in particular, as an assistant to Lillian Sarason, a properly certificated teacher in the school, and that she was always under the direct supervision of Ms. Sarason. This argument is not convincing. Neither Ms. Nemeroff nor Ms. Sarason testified at the hearing or even submitted a statement to this effect. The only evidence to support Search Day's position came from Lillian Hobson, who admitted that she rarely had occasion to personally observe the relationship, if any, between Nemeroff and Sarason, together with the undisputed fact that Nemeroff worked with the children in a small (approximately 8' x 15') room immediately adjacent to where Ms. Sarason usually taught. All other evidence pertaining to Ms. Nemeroff's actual duties is hearsay. In my opinion this is not enough to satisfy the residuum rule, *i.e.,* the requirement that some legally competent evidence must exist to support each ultimate finding of fact. *N.J.A.C.*1:1-15.8.

CONCLUSION AND ORDER

For the reasons stated above I **CONCLUDE** that the decision of the Department to disallow the lump sum payment made to Search Day's staff in June 1998 and the salary paid to Lauren Nemeroff during the months of January to April 1998 was correct and should be **AFFIRMED.** It is so **ORDERED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 30, 2003
DATE

ROBERT S. MILLER, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

September 30, 2003
DATE

Mailed to Parties:

OCT 6 2003
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/tmp

APPENDIX

WITNESSES

For petitioner:

Lillian Hobson

For respondent:

Roger Bell

EXHIBITS

For petitioner:

P-1 Id. Certification of Lillian Hobson, dated 1/10/02

P-2 Id. Certification of Lillian Hobson, dated 10/10/02

P-3 Chart Showing Salary Increase for Hypothetical Teacher

P-4 Id. Photograph showing right side viewing from the doorway looking in of Speech Department room

P-5 Id. Photograph showing left side viewing from the doorway looking in of Speech Department room

For respondent:

R-1 Id Contract dated 7/20/95 for Margie Odom

R-2 Id. Contract dated 7/17/95 for Jean Veltri

R-3 Id. Contract dated 7.17.95 for Theresa Dolan

R-4 Id. Contract dated 7/21/95 fro Jill Bader

R-5 Id. Minutes of meeting of Board of Trustees of 5/18/98

R-6 Id. Payroll Register

R-7 Id. Finance Committee Report dated 2/8/99

R-8 Id. Search Day Program – Base Pay – June-Sept. 1998

R-9 Id. Consolidated Statement of Tuition Rate Computation Year Ending 6/30/98

Joint:

J-1 Stipulation of Facts (#1 - #34)

OAL DKT. NO. EDU 2446-00
AGENCY DKT. NO. 24-1/00

SEARCH DAY PROGRAM, INC.,

PETITIONER,

V.

NEW JERSEY STATE DEPARTMENT OF EDUCATION,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon review, the Commissioner concurs with the Administrative Law Judge that the Department of Education was correct in disallowing, in petitioner's calculation of tuition for its public school students, the cost of lump sum payments to staff and the salary of an uncertified teacher.

Accordingly, the Initial Decision of the OAL recommending dismissal of the Petition of Appeal is adopted for the reasons expressed therein.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 11|12|03

Date of Mailing: 11|13|03

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

628-03

628-03

M.E., on behalf of minor child, A.V.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning aunt challenged the Board's residency determination that her nephew, A.V., was not entitled to a free public education in the District.

The ALJ concluded that undisputed evidence showed that A.V. was not domiciled in the District. Twice, petitioner failed to appear at hearing. Thus, the ALJ granted the District's request to dismiss the appeal for petitioner's failure to appear and granted the District's request for reimbursement of past tuition in the amount of $7,092.40.

The Commissioner adopted the Initial Decision and directed petitioner to remit to the Board the tuition due.

November 17, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 09386-02
AGENCY DKT. NO. 297-9/02

M.E. ON BEHALF OF MINOR CHILD, A.V.,
Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,
Respondent.

M.E., *pro* se

Anthony V. D'Elia, Esq. representing Respondent
(Chasan, Leyner, Bariso & Lamparello, attorneys)

Record Closed: September 23, 2003 **Decided**: October 3, 2003

BEFORE **SANDRA ANN ROBINSON**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner appealed the determination by respondent Board of Education of the City of Clifton (District) that her minor nephew A.V. was not entitled to a free public education in the District. Petitioner claimed that the minor child was entitled to a free public education pursuant to *N.J.S.A.* 18A:38-1(a) because the child was domiciled

within the District. Respondent answered that the minor child did not meet the requirements of domicile in the District and filed a counterclaim for payment of tuition.

On September 20, 2002, petitioner submitted an appeal of the District's residency determination. The Department of Education transmitted the matter to the Office of Administrative Law (OAL) on November 1, 2002. The OAL scheduled a prehearing conference for January 3, 2003. As the petitioner did not make herself available, the prehearing conference could not be held. The hearing was scheduled for March 12, 2003 and again the petitioner failed to appear. The hearing was scheduled again for July 31, 2003 and petitioner did not appear. Phone calls were made to Petitioner's home by the OAL secretary and Petitioner's daughter said Petitioner was on her way. Counsel for the District waited 1-1/2 hours for Petitioner's arrival. She did not appear. The OAL opened the record to entertain the District's motion to dismiss Petitioner's appeal and to accept evidence on the District's counterclaim for back tuition. The record was held open until September 23, 2003, for the submission of an affidavit concerning the per diem tuition rate. To date the petitioner has not phoned or mailed an explanation or any other writing regarding her failure to appear.

FACTS

The following facts are undisputed and I **FIND** them to be **FACTS** in the case.

On or about September 12, 2002, Petitioner received notice from the Superintendent of Schools that the application for school admission submitted for Petitioner's nephew had no sworn statement from the parent/guardian stating an inability to support or care for the student.

The District through its business administrator reviewed the business records and determined that A.V. was enrolled in the Clifton public school on September 19, 2002 and continued to the present. The cost of educating A.V. in the District amounted to $7,092.40 per year for the 2002-03 school year with the per diem rate of $41.72.

Thus, the amount of tuition owed by petitioner for the period of ineligible attendance in 2002-03 amounted to $7,092.40 (170 school days x $41.72). (Exhibit R-1)

LEGAL DISCUSSION

Public education must be provided free to persons over five and under twenty years of age who are domiciled within the school district. *N.J.S.A*: 18A:38-1(a). The converse is also true that a person is not entitled to a free public education if they are not domiciled within the District. I **FIND** that the undisputed evidence showed that petitioner's minor child was living with his Aunt in Clifton. Hence, I **CONCLUDE** that A.V. was not domiciled in Clifton and was not entitled to receive a free public education from that District. I further **CONCLUDE** that at the per diem rate of $41.72, petitioner owes the District tuition for one hundred and seventy school days in the 2002-03 year amounting to $7,092.40.

ORDER

Based on the foregoing it **ORDERED** that the District's request to dismiss petitioner's appeal for failure to appear is **GRANTED.** It is further **ORDERED** that the District's request for reimbursement of past tuition in the amount of $7,092.40 is hereby **GRANTED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this

recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 3, 20032
DATE

Sandra Ann Robinson
SANDRA ANN ROBINSON, ALJ

Receipt Acknowledged:

October 7 2003
DATE

M. Kathleen Drurean (Ca)
DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OCT 14 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

cml

APPENDIX

LIST OF WITNESSES

For Petitioner:

None

For Respondent:

Anthony V. D'Elia, Esq.

LIST OF EXHIBITS

For Petitioner:

None

For Respondent:

R-1 Affidavit of Karen Perkins, Business Administrator and Board Secretary BOE, City of Clifton, NJ

OAL DKT. NO. EDU 09386-02
AGENCY DKT. NO. 297-9/02

M.E., on behalf of minor child, A.V.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon careful and independent review of the record in this matter, and accepting the factual findings of the Administrative Law Judge, the Commissioner concludes that petitioner, the minor child's aunt, twice failed to appear for the hearings scheduled in this matter, and, therefore, has not demonstrated that A.V. is entitled to a free public education in respondent's District pursuant to *N.J.S.A.* 18A:38-1(b)1.

Accordingly, the Petition of Appeal is dismissed. Pursuant to *N.J.S.A.* 18A:38-1b(1), the Commissioner directs that petitioner remit to the Board tuition for the 2002-03 school year in the amount of $7,092.40.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 11|17|03
Date of Mailing: 11|17|03

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

629-03

S.J.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MOUNTAIN LAKES, MORRIS COUNTY, AND JOHN KAZMARK, SUPERINTENDENT,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioning parent challenged the Honors Physics grading policy for the 2001-02 school year, claiming the flawed policy would result in the wrong persons being selected as Valedictorian and Salutatorian. In June 2003, the Commissioner denied emergent relief in this matter and the matter was transmitted to the Office of Administrative Law for hearing.

The Board moved to dismiss this matter on three grounds: 1) petitioner did not have standing; 2) petitioner's claims were moot; and 3) the petition was untimely filed. The ALJ concluded that the petition must be dismissed for said reasons.

The Commissioner adopted the findings and determination in the Initial Decision as his own.

November 17, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 7081-03

AGENCY DKT. NO. 159-5/03

S.J.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF MOUNTAIN LAKES, MORRIS COUNTY AND JOHN KAZMARK, SUPERINTENDENT,

Respondent.

S.J., appearing *pro se*

Vito Gagliardi, Jr., Esq., appearing for respondent
(Porzio, Bromberg & Newman, attorneys)

Record Closed: September 15, 2003 Decided: October 7, 2003

BEFORE **MARGARET M. HAYDEN**, ALJ:

STATE OF THE CASE AND PROCEDURAL HISTORY

Petitioner challenged the Honors Physics grading policy for the 2001-02 school year.

By emergency petition filed May 20, 2003, petitioner requested emergent relief on the grounds that the allegedly flawed grading policy might result in the wrong persons being selected as Valedictorian and Salutatorian. The Commissioner denied the application for emergent relief on June 16, 2003. In his opinion Commissioner Librera specifically declined to entertain either petitioner's request for summary decision or the Board's motion to dismiss.

The Department of Education transmitted the matter to the Office of Administrative Law (OAL) for a hearing as a contested case on July 16, 2003. When the matter was transmitted the transmittal noted that the threshold issues were the timeliness of the petition and whether petitioner has standing to bring this action. On August 26, 2003, the OAL held a prehearing conference at which the schedule for the pending motion to dismiss was set. Petitioner filed her opposition to the pending motion on September 3, 2003. The district filed its reply on September 15, 2003.

FACTS

For purposes of this motion, the following **FACTS** are undisputed.

Petitioner is the mother of C.J., who graduated Mountain Lakes High School in June 2003 and is now attending Johns Hopkins University. During the 2001-02 school year, C.J., a junior at the time, received a "C" as his final grade in Honors Physics. C.J. felt he deserved a higher grade and met with his teacher about it but to no avail.

In September 2002, petitioner met with the Honors Physics teacher, Mr. Polashenski, and Mr. Ludwig, Principal of the high school, about the calculation of her son's grade. Petitioner also spoke to the Superintendent about her concerns. Petitioner also requested the Board to consider the grading practice used to determine the 2001-02 grades for Honors Physics. In late October 2002 the Board denied her request.

C.J. was not in contention to be named either Valedictorian or Salutatorian of the high school 2003 graduating class. The high school does not provide the ranking of its students, although it does provide the grade point average. Any change in the grade distribution of the 2001-02 Honors Physics class could not affect the ranking of any member of the class of 2003.

LEGAL ANALYSIS AND CONCLUSION

The Board moved to dismiss this action on three grounds. The first basis was that petitioner does not have standing to bring this claim. The Board also contended that petitioner's claims are moot. Lastly, the Board argued that the petitioner's claim was not filed within 90 days of the Board's refusal to provide a hearing and thus was untimely. The petitioner argued that the motion was timely because unless the discriminatory process and faulty procedures are addressed the students will continue to suffer from these improper procedures. The petitioner claimed an interest in the subject matter because if the Valedictorian or Salutatorian filed suit for damages, petitioner as a taxpayer would be harmed. Further, such an unfair grading situation might in the future happen to her minor child currently in the high school. Petitioner argued she should also be allowed to bring this action because the school cannot provide adequate representation to protect the students' interest.

The Standing Issue

In order to bring a claim a litigant must have sufficient interest in the subject matter of the litigation; this concept is known as standing. See *U.K. and G.K. o/b/o D.K. v. Clifton Bd. of Educ.*, 93 *N.J.A.R.* 2d (EDU) 71 (1992). Generally, in order to have standing a petitioner must demonstrate a sufficient stake in the outcome of the proceedings and his/her position must be truly adverse to that of respondents. *K.S.R. and E.D.R. o/b/o E.D.R., Jr. v. Montague Bd. of Educ.*, OAL Dkt. No. EDU 5300-03, 201 *AGEN LEXIS* 583, (Oct. 3, 2001) citing *Home Builders League of So. Jersey, Inc. v. Berlin Tp.*, 81 *N.J.* 127, 123 (1979). It is necessary to demonstrate standing by showing some measurable amount of detrimental impact on the complaining party's personal

rights. *Salorio v. Glaser*, 82 *N.J.* 482, 491 (1998). The courts refused to entertain proceedings by parties who are mere intermeddlers, interlopers, or strangers to a dispute. *Cresent Park Tenants Ass'n v. Realty Equities Corp.,* 58 *N.J.* 98, 107 (1971).

Additionally in order to bring a complaint to hear a controversy or dispute arising under the school laws, a person must be an interested party. *N.J.A.C.* 6A:3-1.2 defines interested persons as those who will be substantially, specifically and directly effected by the outcome of the controversy before the Commissioner. The dismissal of cases brought by litigants who will not be effected by the outcome in a direct and meaningful way is required by this regulation. *E.D.R. v. Montague* at 15.

The district argued that the petitioner has not shown that she is directly effected by the outcome in a direct and meaningful way. Petitioner has admitted that she is not contesting this grade on account of her son as he is not going to become Valedictorian or Salutatorian. Her claim that the Valedictorian or Salutatorian may sue the district therefore costing her as a taxpayer extra money was previously rejected by the Commissioner as too speculative. She now claims that her other son is in the high school and if he takes Physics and if he has the same teacher and if the teacher continues to mark in the same way as he did in 2001-02 school year her son will be subjected to the same unfairness. Plainly, I **FIND** that the requisite demonstration of direct and meaningful involvement is not shown by these contingencies: if the family continues to live in the district, if the child continue going to the school, if the child takes the Physics, if the teacher is still there, if the teacher uses the same computer program and the same text books. These mere speculative effects are not the measurable amount of detrimental impact required to demonstrate a sufficient interest in the subject matter to provide standing. Hence on the undisputed facts I **CONCLUDE** that the petitioner does not have standing under *N.J.A.C.* 6A:3-1.2 as she is not an interested person who will be substantially, specifically and directly effected by the outcome of this controversy.

The Issue of Mootness

The Board also contends that petitioner's claim should not be considered as the matter is moot. An action is considered moot where it no longer presents a justiciable controversy because the issues have become academic. When a determination is sought on the matter which when rendered cannot have practical effect on the existing controversy, the matter is moot. *S.G. v. Fairlawn Bd. of Educ.*, 2000 *N.J. AGEN LEXIS* 552. The purpose of the doctrine of mootness is to refrain from unnecessary decision where an issue is hypothetical, judgment cannot grant effective relief or the parties do not have concrete adversity of interest. *Fox v. Tp. of East Brunswick Bd. of Educ.,* OAL Dkt. No. EDU 10067-98, 1999 *N.J. AGEN LEXIS* 140 (March 19, 1999).

In a landmark case the Supreme Court considered a case where students were disciplined for violation of a regulation. By the time the matter reached the Appellate Division the students challenging the regulation had graduated from the high school. Under the circumstances the Supreme Court declined to review the educational authority's actions. *Oxfeld v. N.J. Bd. of Educ., 68 N.J.* 301, 304 (1995). Similarly, in a recent case where a student was disciplined under a zero tolerance policy, the State Board of Education was asked to consider uniform guidelines for the discipline of students and the constitutionality of zero tolerance policies. The State Board refused to consider the policy issues as any dispute regarding H.R.'s ability to attend school in the district had been resolved, meaning that the questions being raised by petitioner were academic at that point. *L.H. and L.H. o/b/o H.R. v. Bd. of Educ. of Rahway*, OAL Dkt. No. EDU 5449-01, State Board of Education decision April 2, 2003. In the instant case, the Valedictorian and Salutatorian have graduated and petitioner's son has also graduated. Hence, I **CONCLUDE** that the issues raised concerning the 2002-2003 Honors Physics grades have become academic, rendering them moot.

The Timeliness Issue

Claims brought before the Commissioner must be brought in a timely manner in order to provide "a measure of repose, an essential element in the proper and efficient

administration of the school laws." *Kaprow v. Bd. of Educ. of Berkeley*, 131 *N.J.* 572, 582 (1993). Specifically, *N.J.A.C.* 6A:3-1.3(d) provides the petitioner "shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing." The 90-day rule can only be relaxed if strict adherence to the rule would be inappropriate, unnecessary, injustice or if there exist substantial constitutional issue or other issue of fundamental public interest beyond the parties themselves. *DeMaio v. New Providence Bd. of Educ.*, 96 *N.J.A.R.* 2d (EDU) 449, 453.

Here petitioner does not deny the fact stated by the Board that her request for a hearing in front of the Board was rejected in late October 2002. Although petitioner did not cease her inquiry and went to other agencies and continued her investigation, she knew in late October that the Board had refused to hold a hearing on the matter. Accordingly, the petition filed in May 2003 was about four months later than the 90-day time limitation required. Moreover petitioner has not demonstrated the necessary elements required to relax the rule. Therefore, I **CONCLUDE** that the petition must be dismissed because petitioner did not adhere to the 90-day deadline required in *N.J.A.C.* 6A:3-1.3(d).

In sum, I **CONCLUDE** that the petition must be dismissed because the matter is moot, the petitioner has no standing, and the petition was filed untimely.

ORDER

For the foregoing reasons it is hereby **ORDERED** that the petitioner's request for an examination of the grades of the 2001-02 Honors Physics is **DISMISSED WITH PREJUDICE.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Oct 7, 2003
DATE

MARGARET M. HAYDEN, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

October 7, 2003
DATE

Mailed to Parties:

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OCT - 8 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

jb

OAL DKT. NO. EDU 7081-03
AGENCY DKT. NO. 159-5/03

S.J.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MOUNTAIN LAKES, MORRIS COUNTY, AND JOHN KAZMARK, SUPERINTENDENT,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions and the Board's reply thereto are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4, and were considered by the Commissioner in reaching his decision.

Upon careful and independent review of the record of this matter, the Commissioner concurs that the Board's Motion for Summary Decision is properly granted for the reasons set forth in the Initial Decision. The Commissioner additionally finds that there is nothing in this matter which justifies relaxation of the filing requirement set forth at *N.J.A.C.* 6A:3-1.3(d).

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 11|17|03
Date of Mailing: 11|17|03

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

673-03

673-03SEC

IN THE MATTER OF LARRY HAZZARD,:

NEWARK BOARD OF EDUCATION, :

ESSEX COUNTY. :

:

COMMISSIONER OF EDUCATION

DECISION

December 22, 2003

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	
	:	**Docket No.: D12-03**
LARRY HAZZARD **NEWARK BOARD OF EDUC.** **ESSEX COUNTY**	:	**RESOLUTION FOR FAILING TO FILE DISCLOSURE STATEMENT**

WHEREAS, N.J.S.A. 18A:12-25 of the School Ethics Act requires each school official to file a personal/relative disclosure statement and N.J.S.A. 18A:12-26 requires each school official to file a financial disclosure statement for the School Ethics Commission; and

WHEREAS, Mr. Larry Hazzard is a member of the Newark Board of Education and thus a "school official" under N.J.S.A. 18A:12-23 of the Act and N.J.A.C. 6A:28-1.2 of the Code; and

WHEREAS, the deadline to file these disclosure statements was April 30, 2003 for school officials in office since January 30, 2003 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators; and

WHEREAS, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with his school district and the County Superintendent's office as required by the Act; and

WHEREAS, the Commission sent a reminder letter to him on September 5, 2003, indicating that if the completed statement was not filed by September 15, 2003, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

WHEREAS, the Commission issued an Order on September 24, 2003, directing this school official to Show Cause why the Commission should not find him in violation of the Act for failing to file the disclosure statements; and

WHEREAS, the school official failed to reply to Order to Show Cause; and

WHEREAS, in its letter enclosing the Order, the Commission notified this school official that the Commission would discuss this matter at its October 28, 2003 meeting, that he had the right to attend, and he could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission finds that the failure to file a disclosure statement within the designated timeline constitutes a clear violation of N.J.S.A. 18A:12-25 and 26; and

WHEREAS, the Commission finds that this school official did not provide any reason why he failed to comply with the requirement under N.J.S.A. 18A:12-25 and 26; and

WHEREAS, the Commission finds that this school official was given ample opportunity to provide the complete disclosure statement; and

WHEREAS, the appropriate penalty for the violation is suspension from his Board, but removal if he does not file within 30 days of the date of the Commissioner's decision on penalty, especially in light of the failure to respond to the Commission's reminder letter before the September 15, 2003 deadline.

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Larry Hazzard violated N.J.S.A. 18A:12-25 and 26 of the School Ethics Act and recommends that the Commissioner of Education impose a sanction of suspension from his Board, but removal if he does not file within 30 days of the effective date of the Commissioner's decision.

Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: October 28, 2003

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to you, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

AGENCY DKT. NO. 408-11/03

IN THE MATTER OF LARRY HAZZARD,:
NEWARK BOARD OF EDUCATION, :
ESSEX COUNTY. :
_____:

COMMISSIONER OF EDUCATION

DECISION

Whereas, the School Ethics Commission has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named school official for failure to file a personal/relative disclosure statement, pursuant to *N.J.S.A.* 18A:12-25 and/or an annual financial disclosure statement required by *N.J.S.A.* 18A:12-26;

Whereas, the deadline to file these disclosure statements was April 30, 2003 for school officials in office since January 30, 2003, or 30 days from swearing in or start of service for newly elected or appointed board members and administrators; and

Whereas, the School Ethics Commission, was advised by the County Superintendent that this school official did not file a disclosure statement with his school district and the County Superintendent's office, as required by the Act; and

Whereas, the Commission sent a reminder letter to the above-named school official on September 5, 2003, indicating that if the completed statement was not filed by September 15, 2003, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.5(j), the Commission issued an Order on September 24, 2003 directing this school official to Show Cause why the Commission should not find him in violation of the Act for failing to file the necessary statement(s); and

Whereas, the above-named school official failed to reply to the Order to Show Cause; and

Whereas, the Commission found that failure to file a disclosure statement within the designated timeline constitutes a clear violation of *N.J.S.A.* 18A:12-25 and 26; and

Whereas, the above-referenced school official did not provide any reason why he failed to comply with the requirement under *N.J.S.A.* 18A:12-25 and 26; and

Whereas, the Commission voted on October 28, 2003 to recommend suspension of the above-named school official until he files the necessary disclosure statement, and his automatic removal from the board if he fails to file within 30 days, memorializing such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, by letter dated November 7, 2003 from the School Ethics Commission, the above-named school official was afforded an opportunity to submit to the Commissioner a response to said resolution recommending removal; and

Whereas, neither the above-named school official nor anyone on his behalf submitted a response for the Commissioner's consideration; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission; and

Whereas, the Commissioner recognizes that, were the Commission's recommendation to be adopted without modification, school officials filing the requisite disclosure statement prior to the decision of the Commissioner, and hence, prior to imposition of the recommended suspension, would receive no penalty notwithstanding that the School Ethics Act was violated and the Commission has recommended reprimands for school officials who failed to file until after issuance of the Order to Show Cause; now therefore

IT IS ORDERED that, as recommended by the School Ethics Commission, the above-named school official be suspended until he files the necessary disclosure statement, and automatically removed from the Board if he fails to file within 30 days. IT IS additionally ORDERED that even if the above-named school official shall have filed the necessary statement prior to the filing date of this decision, he shall nevertheless be reprimanded for his failure to abide by the requirements of the School Ethics Act despite many opportunities for compliance, thereby causing administrative and adjudicative time to be wasted by local, county and state education officials.*

COMMISSIONER OF EDUCATION

Date of Decision: 12/22/03

Date of Mailing: 12/24/03

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

630-03

630-03 R

PAMELA JUSTINIANO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	
	:	

November 20, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 2713-03
AGENCY DKT. NO. 134-5/98

PAMELA JUSTINIANO,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY,
Respondent.

Barbara E. Riefberg, Esq., for petitioner (Baron & Riefberg, P.A., attorneys)

Eric Martin Bernstein, Esq., for respondent (Eric M. Bernstein & Associates, attorneys)

Record Closed: October 3, 2003 Decided: October 7, 2003

BEFORE **EDGAR R. HOLMES**, ALJ:

This matter was transmitted to the Office of Administrative Law on May 12, 2003, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement and General Release indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

10-7-03
DATE

EDGAR R. HOLMES, ALJ

Receipt Acknowledged:

October 9, 2003
DATE

M. Kathleen Duncan (Ca
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 14 2003

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE,

DATE

OFFICE OF ADMINISTRATIVE LAW

sd

ATLANTIC CITY BOARD OF EDUCATION
Office of the Secretary

Administration Building
1809 Pacific Avenue
Atlantic City, NJ 08401

Lisa Mooney
Business Administrator / Board Secretary
(609) 343-7200 ext. 5038 - Fax (609) 347-1549

September 24, 2003

At the regular meeting of the Atlantic City Board of Education, held on Tuesday, September 23, 2003, the following resolution was approved:

Resolution No. 03 9B 57: Resolved by the Atlantic City Board of Education to approve the Settlement Agreement and General Release in regards to Pamela Justiniano and the Atlantic City Board of Education and to further authorize Business Administrator/Board Secretary Lisa Mooney and Board President James Herzog to execute the agreement, per **Exhibit M.**

Respectfully,

Lisa Mooney

Lisa Mooney AB
Business Administrator / Board Secretary

CONFIDENTIAL

SETTLEMENT AGREEMENT AND GENERAL RELEASE

IT IS HEREBY AGREED by and between **PAMELA JUSTINIANO** ("Justiniano") and the **ATLANTIC CITY BOARD OF EDUCATION** ("Board"), for the good and sufficient consideration set forth below, as follows:

1. The Board, as used herein, shall at all times mean the Atlantic City Board of Education, its subsidiaries, affiliates, predecessors, successors and assigns of any and all of them, their present and former directors, officials, officers, representatives, associates, partners, servants, employees, agents, attorneys, designees, successors, heirs, executors and administrators whether in their individual or official capacities, and all other persons, firms, corporations, associations, partnerships or any other entity connected therewith; and,

2. Justiniano, as used herein, shall mean Pamela Justiniano, her heirs, representatives, privies, executors, administrators, assigns, successors-in-interest and predecessors-in-interest; and,

3. Within thirty (30) working days of the Board's receipt of this Settlement Agreement and General Release, executed by Justiniano before a Notary Public, the Board shall pay to Justiniano an amount equal to ONE THOUSAND FIVE HUNDRED DOLLARS AND NO CENTS ($1,500.00). Justiniano and the Board acknowledge and agree that the payment mentioned above is in settlement of any and all claims that had been asserted, were asserted or may have been asserted or could be asserted by Justiniano for compensatory damages, pain, suffering, emotional distress, stress, humiliation, embarrassment, mental anguish, medical expenses, punitive damages, interests, attorneys fees, costs of suit, loss of sick time, loss of vacation time, loss of benefits, consequential damage, reputation damage, breach of express or implied contract, interference in any contract, economic opportunity or prospective economic advantage which arose out of Justiniano's employment with the Board, as well as deriving from

the incidents related to the matter known as Pamela Justiniano v. Atlantic City Board of Education, Docket No. EDUOA-04650-98S, for, but not limited to, violation of her civil rights, privileges and immunities secured by the Civil Rights Act of 1871, 1964 and 1991, 42 U.S.C. §§1981, 1983, 1985, 1986 and 1988, the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 et. seq., the Fifth and Fourteenth Amendments to the United States Constitution, the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et. seq., the Tenure Protection Act, N.J.S.A. 18A:17-4 and any and all other federal, state and local constitutional, statutory, regulatory or administrative laws, ordinances or common law duties. Justiniano and the Board expressly understand and agree that said payment includes any and all amounts that may be, could be or will be claimed by Justiniano or on her behalf, or by her attorneys, heirs, successors or assigns, against the Board. The payment mentioned above is in complete and full settlement of all amounts that Justiniano is or could be owed by the Board and Justiniano agrees that she will not seek any future compensation or benefits from the Board except what is stated explicitly herein. Further, Justiniano and the Board agree that this Settlement Agreement and General Release is contingent on and subject to approval and ratification by the Board; and,

4. (a) This settlement is intended as a resolution for any and all possible claims, actual or implicit, and Justiniano hereby waives any and all claims for lost wages, income or future earnings and any other benefits potentially available arising out of the matter known as Pamela Justiniano v. Atlantic City Board of Education, Docket No. EDUOA-04650-98S. Justiniano also understands and agrees that any adjustments to her withholding or any estimated tax payments are her responsibility; and,

(b) In any action commenced by either party against the other to enforce the provisions of this paragraph, the Board or Justiniano, if it/she is the prevailing party, shall be entitled to recover its reasonable attorneys' fees, costs and disbursements incurred in prosecuting the action.

5. Neither this Settlement Agreement and General Release, nor anything contained herein, shall be construed as an admission by the Board or Justiniano of any liability or unlawful conduct whatsoever. Justiniano and the Board further acknowledge that the parties enter into this Settlement Agreement and General Release solely to avoid further expensive, burdensome and protracted litigation. This Settlement Agreement and General Release is not intended to be used and shall not be used as evidence or for any other purpose in any other action or proceeding, other than evidence of the compromise between Justiniano and the Board as set forth herein or to enforce the terms of this Settlement Agreement and General Release; and,

6. Justiniano releases, acquits, gives up and forever discharges any and all claims and rights which she may have against the Board up to the time of the execution of this Settlement Agreement and General Release. Justiniano specifically releases the following claims:

Any and all damages, whether known or unknown at this date, arising from or in any way relating to the matter known as Pamela Justiniano v. Atlantic City Board of Education, Docket No. EDUOA-04650-98S or arising from Justiniano's employment with the Board, including, but not limited to, attorney fees pursuant to 42 U.S.C. §1983 and/or 42 U.S.C. §1988 and/or N.J.S.A. 10:5-1 et seq.

More specifically, in consideration of the payment specified in Paragraph 3 above and the entry into this Settlement Agreement and General Release by the Board, Justiniano hereby releases, acquits and forever discharges the Board of and from any and all actions or causes of action, suits, debts, claims, complaints, contracts, controversies, agreements, promises, damages, cross-claims, claims for contribution and/or indemnity, claims for costs and/or attorney's fees, judgments and demands whatsoever, in law or equity, which Justiniano ever had, now has, or may have, as of the date of this Settlement Agreement and General Release, as set forth more particularly in Paragraph 3.

7. Justiniano agrees not only to release, acquit and forever discharge the Board from any and all claims which arose from Justiniano's employment with the Board that Justiniano could make on her own behalf, but also those which have been or may be made against the Board by any other person or organization on her behalf. Justiniano specifically waives any right to become, and promises not to become, a member of any class in any case in which any claim is asserted against the Board, involving any event that has occurred on or before the date of this Settlement Agreement and General Release; and,

8. The Board affirms that, as of the date of execution of this Settlement Agreement and General Release, they have no knowledge of any pending class action against it to which Justiniano could be a potential class member, and,

9. Justiniano specifically acknowledges that the arrangement referred to in Paragraph 3 hereof constitutes additional consideration not otherwise owed to her but for this Settlement Agreement and General Release; and,

10. Unless directed to do so by court order or lawfully issued subpoena with notification to the Board at the time the lawfully issued subpoena was issued, Justiniano agrees that she will not give testimony or evidence against the Board in any proceeding with respect to any incidents related to any incidents/events involving Justiniano's employment with the Board; and,

11 This Settlement Agreement and General Release contains the full agreement of Justiniano and the Board and may not be modified, altered, changed or terminated except upon the express prior written consent of Justiniano and the Board, which consent must be signed by Justiniano and the Board or their duly authorized agents; and,

12. The waiver by Justiniano and the Board of a breach of any provision hereof shall not operate or be construed as a waiver of that breach by the other, or as a waiver of any subsequent breach by the other; and,

13. If any term, provision or condition of this Settlement Agreement and General Release is held invalid or unenforceable by a court of competent jurisdiction, such holding shall be without effect upon the validity or enforceability of any other provision, term or condition of this Settlement Agreement and General Release; and,

14. Justiniano hereby acknowledges and agrees that she further expressly waives and assumes the risk of any and all claims or damages which exist as of this date for which Justiniano does not know of or suspect to exist, whether through ignorance, oversight, error, negligence, or otherwise and which, if known, would materially effect her decision to enter into this Settlement Agreement and General Release; and,

15. Justiniano represents and warrants that no other person or entity has or has had any interest in the claims, demands, obligations, or causes of action referred to in this Settlement Agreement and General Release; that Justiniano has not sold, assigned, transferred, conveyed or otherwise disposed of any of the claims, demands, obligations or causes of action referred to in her verbal complaint(s) and/or in this Settlement Agreement and General Release; and,

16. This Settlement Agreement and General Release shall be construed and interpreted in accordance with the laws of the State of New Jersey; and,

17. Justiniano and the Board agree to cooperate fully and execute any and all supplementary documents and to take all additional actions which may be necessary or appropriate to get full force and effect of the basic terms and interest of this Settlement Agreement and General Release; and,

18. This Settlement Agreement and General Release shall not be executed in counterparts and shall be enforceable only if executed by Justiniano and the Board; and,

19. This Settlement Agreement and General Release shall become effective immediately following execution by Justiniano and the Board and approval by all applicable Board officials, except as noted herein; and,

20. Justiniano and the Board shall bear all costs and expenses arising from the actions of their own counsel in connection with the Settlement Agreement and General Release. As set forth in Paragraph 3, the Board has agreed to only pay the amounts herein mentioned to Justiniano. As further consideration for this Settlement Agreement and General Release, Justiniano and her attorney agree that this sum represents all of the monies which the Board has agreed to pay to Justiniano and her attorney and that any additional attorney's fees which may arise from the actions of Justiniano' attorney in connection with any matter arising from Justiniano' employment with the Board are to be borne by Justiniano; and,

21. This Settlement Agreement and General Release contains the entire agreement between Justiniano and the Board with regard to the matters set forth in it, and shall be binding upon and inure to the benefit of their officials, officers, directors, attorneys, representatives, employees, associates, partners, agents, servants, executors, administrators, personal representatives, heirs, successors and assigns of each, and all other persons, firms, corporations, associations or partnerships or any other entity or persons connected therewith, except as set forth herein or as may be agreed to in writing between the parties; and,

22. In entering into this Settlement Agreement and General Release, Justiniano has relied upon the legal advice of her attorney, who is the attorney of her own choice, as to the terms of this Settlement Agreement and General Release which have been completely read and explained by her attorneys and those terms are fully understood and voluntarily accepted; and,

23. All notices, demands and requests which are required and desired to be given shall be in writing and shall be sent regular mail and pre-paid, registered or certified mail, return receipt requested, addressed as follows:

For **PAMELA JUSTINIANO**:

Barbara Reifberg, Esq.
BARON, RIEFBERG & WARD
1307 White Horse Road
Vorhees, New Jersey 08043

For the **ATLANTIC CITY BOARD OF EDUCATION**:

Eric Martin Bernstein, Esq.
ERIC M. BERNSTEIN & ASSOCIATES, L.L.C.
Two North Road
P.O. Box 4922
Warren, New Jersey 07059

IN WITNESS WHEREOF, Justiniano and the Board have hereunto set their hands.

Barbara Reifberg, Esq.

PAMELA JUSTINIANO

By: _____
Pamela Justiniano

Lisa Mooney, Business Administrator/
Board Secretary

ATLANTIC CITY BOARD OF EDUCATION

By: _____
James Herzog, Board President

N:\Clients\ACBOE (1752)\1009 justiniano settlement agreement revise 8-20-03.doc

STATE OF NEW JERSEY)
) ss.
COUNTY OF Atlantic)

I, Angelique Brown, a Notary Public, do hereby certify that Pamela Justiniano, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledges that he signed and delivered the said instrument as his free and voluntary act, for the uses and purposes set forth therein.

Given under my hand and official seal this 8th day of September, 2003

Angelique Brown
Notary Public

ANGELIQUE BROWN
NOTARY PUBLIC
STATE OF NEW JERSEY
MY COMMISSION EXPIRES AUGUST 29, 2007

OAL DKT. NOS. EDU 2713-03 AND EDU 4650-98 (ON REMAND)
AGENCY DKT. NO. 134-5/98

PAMELA JUSTINIANO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	
	:	

The record, Settlement Agreement and General Release, and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 11|20|03

Date of Mailing: 11|20|03

638-03

A.J., on behalf of minor child, C.F.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTHAMPTON, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

November 20, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 4881-03
AGENCY DKT. NO. 184-6/03

A.J. O/B/O C.F.,
Petitioner,
v.
SOUTHAMPTON TOWNSHIP BOARD OF EDUCATION,
Respondent.

A.J., parent, *pro se*

David M. Serlin, Esq., for respondent

Record Closed: October 6, 2003 Decided: October 7, 2003

BEFORE **DOUGLAS H. HURD,** ALJ:

This matter was transmitted to the Office of Administrative Law on July 25, 2003, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared an Order Approving Settlement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

October 7, 2003
DATE

DOUGLAS H. HURD, ALJ

Receipt Acknowledged:

October 10, 2003
DATE

M. Kathleen Duncan (by)
DEPARTMENT OF EDUCATION

OCT 14 2003

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

/lam

DAVID M. SERLIN, ESQUIRE
34 West Broad Street
P.O. Box 7
Burlington, NJ 08016
(609) 387-9220
Attorney for the Southampton Township Board of Education

	: OFFICE OF ADMINISTRATIVE LAW
A.J., o/b/o MINOR CHILD, C.F.	:
Plaintiff,	**: OAL DOCKET NO.: EDUOS 04881-2003S**
vs.	**: AGENCY REF. NO.: 184-6/03**
BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTHAMPTON	:
	: ORDER APPROVING SETTLEMENT
Defendant(s).	:

THIS MATTER having been brought by Amadu A. Jollah by filing a pro se residency appeal on behalf of his minor child, C.F., against the Southampton Township Board of Education, wherein on June 12, 2003 he alleged that he was in the process of purchasing a home in Southampton Township.

Amadu A. Jollah now admitting that he has been domiciled in the Township of Mount Laurel since January 2003 while C.F. attended schools in Southampton Township and his efforts to purchase homes within the Southampton Township have been unsuccessful, although it is his intention to become domiciled within Southampton Township by December 31, 2003, and it is his desire to pay tuition so that C.F. can continue to be educated in the Southampton Township school district.

IT IS ORDERED that the parties comply with the terms of the settlement set forth hereinafter and these proceedings be and hereby are concluded.

C.F. shall be permitted to remain a pupil in the Southampton Township school district upon Amadu A. Jollah paying tuition of $9,303.30 by cash or certified check. By September 26, 2003 he shall pay $2,000.00 and the balance by October 27, 2003. Failure to make either payment on time shall result in C.F. not being permitted to attend school in the Southampton Township unless at such time Amadu A. Jollah is domiciled in the Township of Southampton. If Amadu A. Jollah makes the required tuition payments but is not a domiciliary of Southampton Township by December 31, 2003, C.F. shall not be permitted to attend school in Southampton Township beyond that date. Tuition for January to June 2003 semester is $5,365.80. Tuition for the September to December 2003 semester is $3,937.50. If Amadu A. Jollah is domiciled in Southampton Township before December 31, 2003 he shall receive a credit of $52.52 for each day he is domiciled within the municipality for which tuition was charged.

Date: 10/7/2003

DOUGLAS H. HURD, ALJ

I hereby consent to the terms
and contents of the ORDER.

AMADU A. JOLLAH, Pro Se

I hereby consent to the terms
and contents of the ORDER.

DAVID M. SERLIN, ESQUIRE
Southampton Township Board
of Education Attorney

C:\Forms\stbe2003-4.order.wpd

OAL DKT. NO. EDU 4881-03
AGENCY DKT. NO. 184-6/03

A.J., on behalf of minor child, C.F.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTHAMPTON, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Settlement Agreement and Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1 have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 11/20/03

Date of Mailing: 11/20/03

639-03

659-03

T.L.S., on behalf of minor child, J.L.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF DUNELLEN, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning parent challenged the Board's residency determination that petitioner and her child, J.L.S., were not domiciled in the District. The Board counterclaimed for tuition and costs.

In light of the record and the testimony of witnesses, the ALJ found that petitioner did not prove by a preponderance of evidence that J.L.S. was eligible for a free education based on domicile within the District. Thus, the ALJ dismissed the petition and granted the Board's counterclaim for tuition and costs. The ALJ ordered petitioner to pay $7,175 in tuition and $378.69 in sanctions to the Board.

The Commissioner concurred with the dismissal of the petition and the grant of tuition to the Board. The Commissioner, however, did not reach to the order for sanctions, since final agency review of such orders is within the sole purview of the Director of the OAL.

November 20, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 2714-03

AGENCY DKT. NO. 115-4/03

T.L.S., on behalf of minor child,

J.L.S.,

Petitioner,

v.

BOARD OF EDUCATION OF THE

BOROUGH OF DUNELLEN,

MIDDLESEX COUNTY,

Respondent.

No appearance by or on behalf of the petitioner

Joan M. Damora, Esq., for the respondent (Schwartz Simon Edelstein Celso & Kessler, attorneys)

Record Closed: September 6, 2003 Decided: October 7, 2003

BEFORE **JOHN SCHUSTER III**, ALJ:

STATEMENT OF THE CASE

Pursuant to *N.J.S.A.* 18A:38-1, respondent, Board of Education of the Borough of Dunellen (hereinafter BOE or respondent), held a hearing and determined that J.L.S., the child of

T.L.S., was not domiciled within the BOE school district, although she continued to attend school within the BOE district. Consequently, the respondent decided that the child should be removed from the school and that T.L.S. should pay tuition for the child. According to the papers filed, T.L.S. alleges that she and her child, J.L.S., are domiciled within the district and claim that the BOE was and is required to provide her child with a free public education. The BOE submits that T.L.S. has not met her burden of proof and counterclaims for an order requiring T.L.S. to pay tuition.

In addition, the BOE has requested that petitioner pay a sanction as a result of her failure to answer interrogatories or otherwise provide discovery causing a postponement of a hearing.

PROCEDURAL HISTORY

On March 18, 2003, a hearing was held by the BOE, which the petitioner attended, for the purpose of giving the petitioner the right to appeal the determination of the respondent that J.L.S., the daughter of petitioner, does not reside within the Dunellen school district (R-3). On March 20, 2003, the respondent notified the petitioner that the BOE affirmed its initial determination and directed the petitioner to remove the child from the Dunellen schools. That notice (R-5) also advised the petitioner that she could file an appeal with the Commissioner of Education. On April 3, 2003, petitioner filed a *pro se* residency appeal with the Commissioner of Education. On April 23, 2003, the respondent filed an answer to the aforesaid petition. The Department of Education then transmitted the matter to the Office of Administrative Law (OAL) on May 12, 2003, where it was received and filed as a contested case pursuant to *N.J.S.A.* 52:14B-2(b). Respondent made a discovery demand on petitioner on June 4, 2003. The original hearing was scheduled for June 16, 2003, but an adjournment was granted at the request of the petitioner because she advised the court she was out-of-state because of a severe illness in her family. By way of a telephone conference call with the parties on June 11, 2003, I ordered that all discovery requests had to be answered no later than July 18, 2003. The matter was rescheduled for August 1, 2003, at which time the parties appeared. Respondent made a motion to strike petitioner's pleadings at that time and declare her in default for failure to respond to interrogatories and a request for a production of documents, which had been duly served upon her. At the August 1 hearing, the petitioner admitted that she did not answer the discovery

requests previously served upon her. On August 7, 2003, I entered a Letter Order, by which I directed the petitioner to answer all discovery requests no later than August 20, 2003. In addition, I ordered that if petitioner did not do so, I would reconsider respondent's request to strike petitioner's pleadings and conduct a proof hearing at 4:00 p.m. on September 2, 2003, regarding the BOE's claim for tuition and for payment of monetary sanctions for failure to comply with my discovery order of June 11, 2003. On August 13, I received a Certification of Expenses from the respondent and a request that I consider them as a sanction against petitioner pertaining to the postponed August 1 hearing. On August 18, 2003, I wrote to petitioner and advised her she had until September 6, 2003 to respond to respondent's request. Petitioner did not provide discovery responses by August 20, 2003, and a proof hearing was held on September 2, 2003. Petitioner did not attend the September 2, 2003 hearing, nor did she ever respond to the Certification of Expenses submitted by attorney Damora. At the September 2 hearing, respondent appeared and at that time testimony was taken pertaining to J.L.S.'s domicile and the cost of her education provided by the Dunellen Board of Education.

FINDINGS OF FACT

Dr. Joyce Baynes testified on behalf of the respondent. She is the superintendent of schools for that district. She testified that J.L.S. was enrolled for a full-day kindergarten at the John P. Faber School. She further testified that the BOE has an excellent academic program for its kindergarten students and is one of the few districts in the area that has a full-day kindergarten program. This program is very attractive because it eliminates any childcare costs that would be incurred by working parents if it was only a part-time program. Dr. Baynes testified that she questioned the residency of this student because she discovered that the school's emergency notification card listed the student's home telephone number as being a land-based telephone exchange for Branchburg, New Jersey and not Dunellen (R-1). When residency was questioned, Dr. Baynes testified that the petitioner supplied a 2001 preliminary tax bill for property known as 212 North Washington Avenue, Dunellen, New Jersey, listed in her name (R-2). The mailing address for the tax bill indicates 212 North Washington Avenue, Dunellen, New Jersey, however; it appears to have been altered. She further testified that at one point, the petitioner told a school official that she did not live in Dunellen, but later changed her story to indicate that she misspoke and that her husband was the one that did not live in the Borough of Dunellen. In addition, the

witness testified that the petitioner advised her that she was going through a divorce, that her husband lived in Branchburg, New Jersey and that she lived in Dunellen with a newborn child fathered by an individual other than her husband. Dr. Baynes testified that the issue of domicile was first brought to the surface because on October 25, 2002 one of the school's secretaries called the phone number of the emergency record card and the petitioner answered the phone and admitted that she was at the Branchburg residence. Upon further investigation of this matter, Dr. Baynes testified that the 2001 tax records from the Borough of Dunellen indicate that the tax bills for the property owned by the petitioner on North Washington Avenue gets sent to a Neshanic Station (Branchburg), New Jersey address (R-7). This is a further indication that the tax bill supplied by the petitioner as proof of her residence (R-2) was altered.

The next person to testify was the child's kindergarten teacher, Ms. Laurie Mann. She testified that J.L.S. was a student of her's in the 2002-2003 school year. She further testified that the child always told her that she lived in Branchburg, and she had observed the child's father dropping her off from school consistently and the mother picking her up on a regular basis, instead of using school bus transportation. She also observed that on many occasions the father had a newborn child with him, even thought the petitioner said that the parties were going through a divorce, that the child resided with her in Dunellen and not with the father in Branchburg and that the newborn child was fathered by a man other than J.L.S.'s father. In addition, Ms. Mann testified that another child, a friend of J.L.S., told her that she visited J.L.S. at her home in Branchburg.

The next witness to testify was Frank Patullo, who was the supervisor of the respondent's buildings and grounds department. He testified that in the early part of March, 2003, the petitioner picked up J.L.S. from school and he followed her in his vehicle to 173 Brandon Court in Branchburg, the address listed on the Borough of Dunellen's tax records. He further testified that in early April, he observed J.L.S.'s father pick her up from school and likewise he followed him to the home in Branchburg with the child. He further testified that he observed the house at 212 North Washington Avenue, at least ten times from 7:30 a.m. He did not see the petitioners or their cars at that location. Over a period of time, he observed that property at least 50 times at various times of the day and he never saw the petitioner's car at that location. He did however candidly record that on one instance he spoke to a neighbor who was very reluctant when

questioned on the issue of residency, but she did say that the petitioner resided at the Washington Avenue address. Mr. Patullo believed that from his observations that she was a tenant of the petitioner. Therefore, I **FIND**, based on the inconsistencies in petitioner's statements to the witnesses, the statements of the child, the observations of the respondent's employees and the documentary evidence presented, that J.L.S. is not domiciled within the Borough of Dunellen and, in fact, resides at 173 Brandon Court, Neshanic Station (Branchburg), New Jersey.

LEGAL ANALYSIS

N.J.S.A. 18A:38-1(b)(2) states that when the superintendent of a school district determines that a person is attending a district school but is not domiciled within the district, the parent may present proofs at a hearing to show by a preponderance of the evidence that the child is eligible for a free education based on domicile within the district. If the parent or guardian does not meet that burden, then they may be assessed for the child's tuition prorated on a per diem basis. Based on the unrefuted testimony at the hearing, it is clear that T.L.S. and J.L.S. do not reside or are domiciled in the Borough of Dunellen, but, in fact, are domiciled and reside at 173 Brandon Court, Neshanic Station (Branchburg), New Jersey, a location not within the district of the BOE. The respondent has made an application pursuant to that statute for tuition reimbursement, which I **FIND** it is entitled to pursuant to *N.J.S.A.* 18A:38-1(b)(2). I also **FIND** that the allowable tuition for reimbursement purposes has been fixed at $7,175 for the 2002-2003 school year. I further **FIND** that J.L.S. attended the John P. Faber School in Dunellen for the entire 2002-2003 school year.

As a result of my Letter Order of August 7, 2003, the respondent was to submit a certification of expenses to be considered as a sanction for the postponement of the August 1 hearing, which was a direct result of the petitioner's failure to comply with my prior discovery order. The respondent has submitted a certification indicating that counsel fees for that date are $641.25 based on 4 ¾ hours at the district's rate of $135 per hour. The work involved making up that 4 ¾ hours is for the appearance in court, a prehearing meeting with the witnesses to review their testimony and prepare for the hearing scheduled on the August 1 date. In addition, there is a request that the district expended $108.69 for mileage and substitute coverage for the witnesses that attended the August 1 hearing. I **FIND** the expenses incurred by the district of $108.69 to be

fair and reasonable. I also **FIND** that the hourly rate charged by counsel to be reasonable. I do not **FIND** however the time spent of 4 ¾ hours to be appropriate since it included prehearing meetings with the witnesses, which is necessary for all hearings and not just the August 1 hearing, which was adjourned. Consequently, I am ordering the appropriate counsel fee to be two hours at the rate of $135 or $270 and a reimbursement of expenses in the amount of $108.69 for a total of $378.69.

ORDER

Based on the above, and for good cause shown, I **ORDER** that the petition in this matter be and is hereby **DISMISSED WITH PREJUDICE**. I further **ORDER** that the BOE's counterclaim for tuition is **GRANTED** and I **ORDER** T.L.S. to pay $7,175. I further **ORDER** that because J.L.S. is not domiciled within the district, she may be removed from the educational program offered by the BOE. I further **ORDER** T.L.S. to pay the sanction previously ordered in the amount of $378.69.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

OCTOBER 7, 2003
DATE

JOHN SCHUSTER III, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

10-10-03
DATE

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OCT 16 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

jh

WITNESSES

For the petitioner:

None

For the respondent:

Dr. Joyce Baynes

Laurie Mann

Frank Patullo

EXHIBITS

For the petitioner:

None

For the respondent:

R-1 Emergency notification card

R-2 2001 preliminary tax bill

R-3 Notes of residency hearing of March 18, 2003

R-4 Secretary notes

R-5 Letter of March 20, 2003, respondent to petitioner

R-6 Tuition statement, 2002-2003 year

R-7 2001 Borough of Dunellen tax duplicate

R-8 2003 preliminary tax bill

OAL DKT. NO. EDU 2714-03
AGENCY DKT. NO. 115-4/03

T.L.S., on behalf of minor child, J.L.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF DUNELLEN, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon review, the Commissioner concurs with the Administrative Law Judge (ALJ) that J.L.S. is not domiciled in the respondent's school district and that the Board of Education is entitled to collect tuition from T.L.S. in the amount of $7,175 for the period of J.L.S.'s ineligible attendance. The Commissioner does not, however, reach to the ALJ's recommended order for sanctions, since final agency review of such orders is within the sole purview of the Director of the OAL pursuant to *N.J.A.C.* 1:1-3.2(c)4.

Accordingly, the Initial Decision of the OAL, recommending dismissal of the Petition of Appeal and granting the Board's counterclaim for tuition, is adopted for the reasons expressed therein.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 11/20/03

Date of Mailing: 11/20/03

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

645-03

BOARD OF EDUCATION OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY, ON ITS OWN BEHALF AND ON BEHALF OF GREGORY RAIFORD,

PETITIONER,

V.

NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning Board sought reversal of the NJSIAA's decision not to allow Gregory Raiford, a 19-year-old educationally disabled student in his senior year, to participate in interscholastic competition in contact sports, *i.e.*, football and basketball, for the 2003-04 school year. He was denied a waiver of the "Age Rule," Article V, Section 4.C of the NJSIAA Bylaws.

Noting that it conducted the individualized review contemplated by the NJSIAA's Constitution, Bylaws, Rules and Regulations in its consideration of this matter, the NJSIAA denied the waiver, alleging that the student would have an unfair advantage over the other participants because of his size and experience and that the nature of the competition would be altered.

The Commissioner found that the student was provided the due process to which he was entitled; that the NJSIAA made every effort to provide a full, fair and timely hearing by the Eligibility Appeals Committee; and that NJSIAA's rule was not applied in an inconsistent manner. The Commissioner found that the NJSIAA's decision to deny the request for waiver of the provisions of Article V, Section 4.C of the NJSIAA Bylaws was not arbitrary, capricious or unreasonable. Also, the student was granted a "limited" waiver allowing him to travel or "suit up" with the football and basketball teams, or to participate in other team activities such as practices and scrimmages. The Commissioner upheld the NJSIAA's decision. Petition was dismissed.

December 5, 2003

AGENCY DKT. NO. 298-8/03

BOARD OF EDUCATION OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY, ON ITS OWN BEHALF AND ON BEHALF OF GREGORY RAIFORD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	DECISION
RESPONDENT.	:	

For Petitioner, Edison Township Board of Education, Elizabeth Farley Murphy, Esq. (Wilentz, Goldman & Spitzer, P.A.)

For Respondent, Michael J. Herbert, Esq. (Herbert, Van Ness, Cayci & Goodell)

This matter came before the Commissioner of Education on August 25, 2003 through the filing of a Petition of Appeal by the Board of Education of Edison Township (petitioner), on its own behalf and that of student Gregory Raiford. Petitioner sought an order reversing the determination of the Eligibility Appeals Committee (EAC) of the New Jersey State Interscholastic Athletic Association (NJSIAA), wherein Gregory Raiford, a 19-year-old educationally disabled student, was denied a waiver of the "Age Rule," Article V, Section 4.C of the NJSIAA Bylaws, thereby precluding him from participation in interscholastic competition in contact sports, *i.e.,* football and basketball, for the 2003-04 school year. Petitioner's submission also included a Motion for Emergent Relief and to Supplement the Record. Respondent's Answer to the Petition and the motions were filed on September 2, 2003, together with a complete record of the proceedings before the NJSIAA's EAC. Upon consideration of the

parties' submissions with respect to the Motion for Emergent Relief and to Supplement the Record, such motions were denied by the Commissioner by decision dated September 10, 2003, and a briefing schedule for the matter on its merits was established. On September 22, 2003, petitioner submitted a brief in support of its position, and NJSIAA filed its reply brief on October 2, 2003, whereupon the record in this matter was closed.

Gregory Raiford is a senior in this 2003-04 school year. On November 21, 2002, the principal of John P. Stevens High School, in the Edison Township Public School District, requested the NJSIAA to review the eligibility of Gregory, who turned 19 years of age on June 10, 2003 and would, therefore, be ineligible to participate in sports, specifically basketball, during the 2003-04 school year pursuant to the "Age Rule," Article V, Section 4.C of the NJSIAA Bylaws.[1] [2] On February 13, 2003, petitioner's request for a waiver of the Age Rule was considered by the NJSIAA's Eligibility Committee, which denied the request by a vote of 7-0. On June 4, 2003, an appeal hearing was conducted by NJSIAA's EAC. After considering the evidence, the EAC, by unanimous decision, declined to waive the Age Rule to permit Gregory to compete interscholastically in contact sports. The EAC did, however, grant a waiver to allow him to be a member of, travel with or "suit up" with the football and basketball teams, or to participate in other team activities, as long as he did not compete interscholastically in those sports. The granted waiver also permitted Gregory to *compete* in any non-contact sport during

[1] This rule, in pertinent part, specifies "An athlete becomes ineligible for high school athletics if he/she attains the age of nineteen prior to September 1.***" (*NJSIAA Handbook*, 2002-2003, at 45) Rationale for this rule is provided by the *NJSIAA Interpretive Guidelines For Student-Athlete Eligibility* which state: "This rule is not only aimed at preventing 'red-shirting' but is also aimed at encouraging students to satisfactorily complete their academic studies starting with the elementary school level. It is also a safety measure to assure that 13-and 14-year-old students are not expected to compete against adults who are six or more years older, with substantially greater physical size, strength and skills." (*NJSIAA Handbook*at 70)

[2] It is noted that although the within Petition of Appeal seeks a waiver of the Age Rule to permit participation in both basketball and football, the record indicates that the Eligibility Waiver Request made to the NJSIAA by the District on November 21, 2002, the issue before both the NJSIAA Eligibility Committee and the NJSIAA Eligibility Appeals Committee (EAC), and the subject of the EAC's final decision, all dealt with an application to allow Gregory Raiford to play *basketball* in his senior year of high school.

his senior year. The EAC issued a written decision to this effect on June 9, 2003, explaining its rationale for granting only a limited waiver thusly:

> The Committee was extraordinarily sympathetic to the plight of this young man. However, it was noted at the hearing that special provisions had been made for this type of student several years ago when the NJSIAA amended its eligibility rules to permit eighth graders to play on a high school team so as to allow such students four years of competition in any sport. These provisions are set forth in Article V, Section 4.1 of the NJSIAA Bylaws and the clarifications to that section in the *NJSIAA Handbook*. (*See NJSIAA Handbook*, pp. 51, 53.) This legislation was designed in recognition that the Association does not grant waivers of the Age Rule for contact sports, since that Age Rule, imbedded in Article V, Section 4.C. of the NJSIAA Bylaws, is predicated on health and safety considerations. The facts in this case show that the student did not participate in the eighth grade and therefore his eligibility has been limited to three years based on the Age Rule. Accordingly, the Committee must respectfully decline waiving the Age Rule to permit this student to participate in any contact sports in interscholastic competition during his senior year, including basketball.
> (Statement of Items Comprising the Record on Appeal, Exhibit H, at 1, 2)

The record evidences the following facts: Gregory was born and raised in Plainfield. His father was a victim of homicide in 1993 and his mother is HIV positive and has not been a positive influence in his life. Gregory was retained three times in elementary school in Plainfield because of excessive absenteeism. In approximately February 1997, guardianship of Gregory was transferred to his paternal aunt, Laura Grayer, and he entered Edison Township Public Schools in September 1997 as a 6th grader. He was classified in October 1998, with a disability category of specific learning disability. Gregory participated in football as a freshman and in basketball, at JV Varsity level as a freshman and Varsity level as a sophomore and junior.

PETITIONER'S POSITION

Petitioner contends that the NJSIAA's decision was arbitrary, capricious and unreasonable as it failed to conduct an individualized review as to the appropriateness of applying the Age Rule to Gregory, thereby violating its own Constitution, Bylaws, Rules and Regulations and Gregory's rights pursuant to Federal law. Specifically, petitioner alleges that in reaching its determination the NJSIAA failed to consider whether the granting of a waiver under the particular circumstances here was a "reasonable and necessary" accommodation, in violation of Section 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act, and the Civil Rights Act. (Petition of Appeal at 6) Further, petitioner charges "[t]he decision also neglected to 'take into account the size, agility and skills of the student in question and the degree to which these issues will not fundamentally alter the competition' as required by NJSIAA's own interpretive guidelines." (*Ibid.*)

In this connection, petitioner points out that, as a classified student, Gregory is entitled to the protections of Section 504 of the Rehabilitation Act of 1973, which provides:

> [n]o otherwise qualified individual with a disability ***shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance***. 29 *U.S.C.* Section 794(a).

Pursuant to 34 *C.F.R.* Section 104.3(j)(1), (j)(2)(ii), it argues, a disabled individual is defined as one "who 'has a physical or mental impairment which substantially limits one or more major life activities,' such as 'learning.'" (Petitioner's Brief in Support of Appeal at 5) Moreover, it contends, 34 *C.F.R.* Section 104.4(b)(1)(i), specifies that "[a] recipient of federal funds may not deny an otherwise qualified disabled person the opportunity to participate in or benefit from an aid, benefit or service." (*Id.* at 6)

Petitioner, additionally, argues that Title II of The Americans with Disabilities Act, 42 *U.S.C.* 12101 *et seq.* (ADA) and a recent Supreme Court case interpreting this provision further supports Gregory's entitlement to a waiver here. Specifically, petitioner observes that Title II of the ADA specifies:

> [s]ubject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity. (42 *U.S.C.* Section 12132)

The ADA defines a "qualified individual with a disability" as:

> an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, ***meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity. (42 *U.S.C.* Section 12131(2)
> (Petitioner's Brief in Support of Appeal at 6)

Petitioner argues that, pursuant to the dictates of the ADA, the NJSIAA is required to make "reasonable and necessary" modifications to meet Gregory's disability, *i.e.*, a waiver of the Age Rule, "provided the requested modification would not fundamentally alter the nature of the service." (*Ibid.*)

In support of its position here, petitioner cites to the Supreme Court's decision in *PGA Tour, Inc. v. Martin*, 532 *U.S.* 661 (2001). In this case, a golfer suffering from a degenerative condition, which caused his leg to atrophy causing him significant pain when walking, was denied permission to use a golf cart by the PGA which determined that his use of a cart would fundamentally alter the nature of the competition because he would not be subject to the fatigue experienced by other players walking the course during the tournament. The Court disagreed stating:

> Petitioner's refusal to consider Martin's personal circumstances in deciding whether to accommodate his disability runs counter to the clear language and purpose of the ADA. As previously stated, the ADA was enacted to eliminate discrimination against "individuals" with disabilities, 42 *U.S.C.* Section 12101(b)(1), and to that end Title III of the Act requires without exception that any "policies, practices, or procedures" of a public accommodation be reasonably modified for disabled "individuals" as necessary to afford access unless doing so would fundamentally alter what is offered, Section 12182(b)(2)(A)(ii). *To comply with this command, an individualized inquiry must be made to determine whether a specific modification for a particular person's disability would be reasonable under the circumstances as well as necessary for that person, and yet at the same time not work a fundamental alteration. Martin, supra,* at 688 (emphasis added)
> (Petitioner's Brief in Support of Appeal at 7)

Additionally, petitioner cites to *Cruz v. Pennsylvania Interscholastic Ass'n., Inc.*, 157 *F.Supp. 2d* 485 (E.D. Pa. 2001), a case which it contends is "very similar" to the instant matter, as further evidence of its entitlement to a waiver. In this case the petitioner charged that the Association violated the ADA by refusing the school district's request for a waiver of the Age Rule for a 19-year-old classified student. The *Cruz* court observed that *Martin, supra,* clarified that a fundamental requirement of the ADA is that a disabled person must be evaluated on an individual basis. It posits that *Cruz, supra,* further found that, pursuant to *Martin*, three inquiries are relevant in such an individualized evaluation: "(1) whether the requested modification is reasonable; (2) whether it is necessary for the disabled individual; and (3) whether it would fundamentally alter the nature of the competition." *Cruz* at 498-99. (Petitioner's Brief in Support of Appeal at 8)

Finally, in this regard, petitioner argues that the NJSIAA's Interpretive Guidelines with respect to the Age Rule, in pertinent part, provide:

> In contact sports, the rule may be waived if the student can't comply due to circumstances beyond the student's control. A determination will take into account the size, agility and skills of

> the student in question and the degree to which these issues will not fundamentally alter the competition. (NJSIAA Interpretive Guidelines at 70) (Petitioner's Brief in Support of Appeal at 3-4)

Notwithstanding the clear mandates of federal law, the courts, and even the NJSIAA's own rules with regard to the necessity of an "individualized assessment" in making a determination regarding a waiver of the rule for a "disabled" student, the June 9, 2003 determination of the NJSIAA was completely devoid of such an examination and analysis, rendering this decision arbitrary, capricious and unreasonable, requiring its reversal. (Petitioner's Brief in Support of Appeal at 8)

In conclusion, petitioner contends that the NJSIAA's assertion that its Constitution, Bylaws and Rules and Regulations have undertaken to accommodate disabled students "generally" is of no import here, as such general provisions do not serve to "diminish its obligation to provide reasonable accommodations for disabled students on a case-by-case basis." (*Id.* at 9) Petitioner further argues that the record does not sustain a finding that school officials should have encouraged Gregory to play contact sports in 7th and 8th grade or "that this was a practical solution in Gregory's case." (*Ibid.*)

NJSIAA'S POSITION

Citing D.J.K. and H.J.K. v. NJSIAA, 1987 *S.L.D.* 259 and *Board of Education of the City of Camden v. NJSIAA*, 92 *N.J.A.R.* 2d (EDU)182, 188, the NJSIAA, initially, points out that the Commissioner's scope of review in NJSIAA determinations is an appellate one; thus, where due process has been granted and the record substantiates that there is an adequate basis for the decision reached below, the Commissioner may not overturn an eligibility decision of the NJSIAA. (Respondent's Letter Brief at 2)

The NJSIAA next underscores that the purpose of the Age Rule, as set forth in the *NJSIAA Handbook* is as "a safety measure to assure that 13 and 14-year-old students are not expected to compete against students who are six or more years older, with substantially greater physical size, strength and skills. **In view of this paramount safety factor, waivers of this rule will be granted only in truly extraordinary circumstances.**" (*NJSIAA Handbook,* p. 70) (Respondent's Letter Brief at 5) (emphasis in text) Recognizing that the education of students who are classified or disabled may be extended beyond the customary 12-year period and, therefore, they may turn 19 years of age before their senior year of high school, the NJSIAA rules make provision for accommodation of such students by allowing them to compete in interscholastic sports in 7th or 8th grade, thus providing for a full eight semesters of competition. (*NJSIAA Handbook*, p. 70) (*Ibid.*) At the time he attended middle school in Edison Township, Gregory was 15 years of age and was eligible to participate in high school sports pursuant to Article V, Section 41.1 of the NJSIAA's Bylaws. (*Id.* at 10)[3]

The NJSIAA next avows that petitioner has cited no facts in support of its contention that the EAC's decision was arbitrary, capricious or unreasonable or that this body failed to conduct an "individualized" review of this case. As specified in its rules, the NJSIAA avers, "[w]aivers for contact sports are only granted in situations that were beyond the student's control; and such **a waiver will take into account the student's size, skill, agility and the degree to which these factors will not fundamentally alter the competition.** (*NJSIAA Handbook*, p. 70) (Respondent's Letter Brief at 5-6) (emphasis in text) It observes that the EAC hearing was attended by Gregory Raiford's guardian, along with the Principal and the Athletic Director of J.P. Stevens High School. Although Gregory received a specific invitation from the

[3] The NJSIAA points out that petitioner presented no circumstances beyond Gregory's control which would have prevented him from participating in contact sports during 7th or 8th grade. (Respondent's Letter Brief at 6)

NJSIAA to attend, he did not do so.[4] As a result of Gregory's failure to attend the EAC hearing, the Committee was required to rely on the information provided by Principal Riccio and Athletic Director Capraro which, although limited, established that:

> [Gregory Raiford] as described by his principal is a tall, well built student; he is six foot two inches tall and weighs 170 pounds. What is more, the record reflects that [he] has been a member of the varsity basketball team for three years, and therefore must possess significant skill. (Respondent's Letter Brief at 12)

In light of the information in the record and that adduced at hearing, the NJSIAA argues that "[a]llowing [Gregory] to participate in football and basketball, would result in giving him an unfair advantage over the other participants and would fundamentally alter the nature of the competition." (*Ibid.*) NJSIAA further argues that there are additional factors in the record which also support denial of the waiver:

> Petitioner would be a starter on the Stevens' basketball team. Allowing him to participate would displace another student, who has not had an opportunity to play for four years, from that starting position. It would also be unfair to opposing teams whose athletes have met the eligibility standards. It would also set the very unwise precedent of permitting a member school to ignore the ability to allow a student to participate in the eighth grade, which would allow four years of participation, to serve as an excuse for waiving eligibility rules. Indeed, it would encourage "red shirting" by allowing student-athletes to play when they are older, stronger and more skilled than their opponents. (*Id.* at 12, 13)

Consequently, notwithstanding petitioner's contention to the contrary, it is evident that the EAC conducted the individualized review contemplated by the NJSIAA's Constitution, Bylaws, Rules and Regulations in its consideration of this matter.

Finally, the NJSIAA maintains that the Age Rule, or its application here, does not violate Section 504 of the Rehabilitation Act or the ADA. In this regard, it avers that petitioner's

[4] The NJSIAA proffers that one of the purposes of urging students seeking a waiver of the Age Rule to attend the EAC hearing is to provide the Committee members an opportunity to personally assess the size and athletic skills of the student. (Respondent's Letter Brief at 11)

reliance on *Martin, supra*, dealing with a disabled individual who wished to use a golf cart while participating in the PGA tour, is misplaced. In that decision

> [t]he Court found that Martin should be permitted to use the cart because such a use did not fundamentally alter the character of the competition. The purpose of the rule against the use of golf carts was to inject fatigue into the game which would [affect] a [player's] shot-making ability. The Court found that allowing Martin to use the golf cart would not alter an essential element of the game which was essentially shot-making. Allowing Martin to use a cart would only have a peripheral impact on the game, and would not give Martin an advantage over the other players. The Court found that even if Martin was permitted to use a golf cart, he would still be required to walk at least 25% of the course, equal to approximately 1¼ miles from the golf cart to the course. Additionally, Martin's disability caused him to fatigue much faster tha[n] other competitors, that he [w]as in significant pain when he walked; and with each step there was a danger of fracturing his leg and hemorrhaging. Permitting Martin to use a golf cart during the tournament in no way gave him an advantage over the other participants, and did not fundamentally alter the nature of the competition. (citations omitted) (Respondent's Letter Brief at 7, 8)

In *Martin*, the NJSIAA argues, it is fully evident that the individual's disability precluded his compliance with the PGA rule. Here, on the other hand, Gregory did not repeat three grades in elementary school as a consequence of any disability but, rather, because of excessive absenteeism. The causal connection between *Martin's* inability to comply with the rule was evident in that case, such is not the case in this matter. "Instead, it was demonstrated that the student could have participated for four years and that the School District did not avail itself of that accommodation. NJSIAA properly found that the granting a waiver of the age requirement in this situation would fundamentally alter the nature of the competition as contrary to the rules." (*Id.* at 13) The NJSIAA finds support for its position in *Baisden v. West Virginia Secondary School Activities Commission*, 568 *S.E.2d* 32 (W.V. 2002), wherein the Supreme Court of Appeals, West Virginia, reversed a lower court determination granting a waiver of the age

requirement for a 19-year-old student to play football. The court held that an individualized approach to granting waivers was preferable and "waivers should be granted where a student's disabilities have delayed his progression through the education process and it is shown that a waiver will not materially alter the quality of the interscholastic sports competition involved." (citations omitted) (Respondent's Letter Brief at 9) Notwithstanding, the court in this matter found a waiver inappropriate as the student's size and ability would compromise the safety of the other players. (*Ibid.*)

Petitioner's claim that *Cruz, supra,* supports its position, the NJSIAA charges, is in error. In that case the court ruled that the association was required to consider applications for waiver of its Age Rule and to review each such application on a case-by-case basis. The NJSIAA points out that the *Cruz* court required nothing additional to that which is already provided by the NJSIAA. Applications for waivers of the age requirement are accepted from anyone who wishes to apply and each of these is reviewed and considered on a case-by-case basis pursuant to the factors articulated in *Martin, supra.*

The NJSIAA emphasizes that its decision in this matter is fully sustainable pursuant to *Martin.* Its enacted standards for modifying the Age Rule are reasonable; its rules allow for exceptions to the age requirement; students who will reach age 19 prior to having eight semesters of interscholastic ability are permitted to play in 7th or 8th grade; and the rules allow for waivers of the age requirement under certain circumstances. A waiver in this matter, it contends, would fundamentally alter the nature of the competition and, therefore, pursuant to *Martin*, was appropriately denied. (*Id.* at 9, 10)

COMMISSIONER'S DETERMINATION

The NJSIAA is a voluntary association of public and nonpublic schools, organized pursuant to *N.J.S.A.* 18A:11-3, to oversee athletics for its member schools in accordance with its Constitution, Bylaws, rules and regulations, which are approved by the Commissioner of Education and adopted annually by the member schools. Upon adoption by the member schools, these rules and regulations are deemed school policy and are enforced by the internal procedures of the NJSIAA.

It is well-established that the Commissioner's scope of review in matters involving NJSIAA determinations is appellate in nature. *N.J.S.A.* 18A:11-3; *N.J.A.C.* 6A:3-7.4; *Board of Education of the City of Camden v. NJSIAA*, 92 *N.J.A.R.* 2d (EDU) 182, 188. That is, the Commissioner may not overturn an action by the NJSIAA in applying its rules, absent a finding that the Association applied the rules in a patently arbitrary, capricious or unreasonable manner. *B.C. v. Cumberland Regional School District*, 220 *N.J. Super.* 214, 231-232 (App. Div. 1987). Nor may the Commissioner substitute his judgment for that of the NJSIAA, *even if he were to decide differently in a de novo hearing,* where due process has been provided and where there is adequate basis for the decision reached by the NJSIAA Committees. *Dam Jin Koh and Hong Jun Kim v. NJSIAA*, 1987 *S.L.D.* 259; *see, also, N.J.A.C.* 6A:3-7.4(a). The scope of the Commissioner's review in NJSIAA matters has also been codified to provide notice of this standard to the public and regulated parties:[5]

> 1. If the NJSIAA has granted a petitioner due process and its decision is supported by sufficient credible evidence in the record as a whole, the Commissioner shall not substitute his ***judgment

[5] *See*, 31 *N.J.R.* 4173(a) and 32 *N.J.R.* 1177(a).

> for that of the NJSIAA, even if the Commissioner might judge otherwise in a *de novo* review.
>
> 2. The Commissioner shall not overturn NJSIAA's application of its own rules absent a demonstration by the petitioner that such rules were applied in an arbitrary, capricious, or unreasonable manner. *N.J.A.C.* 6A:3-7(a).

Moreover, the burden of proof that an action was thus improper rests with the person or entity challenging the decision. *Kopera v. West Orange Board of Education*, 60 *N.J. Super.* 288, 297 (App. Div. 1960). It must be remembered that the arbitrary, capricious or unreasonable standard of review is extremely narrow in its scope and, consequently, imposes a heavy burden on those who challenge determinations of the NJSIAA. The standard, as defined by the New Jersey Courts provides:

> In the law, "arbitrary" and "capricious" means having no rational basis. *** Arbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration and in disregard of circumstances. Where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached.*** (citations omitted) *Bayshore Sew. Co. v. Dep't of Envt. Protection*, 122 *N.J. Super.* 184, 199-200 (Ch. Div. 1973), *aff'd* 131 *N.J. Super.* 37 (App. Div. 1974).

Upon careful consideration of the record of this matter, and mindful of the applicable standard of review, the Commissioner is satisfied that the decision of the NJSIAA denying a waiver of the Age Rule for Gregory Raiford, with respect to competing interscholastically in contact sports, was not arbitrary, capricious, unreasonable or violative of law. Initially in this regard, the Commissioner determines that petitioner was provided with the full measure of due process to which it was entitled. Two separate committees convened to consider petitioner's request for a waiver of the NJSIAA's Age Rule. The EAC hearing was

attended by the school principal, the athletic director and Gregory Raiford's guardian, each giving sworn, recorded testimony which was considered by that body. The Commissioner finds that the EAC rendered its decision based on the record before it and the evidence presented by petitioner.

Next, while not unmindful of the value of athletic competition to Gregory, the Commissioner recognizes the legitimate interest of the NJSIAA in upholding its regulations, based on health and safety considerations, designed to protect younger, less skilled students from having to compete against more skilled adult athletes. He further notes that, notwithstanding Gregory's inability to compete interscholastically in contact sports, the EAC, after considering the circumstances in his case, granted him a "limited" waiver. As such, he is not precluded from being a member of, traveling with, or "suiting up" with the football and basketball teams, or participating in other team activities such as practices and scrimmages. Thus, the Commissioner concludes that Gregory is not prevented from taking advantage of many of the beneficial aspects of the football and basketball programs even though he is ineligible to participate in interscholastic competition in these sports. Moreover, the Commissioner is also cognizant that Gregory was granted a full waiver with respect to non-contact sports, allowing him to participate competitively in any of these activities.

Accordingly, petitioner having failed to sustain its burden of establishing that denial of a waiver for Gregory Raiford to compete interscholastically in contact sports was

arbitrary, capricious, unreasonable or violative of law, the Commissioner upholds the NJIAA's decision and dismisses the Petition of Appeal.

IT IS SO ORDERED.[6]

COMMISSIONER OF EDUCATION

Date of Decision: 12/5/03

Date of Mailing: 12/5/03

[6] Pursuant to *N.J.S.A.* 18A:11-3, this decision shall constitute the final decision of the State administrative agency and may be appealed to the Superior Court. *N.J.A.C.* 6A:3-7.5.

ERNEST L. HARPER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

December 8, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 649-03
ON REMAND EDU-2321-95
AGENCY DKT. NO. 6-1/95

ERNEST L. HARPER,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY
Respondent.

James P. Swift, III, Esq., for petitioner

Eric Martin Bernstein, Esq., for respondent (Eric M. Bernstein & Associates, attorneys)

Record Closed: October 15, 2003 Decided: October 17, 2003

BEFORE **LILLARD E. LAW**, ALJ:

This matter was transmitted to the Office of Administrative Law on February 27, 2003, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement and General Release, indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

10-17-03
DATE

Lillard E Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

10-22-03
DATE

M. Kathleen Duncan/eh
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 23 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

sd

SETTLEMENT AGREEMENT AND GENERAL RELEASE

CONFIDENTIAL

This Release, dated September 30, 2003, is given

BY: The releasor(s): ERNEST HARPER

TO: ATLANTIC CITY BOARD OF EDUCATION, ITS SUBSIDIARIES, AFFILIATES, PREDESESSORS, SUCCESSORS AND ASSIGNS OF ANY AND ALL OF THEM, THEIR PRESENT AND FORMER DIRECTOR, OFFICIALS, OFFICERS, REPRESENTATIVES, ASSOCIATES, PARTNERS, SERVANTS, EMPLOYEES, AGENTS, ATTORNEYS, SUCCESSORS, HEIRS, EXECUTORS AND ADMINISTRATORS WHETHER IN THEIR INDIVIDUAL OR OFFICIAL CAPACITIES AND ALL OTHER PERSONS, FIRMS, CORPORATIONS, ASSOCIATIONS, PARTNERSHIPS OR ANY OTHER ENTITIY CONNECTED THEREWITH.

If more than one person signs this Release, "I" shall mean each person who signs this Release.

1. Release. All parties mentioned above release and give up any and all claims and rights which they may have against each other. This release applies to claims resulting from anything which has happened up to now. I specifically release all claims relating to or arising out of Mr. Harper's employment with the Board Of Education deriving from the incidents related to the matter known as Ernest Harper V. Atlantic City Board Of Education, Docket No: EDUOA-02321-95S. Harper and the Board expressly understand and agree that said payments include any and all amounts that may be claimed by Harper or on his behalf, or by his Attorney's, Heirs, Successors or Assigns, against the Board. The payment mentioned above is in complete and full settlement of any and all claims that Harper has or could be owed by the Board in connection with anything that happened in reference to the above referenced matter. Further, Harper and the Board agree that the Settlement Agreement and General Release is contingent on and subject to approval and ratification by the Board.

   The $9,000.00 (Nine Thousand Dollars) agreed upon settlement figure was inadvertently already paid to Ernest Harper prior to the approval by the commissioner of the Board of Education.

2. Payment. This Settlement is intended as a resolution for any and all possible claims, actual or implicit and Harper hereby waives any and all claims for lost wages, income or future earnings and any other benefits potentially available arising out of the matter known as Ernest Harper V. Atlantic City Board Of Education, Docket NO: EDUOA-02321-95S. Harper also understands and agrees that any adjustments to his withholding or any estimated tax payments are his responsibilities.

3. Who is Bound. This Settlement Agreement and General Release shall not be used as evidence or for any other purpose in any other action or proceeding, other than evidence of the compromise between Harper and the Board as set forth herein or to enforce the terms of the Settlement Agreement and General Release.

4. Signatures. Harper releases, acquits, gives up, forever discharges any and all claims and rights which he may have had against the Board for anything that happened arising from or in

any way relating to the matter known as Ernest Harper V. Atlantic City Board Of Education EDUOA-02321-95S. The Board releases, acquits, gives up and forever discharges any and all claims and rights which the Board may have had against Harper.

5. This settlement and general release contains the full agreement of Harper and the Board and may not be modified, altered, changed or terminated except upon the express prior written consent of Harper and the Board, which consent must be signed by Harper and the Board or their duly authorized agents.

6. Harper represents and warrants that no other person or entity have any interest in the claims, demands, obligations, or causative action referred to in this settlement agreement and general release; that Harper is not sold, assigned, transferred, conveyed or otherwise disposed of any of the claims, demands. Obligations or causative action referred to in the verbal complaint and / or in this settlement agreement and general release.

7. This settlement agreement and general release shall be construed and interpreted in accordance with the laws of the State of New Jersey.

8. Harper and the Board shall bear all costs and expenses arising from the actions of their own counsel in connection with the settlement agreement and general release. As further consideration for the settlement agreement and general release, Harper and his attorney agree that this sum represents all the money the Board has agreed to pay Mr. Harper and his attorney and any additional fees which may arise from the actions of Harper's attorney in connection with any matter arising from Harper's employment with the Board are to be born by Harper.

This settlement agreement and general release contains the entire agreement between Harper and the Board with regard to the matter set forth in Ernest Harper V. Atlantic City Board of Education, Docket No: EDUOA-02321-95S.

9. In entering into the settlement agreement and general release, Harper has relied upon the legal advice of his attorney who is the attorney of his own choice, as to the terms of the settlement agreement and general release which have been completely read and explained by his attorney and has been fully understood and voluntarily accepted.

IN WITNESS WHEREOF, Harper and the Board have hereunto set their hands

JAMES P. SWIFT, ESQUIRE

ERNEST HARPER

ERIC M. BERNSTEIN, ESQUIRE
for Atlantic City Board of Education

OAL DKT. NOS. EDU 649-03 AND EDU 2321-95 (ON REMAND)
AGENCY DKT. NO. 6-1/95

ERNEST L. HARPER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

The record, Settlement Agreement and General Release, and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 12/8/03

Date of Mailing: 12/8/03

650-03

650-03R

K.W. AND W.B., on behalf of minor child, L.B.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MILLSTONE, SOMERSET COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

December 11, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 6697-03
(ON REMAND EDU 4177-02)
AGENCY DKT. NO. 138-5/02

K.W. AND W.B. O/B/O
L.B.,
Petitioners,
v.
BOARD OF EDUCATION
OF THE BOROUGH OF MILLSTONE,
Respondent.

Angela White Dalton, Esq., for petitioners (Foss, Bowe & San Filippo, attorneys)

Bruce W. Padula, Esq., for respondent (Scarni & Hollenback attorneys)

Record Closed: October 27, 2003 Decided: October 27, 2003

BEFORE **ANTHONY T. BRUNO**, ALJ:

This matter was transmitted to the Office of Administrative Law on September 29, 2003, as a remand of OAL Dkt. No. EDU 4117-02, per the Commissioner's decision of September 11, 2003.

The parties have agreed to a settlement and have prepared a Stipulation of Dismissal and Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

October 27, 2003
DATE

Anthony T. Bruno
ANTHONY T. BRUNO, ALJ

Receipt Acknowledged:

October 30, 2003
DATE

M. Kathleen Duncan (for)
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 31 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

lam

SCARINCI & HOLLENBECK, LLC
1100 Valley Brook Avenue
P.O. Box 790
Lyndhurst, New Jersey 07071
Tel: 201-392-8900
Attorneys for Millstone Board of Education

K.W. and W.B on behalf of the minor L.B., Petitioners, vs. MILLSTONE BOROUGH BOARD OF EDUCATION, Respondent.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DOCKET No.: EDU-4177-02 Agency Docket No.: 138-5/02 **STIPULATION OF DISMISSAL AND SETTLEMENT AGREEMENT**

WHEREAS, on or about May 9, 2002, Petitioners filed a Petition of Appeal with the Commissioner of Education regarding Petitioners' residency qualifications for a free public education in the Respondent's district; and

WHEREAS, on June 3, 2002, Respondent filed its Answer and Counterclaim with the Commissioner; and

WHEREAS, the parties have agreed to amicably resolve this matter upon the following terms and conditions.

NOW THEREFORE, the parties stipulate and agree as follows:

1. Petitioners stipulate and agree that this matter shall be dismissed with prejudice and without costs or attorneys fees;

2. Respondent stipulates and agrees that its counterclaim for tuition costs shall be dismissed with prejudice and without costs or attorneys fees; and

3. Petitioners agree to withdraw L.B. from the schools operated by Millstone Borough Board of Education, and further agree not to seek re-admittance thereto.

DATED: 7/18/03

Angela White Dalton, Esq.
Attorney for Petitioners

Frank Gchilson 7/18/03

Frank G. Chilson, Business Administrator
Millstone Borough Board of Education

{00120454.DOC}

OAL DKT. NOS. EDU 6697-03 AND EDU 4177-02 (ON REMAND)
AGENCY DKT. NO. 138-5/02

K.W. AND W.B., on behalf of minor child, L.B.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MILLSTONE, SOMERSET COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

The record, Stipulation of Dismissal and Settlement Agreement, and Initial Decision issued on remand by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. In so doing, the Commissioner notes that the record on remand includes a copy of the minutes from the Millstone Borough Board of Education's meeting on October 17, 2002 wherein the Board approved the settlement of this matter in accordance with *N.J.A.C.* 6A:3-1.13(d).

The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 12/11/03

Date of Mailing: 12/15/03

642-03

J.B. AND D.B., on behalf of minor child, A.B.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF PINE HILL, CAMDEN COUNTY,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioning parents alleged the Board's selection process for the National Honor Society (NHS) was arbitrary and capricious.

The ALJ found that the Board reasonably assessed A.B.'s candidacy for the NHS in the 2002-03 school year. Local chapters of the NHS enjoy a "measure of latitude" in forming policy within broad guidelines as long as the process is fair and fairly applied. The ALJ found this was the case herein and ordered the petition dismissed.

Having considered the record and the ALJ's assessment of the testimony of the witnesses (no transcripts were submitted), The Commissioner adopted the findings and determination of the ALJ as his own.

December 1, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4399-03

AGENCY DKT. NO. /03

J.B. AND D.B. ON BEHALF OF
MINOR CHILD, A.B.,

Petitioners,

v.

BOARD OF EDUCATION OF THE
BOROUGH OF PINE HILL,
CAMDEN COUNTY,

Respondent.

J.B. and D.B., parents of A.B., *pro se*

Anthony Padovani, Esq., for the respondent (Sahli & Padovani, attorneys)

Record Closed: September 29, 2003 Decided: October 17, 2003

BEFORE **SOLOMON A. METZGER**, ALJ:

This matter arises out of a petition filed with the Commissioner of Education, pursuant to *N.J.S.A.* 18A:6-9, alleging irregularities in the selection of students for membership in the National Honor Society (NHS) and seeking instatement for A.B. The matter was referred to the Office of Administrative Law as a contested case, pursuant to *N.J.S.A.* 52:14B-1 through -15. A

hearing was conducted on September 5, 2003 and the record closed on September 29, 2003, with receipt of the last post-hearing memorandum.

The basic facts are undisputed. The NHS is a national organization dedicated to the promotion of scholarship, leadership, service and character in secondary school students. Within the respondent district, Overbrook High School has constituted a local NHS chapter. The chapter is governed by a five-member faculty council, which among other things votes on the admission of student candidates. The faculty council is served by an advisor, who acts as a sixth, non-voting member of the council and is responsible for the day-to-day work of the chapter. A.B. was a candidate for admission to the chapter in 2002/03 while a junior at the High School and was not offered admission.

During the 2002/03 school year the first threshold requirement for student eligibility was a grade point average (GPA) of 3.5. All students with that average, including A.B., entered a second stage of competition, in which questionnaires were sent to the entire faculty seeking evaluations in the areas of interest to the NHS (R-1). A rating scale of 1 to 4 was used and the questionnaires were returned to Jane Windle, the faculty council advisor, who tabulated the results and provided a summary to the council for each student. A.B. received a score of 3.268, which was rounded up to the next 100^{th} of a point, or 3.27 (R-3). A weighted average rating of 3.3 was required to continue in the competition. Of 38 students with qualifying GPA's 29 were admitted to the chapter (R-8).

Petitioners subpoenaed Barbara Ashe as a witness. She is a guidance counselor at Overbrook High School and has been a member of the faculty council for about ten years. Ms. Ashe testified that the faculty council voted a few years ago to use 3.5 as the GPA requirement and 3.3 as the faculty response threshold. Ms. Windle organizes and summarizes the information upon which the council votes. Typically she does not see the questionnaires provided by the faculty, but these raw scores can be made available should any council member have a question. The students who achieved the 3.3 level on questionnaire responses were invited to a final step in the competition, which requires them to substantiate extra-curricular activity information. Those that fell below 3.3 were eliminated from further consideration by a vote of the council.

Ms. Ashe testified that she was disappointed that A.B. was not invited to join the NHS, however, the process of the faculty council was serious and deliberate. There were a few other students who missed the second threshold by even closer margins than A.B.

A.B. testified in his own behalf. He feels that he was eliminated unfairly partly because he was given no idea of the qualification requirements. He was a member of the NHS in his junior high school and he recalled that at that time there was a form to complete that allowed him to discuss his accomplishments. Under the system used in the senior high school his teachers did not have the benefit of this type of information. A.B. testified that Ms. Windle was his math teacher last year and that she discussed the NHS with him. She told him that if he had a sport, or a club he would probably be fine. Ms. Ashe gave him similar advice and this was inadequate. A.B. testified that Ms. Ashe told him that there was no vote to utilize 3.3 as a minimum score.

Respondent also presented witnesses. Jane Windle has been employed in the district for thirty-seven years as a math teacher and has been the NHS advisor for twenty-five years. As the faculty advisor she chairs the meetings of the council and oversees student service projects. Ms. Windle testified that she forwarded student questionnaires to the faculty on or about March 10 2003 and these were completed and returned to her on or about March 14, 2003. She then eliminated the highest and lowest scores to protect students from any one adverse responder and rounded to the nearest 100^{th} to determine whether the standard had been met. This procedure has been in place since the 1998 school year (R-2, R-6). Before then there was no 3.3 cut-off and the faculty council felt that the system was overly subjective. Rounding is done to the nearest 100^{th} because that is also the standard for calculating a GPA.

Ms. Windle testified that the faculty council reviews the summary data she provides and then votes on each student. After the vote she talks to students who have been rejected and tries to explain what they might do as seniors to compensate. It is not always clear what is missing, but she can sometimes glean the areas of perceived weakness from the faculty assessments. The low scores for A.B. fell in the areas of leadership and service (R-3). Ms. Windle testified that she spoke to A.B. generally as a junior about how he might gain admission to the NHS and she did mention clubs and sports because often this is where students falter. Ms. Windle testified

that there were students who missed the 3.3 cut, who were closer to this threshold than A.B. The final stage of the competition requires students to complete an activity advisory form and have their list of extra-curricular activities verified.

Ms. Windle testified that Mr. and Mrs. B. visited her after A.B.'s rejection and they sought to probe into the workings of the faculty council and the raw scores provided by the general faculty. This was delicate because the deliberations of the faculty council are intended to be confidential and faculty members are assured that their questionnaire responses will not be divulged. Ms. Windle testified that most faculty councils that she is aware of do not retain the faculty questionnaires and she destroyed this material soon after tabulating the scores. Petitioners formally requested these responses by letter of March 27, 2003, but they were no longer available (P-3).

Paul J. Harmelin has been the principal of Overbrook High School for nineteen years. He testified that he annually appoints Ms. Windle as the NHS advisor and that he is not involved in the faculty council deliberations. He maintains this distance so that he can review questions that may arise after a student is rejected. He was asked to review this matter and could find no basis for disagreeing with the vote of the council.

Mr. Harmelin conceded that information about the NHS was not published in the student handbook last year and he explained that this was an error due to reorganization. He testified, however, that all of the candidates were assessed in exactly the same way and he saw no prejudice in this omission. He has made certain that information about the NHS is in the current handbook. This is the substance of the record.

School districts enjoy wide policy-making discretion and their actions may not be disturbed unless arbitrary and capricious, *Thomas v. Morris Bd. Of Educ.*, 89 N.J. Super. 327 (App. Div. 1965); *Kopera v. West Orange Bd. Of Educ.*, 60 N.J. Super. 288(App. Div. 1960). To satisfy this burden petitioners were obliged to show that District practices for admission to the local NHS chapter varied significantly from core NHS requirements. This has not been done. Petitioners have carefully scrutinized the NHS rules in search of deviations by respondent, but it may be useful to note that NHS is not the forum for this controversy and we do not know clearly

the measure it uses to evaluate chapter conformity. The arbitrary and capricious standard imposes obligations well short of the exacting compliance sought by petitioners.

It appears from the NHS documentation in the record that local chapters enjoy a measure of latitude in forming policy within broad guidelines. Thus, for example the NHS does not mandate general faculty involvement in the selection process and creates no point system for evaluation. Nonetheless, local chapters are authorized to utilize both. The NHS is also cognizant of the fact that local law may govern in some jurisdictions and instructs local chapters to make appropriate adjustments. The primary concern throughout the NHS records is that the process be fair and fairly applied. R-4.

Respondent generally follows the NHS guidelines. Ms. Windle, Ms. Ashe [1] and Principal Harmelin were credible witnesses. They testified that the district uses a five-person faculty council to vote on policy and that in 1998 this council adopted the thresholds at issue here. The faculty assessments are the primary rub in this matter. Ms. Windle gathers these and then tabulates the results for each student. The faculty council reviews her summaries and is free to see the raw scores. The raw scores are then discarded. Petitioners characterized this procedure pejoratively as destruction of evidence. Yet, the NHS actually counsels that this be done to preserve confidentiality; Ms. Windle related that this is how many chapters operate. Although no one from the NHS testified the documentation suggests that the national office is aware that some parents will want to interrogate teachers and faculty council members regarding their deliberative processes, a practice it discourages (R-4).

Petitioners argued that under these circumstances they have only Ms. Windle's assurance that her summary accurately calculated faculty responses. That is true, but in this context it is not the shortcoming they make it out to be. Ms. Windle has been performing this service for twenty-five years and she was A.B.'s math teacher last year. There is no hint that she harbored a bias in the matter. A.B. was among a group of students who missed this second tier measurement, some by a smaller margin than him. Petitioners would prefer a system that affords them open access to

[1] Petitioners advanced the theory that the faculty council was not truly independent and that Ms. Windle essentially controlled decision-making. Although NHS documents recommend that faculty council members not be drawn into disputes, petitioners represented that Ms. Ashe was a critical insider who would support their understanding. They were permitted to call her over the District's protest, however, her testimony did not appreciably help petitioners.

the teachers who provided the low evaluations and to the members of the faculty council. Typically, discovery encourages liberal information gathering. Yet, there are various policy balances that sometimes militate against this. It is not hard to see in our circumstances that the prospect of annual involvement in litigation might dampen faculty enthusiasm for this enterprise, which runs contrary to NHS and District interests. This is not to say that greater openness would be wrong, but rather, that current policy is rationally based and well within an acceptable spectrum.

Mr. Harmelin conceded that a paragraph about the NHS was not contained in the 2002/03 student handbook, but I do not see how A.B. was prejudiced by this. None of the competing students had this information and they all ran the same gauntlet.

Membership in the NHS is a tribute and is coveted particularly by students seeking admission to highly selective colleges. Rejection has clearly been a bitter pill for A.B. and for his parents. Based on this record it appears the process was fair, though it is inherently subjective. Other faculty responders might have evaluated the matter differently and this result is not the measure of A.B. He is an excellent student with bright prospects. A.B. and his family ought to understand this moment for what it is and know that in the long run this event will have no greater importance than they give it.

Based on the foregoing, I **CONCLUDE** that respondent reasonably assessed A.B.'s candidacy for the NHS in the 2002/03 school year and it is **ORDERED** that this petition be dismissed.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

10/17/03
DATE

SOLOMON A. METZGER, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

10/17/03
DATE

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OCT 23 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

/cad

WITNESSES

For Petitioner:

Barbara Ashe

A.B.

For Respondent:

Jane Windle

Paul J. Harmelin

EXHIBITS

For Petitioner:

P-1 NHS Constitution

P-2a Prior District selection procedure for NHS, undated

P-2b Current District Selection Procedure for NHS, undated

P-3 Letter to Mr. Hamlin from Joanne Bilarczyk, dated March 27, 2003

P-4 Board minutes dated April 29, 2003

For Respondent:

R-1 Memo to Staff from Jane Windle, dated March 10, 2003

R-2 Memo to Paul Harmelin from Dennis Grimmett, dated January 9, 1998

R-3 Summary of A.B. evaluations

R-4 NHS Constitution and related documents

R-5 Overbrook High School certificate of NHS affiliation

R-6 Chapter by-laws

R-7 Letter to A.B. and parents, dated April 9, 2003

R-8 Letter to Sahli & Padovani from Paul J. Harmelin, dated August 18, 2003

J.B. AND D.B., on behalf of minor child, A.B.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF PINE HILL, CAMDEN COUNTY,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioners' exceptions and the Board's reply thereto are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4, and were considered by the Commissioner in reaching his decision.

Upon careful and independent review of the record in this matter, the Commissioner finds no cause to disturb the findings of fact and conclusions of law contained in the Initial Decision. Although he acknowledges that petitioners raise exceptions regarding facts determined by the Administrative Law Judge (ALJ) based on testimony of the witnesses and the credence and weight ascribed to such testimony by the ALJ, the Commissioner notes that the record before him does not include transcripts from the hearing conducted at the OAL in this matter. Challenges to the factual findings predicated upon credibility determinations made by an ALJ require that the challenging party supply the Commissioner with the relevant and necessary portion of the transcripts. *In re Morrison*, 216 *N.J. Super.* 143, 158 (App. Div. 1987). In the absence of such transcripts, due regard must be given to the person who heard the live testimony

and assessed the witnesses' behavior at the hearing. *Close v. Kordulak Bros.*, 44 *N.J.* 589, 599 (1965); *N.J.S.A.* 52:14B-10(c).

Accordingly, the Initial Decision is adopted for the reasons expressed therein. The Petition of Appeal is dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 12/1/03

Date of Mailing: 12/2/03

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

#646-03

647-03

KATHLEEN DONVITO,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE NORTHERN VALLEY REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	COMMISSIONER OF EDUCATION
	:	EDUCATION
RESPONDENT,	:	
AND	:	
LOUISE RYAN,	:	
INTERVENOR.	:	

SYNOPSIS

Petitioning Home Instructor/ HSPT/SRA Tutor alleged the Board violated her tenure and seniority rights in deciding not to reemploy her for the 2002-03 school year.

In light of *Hyman, Spiewak* and *N.J.S.A.* 18A:16-1.1, the ALJ concluded that petitioner failed to attain tenure through any of the positions that she held within the District. The ALJ found that home instructors are akin to substitutes for purposes of tenure and, thus, the temporary employee exception to tenure acquisition applies herein. Moreover, the ALJ determined that petitioner's tutor position fell into the category of an extra-classroom assignment that was not subject to tenure. The ALJ ordered that the Board's and Intervenor's Motion for Summary Decision be granted.

Citing Spiewak, and the subsequent court decisions in *Sayreville* and *Lammers,* the Commissioner concluded that the only applicable exception to the Tenure Act relating to tenure accrual by teachers, *N.J.S.A.* 18A:16-1.1, does not apply to teachers serving in the position of home instructors since they are not serving in the place of absent employees who are expected to return. Also, the Commissioner lacks the authority to create exceptions to the tenure law; therefore, petitioner's years of service as a home instructor are found to be tenure eligible. In addition, petitioner's assignment as an HSPT/SRA Tutor was an instructional assignment necessitated by the regulations dealing with graduation requirements and, thus, akin to an assignment as a remedial teacher, basic skills teacher or supplemental teacher. In that petitioner held valid certificates and endorsements issued by the State Board of Examiners and served in positions requiring certification during the entire period of employment at issue, the Commissioner set aside the order of the ALJ and granted summary decision to petitioner. The Commissioner ordered petitioner's reinstatement to a full-time position held by any nontenured teacher within petitioner's area of certification of the Board's choice, with full back salary and benefits, less mitigating income.

December 4, 2003

STATE OF NEW JERSERY
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 5877-02
AGENCY DKT. NO. 162-5/02

KATHLEEN DONVITO,

Petitioner

v.

BOARD OF EDUCATION OF THE NORTHERN VALLEY REGIONAL HIGH SCHOOL,

Respondent

Louis P. Bucceri, Esq. For petitioner

Cherie L. Adams, Esq. (Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross) for respondent

Alfred F. Maurice, Esq. (Springstead & Maurice) for the intervener, Louise Ryan

Record Closed: June 26, 2003 Decided: July 22, 2003

BEFORE **CAROL I. COHEN**, ALJ:

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

Petitioner, Kathleen Donvito, filed a Verified Petition on or about May 31,

2002 alleging that the Respondent, Northern Valley Regional High School Board of Education (Board), violated her tenure and/or seniority rights in deciding not to re-employ her for the 2002-2003 school year. The Board filed its Answer denying the petition on or about June 19, 2002. The matter was forwarded for filing at the Office of Administrative Law (OAL) on July 18, 2002. A pre-hearing telephone conference was held on November 18, 2002. At the time the petitioner was instructed to notify, by January 30, 2002, twenty-two non-tenured teaching staff members of their right to intervene in the litigation. Louise Ryan elected to intervene.

On March 10, 2003, the parties participated in a telephone conference call with the Court. The hearing dates of April 7 & 8, 2003 were adjourned at the parties' request. A schedule was prepared for Cross-Motions for Summary Decision. Initial Briefs were submitted on April 8 and reply briefs were submitted on May 9, 2003. On June 12, 2003 I sent a letter to all parties stating that one issue had not been fully briefed. I asked to be informed, whether the petitioner resigned her position when she accepted the out of district position in September 1999 and what impact her resignation would have on the issue before the court. Petitioner responded by letter brief on June 25 and Respondent on June 26, 2003.

STIPULATION OF FACTS

1. The petitioner, Kathleen Donvito (hereinafter referred to as the "petitioner") was employed by the Northern Valley High School District (hereinafter referred to as "respondent") to perform the following services during the time period indicated.

a) Per diem substitute teacher on occasion through the 1995-96 school year.

b) Home Instructor – Home Instructors are paid on an hourly wage basis, without contract and without benefits. Duties included providing instruction for those students who were

unable to attend classes in school because of physical illness or other reasons. Home Instructors taught course content based upon the program requirements for graduation. Home instructors work at times that varies depending upon the number of students needing services. Since a student's absence is usually unpredictable home instruction assignments are usually made with minimal advance notice. John Salisbury, Director of Guidance for Northern Valley Regional High School, was Petitioner's Supervisor in her role as a home instructor. Petitioner provided such services during the following school year as indicated by the time sheets and other documents referenced:

i) 1995-96
ii) 1996-97
iii) 1997-98
iv) 1998-99
v) 1999-2000
vi) 2000-01
vii) 200-02

c) HSPT/SRA Tutor –Duties included tutoring for the High School Proficiency Test ("HSPT") and tutoring students for the Special Review Assessment ("SRA"). SRA and HSPT tutoring provides remediation for students to assist in preparation for testing and is conducted for a limited time period per pupil. Jim McDonnell, Supervisor of World Languages, ESL, and SRA Coordinator supervised Petitioner in this role. Petitioner provided such services as needed during the following school years as indicated by the time sheets and other documents referenced:

i) 1998-99
ii) 1999-2000

d) Perkins Grant Counselor – Performing testing of students for high schools participating in Region III of the Bergen County Special Services District. Respondent obtained the grant to perform this service in its role as LEA for Region III. John McKeon, Director of Region III Special Education, supervised Petitioner in her role as a Perkins Grant Counselor. These services were performed by petitioner as follows:

i) March 11, 1998 into June 1998

ii) March 1999 into June 1999

e) Special Education Teacher, two-fifths (2/5) contract from February 18, 2000 through June 30, 2000.

f) Special Education Teacher, full-time contract from September 1, 2000 through June 30, 2001.

g) Special Education Teacher, four-fifths (4/5) contract from September 1, 2001 through June 30, 2002.

2. Petitioner holds the following educational certificates and endorsements issued by the New Jersey Department of Education:

a) Elementary School Teacher (issued 2/75)
b) Teacher of English (issued 2/75)
c) Nursery School (issued 4/75)
d) Learning Disabilities Teacher Consultant (issued 8/80)
e) Teacher of the Handicapped (issued 6/99)

3. Petitioner's contract with Respondent expired on June 30, 2002 and Petitioner's employment was not renewed for the following school year.

4. Respondent did employ full-time non-tenured teachers in petitioner's area of certification and endorsement for the 2002-3003 school year. Intervener Louise Ryan is one of those non-tenured teachers.

5. During calendar year 1997, petitioner earned gross wages of $26,112.50 from employment with respondent.

6. During calendar year 1998, petitioner earned gross wages of $15,091.75 from employment with respondent.

7. During calendar year 1999, petitioner earned gross wages of $20,738.42 from employment with respondent.

8. Petitioner was employed and performed the duties of a full-time Learning Disabilities Teacher Consultant in the Park Ridge School District from September 1, 1999 until mid-October 1999. She continued to be paid on 60 days notice by Park Ridge until approximately mid-December, 1999. She did not continue in that position thereafter. She resumed home instruction assignments for Northern Valley as of September 15, 1999.

9. For the 2001-2002 school year petitioner was paid a salary of $50,282.40 on a 4/5 contract based on Salary Guide September 06, Scale 04. She also received the normal benefits due to a teaching staff member.

10. As of January 28, 2003, petitioner secured alternative full-time employment in another school district under contract through June 30, 2003 at a prorated salary based on an annual salary of $65,955.00. She is also receiving full health insurance coverage.

11. All of the students assigned to petitioner for home instruction during the time period from June 1, 1999 to February 18, 2000 were classified as handicapped.

12. From June 1997 through January 2000, the only hiring resolutions by the respondent Board as to petitioner were resolutions placing her on its substitute list.

13. Petitioner's payment as a Home Instructor, based on her hourly time sheets, was duly authorized through the procedures in effect in the district during that time period.

14. As a Home Instructor, petitioner was instructing students who were absent from school due to illness or other reason. If those students were not absent,

they would be taught by classroom teachers who were present, willing and able to teach these absent students if they were able to return to school.

15. During the period of her service as a Home Instructor, Ms. Donvito was not working in a position that was previously held by a teacher who left it on a leave of absence or by a teacher who was otherwise absent from the position but expected to return.

LEGAL ISSUES

1. The first issue raised is whether this matter can be decided on Summary Motion. While the parties dispute who should be granted Summary Decision, they agree that, as a matter of law, there is no genuine issue of material fact with respect to the controversies involved in this matter.
2. The second issue is whether, under a series of scenarios, the Petitioner has gained tenure.
3. The third issue is whether the petitioner resigned from her position when she accepted a full-time position out of District in September 1999.
4. If the petitioner has gained tenure, is she entitled to the relief sought in the petition.

ARGUMENTS OF THE PARTIES

The petitioner argues that, according to *N.J.S.A.* 18A:28-5, an individual appointed to a position requiring a teaching certificate gains tenure, if they teach for the time required under the statute. The time required is three consecutive calendar (12 month) years, three consecutive academic years, together with employment at the beginning of the next succeeding academic year, or the equivalent of more that three academic years within four consecutive academic

years. See *N.J.S.A.* 18A:28-5(a)-(c). The only exception to the statute is the "temporary employment" exception, which, according to *N.J.S.A.* 18A:16-1.1, is limited to employees hired to take the place of an absent teacher. See Spiewak v. Rutherford Bd. Of Ed., 90 *N.J.* 63 (1982) quoting Point Pleasant Beach Teachers' Association v. Callam, 173 *N.J. Super.* 11, certif. den., 84 *N.J.* 469 (1980). Since Spiewak, supra, the only statutory exception relating to tenure accrual by teachers is *N.J.S.A.* 18A:16-1.1, which allows a district to designate some person to act in the place of any absent employee, but that person would not acquire tenure in that office. Thus, according to Sayreville Education Association v. Board of Education of the Borough of Sayreville, 193 *N.J. Super.* 425 (*App. Div.* 1984), *N.J.S.A.* 18A:16-1.1 applies when a substitute teacher is required, because of the absence of the regular teacher, whose return to duty is contemplated. The petitioner further asserts that the fact that an employee is part-time or that there is no formal appointment to the position by the board does not bar the accrual of tenure.

The petitioner then goes on to outline a number of scenarios that could be constructed to prove that she gained tenure by service for the equivalent of more than three academic years within four consecutive academic years. In one scenario, accrual of tenure is based on service during the 1996-97 through the1999-2000 school year. The time consists of a combination of Home Instructor, HSPT/SRA tutor and 2/5 Contract Teacher for a total of 33.5 months. The second scenario covers the period of service from 1997-98 through the 2000-01 school year. The service consists of 10 months as a full-time Contract Teacher, approximately four months as a 2/5 Contract Teacher and the balance of the time as a Home Instructor and HSPT/SRA tutor for a total of 38.5 months. The third scenario is based on service during the 1998-99 through the 2001-2002 school year. Here 19.5 months were accrued as a Home Instructor and 20 months as a full-time Contract teacher and a 4/5 Contract teacher for a total of 39.5 months. The fourth possibility attains tenure based on service as a Home Instructor and 2/5 Contract teacher for the years 1996-2000 for a total of 31.5

months. Finally, the petitioner argues that tenure can be based on service as an HSPT/SRA tutor and Contract Teacher for the period 9/98-6/02 for a total of 31.5 months[1]. The petitioner also posited that the petitioner's service testing students from 3/1/98-6/98 and 3/12/99 to 6/18/99 could be included in the calculations, since certification is required and the source of funding is irrelevant.

The petitioner then goes on to take exception with the decision in *Hyman, et al. v. Bd. Of Ed., Teaneck,* 1983. 1983 S.L.D. 699 (*Comm. Of Ed.*), reversed in part 1985 S.L.D. 1940 (*St. Bd. Of Ed.*) aff'd. in part, remanded in part, *Superior Court Appellate Division, Dkt. No.* A-3508-84T7. In that decision the Administrative Law Judge found that service as a Home Instructor did not count toward tenure. This opinion was adopted by the Commissioner of Education. The petitioner submitted that the *Hyman* decision was wrong as a matter of law and fact. This position was based on the fact that the ALJ referred to home instruction as intermittent, temporary and unscheduled. The petitioner argued that her service as a Home Instructor was virtually continuous from January 1997-June 2000. Therefore, it did not fall into the category of intermittent or temporary. Further, the petitioner earned substantial income from the District during that period of time. In addition, contrary to the conclusion of *Hyman*, Home Instruction does not constitute the work of a substitute, because it is not work done in place of an absent teacher. Since no other statutory exception applies, tenure must be found to accrue based on the Home Instruction service. Therefore, the Petitioner has the right to claim existing full-time positions held by non-tenured employees, whether or not she was last employed as a part-time teacher.

As to the issue of resignation, the petitioner first asserts that there was no formal resignation by Ms. Donvito, when she took a full time position out of district in September 1999. In addition, an employee is permitted to decline part-

[1] This is the position outlined in the reply brief. In the initial brief the last scenario consisted of 7 months as an HSPT/SRA Tutor, 5.5 months as an SRA Home Instructor and 2/5 Contract Teacher, 10 months as a Full-time Contract Teacher and 10 months as a 4/5 Contract teacher.

time employment and still retain their tenure rights to a full time position. Boquszewski v. Board of Ed., Demarest, 1979 S.L.D. 232 (*Comm. Of Ed.*). The petitioner also pointed out that she continued to work for the District in September 1999 as a home instructor and, therefore, there was no break in service. Further, an employee cannot be found to waive the accrual of tenure absent a clear and express agreement to do so. See Carney v. Bd. Of Ed., Summit, 1980 S.L.D. 1110 (*Comm. of Ed.*). In addition, since accrual of tenure prior to the 1999-2000 school year was not possible, the petitioner's working for another district in 1999 had no impact on her tenure rights.

On their part the School District asserts that, time spent working as a home instructor, does not count toward tenure. Their position is that the reasoning in Hyman is applicable to this case as well. Ms. Hyman worked as a home instruction teacher and she possessed a teaching certificate, as required by law. Her schedule varied greatly as to the number of hours she worked per day and the number of days and weeks she worked in a particular month. She was paid hourly and at times performed home instruction, while serving in other tenure eligible positions. This was similar to the present matter. Ms. Hyman claimed that her home instruction assignments should be credited toward tenure. The Board cited the Commissioner's opinion in the Hyman case that home instruction is "intermittent, temporary, and unscheduled employment" and that " it was akin to substitute teachers, who also do not earn tenure, except that the home instruction is necessitated by the student's inability to attend class at school, as opposed to the teachers' absence." *Id.* at 709. The Board asserted that, as in Hyman, the Petitioner was the equivalent of a substitute based on the intermittent and unscheduled nature of her work. They assert that petitioner's service was anything but "virtually continuous", stating that she worked anywhere from one to seven hours per day and "on some days, weeks, and even months she did not work at all." In fact, the Petitioner's hiring resolutions placed her on a substitute list. Thus, the Board argues that Hyman is right on point. Based on this opinion, Petitioner first started to accrue tenure on February 18, 2000, when

she was appointed to a position as a special education teacher on a two-fifths basis. Therefore, her total tenure time is slightly more than two years and four months over three academic years. Louise Ryan, the Intervener in this matter, agreed with the position of the Board, that Ms. Donvito could not gain tenure based on her service as a Home Instructor.

The Respondent also took exception to the Petitioner's scenario, that time spent as a HSPT/SRA tutor counted toward tenure. The Board asserted that the tutor position was essentially an unrecognized, auxiliary assignment that did not count toward the accrual of tenure. See *Boney v. Pleasantville Bd. Of Education,* 71 *S.L.D.*579. In addition, the time sheets demonstrate that the Petitioner performed this work in a sporadic manner, working random hours and days. In addition, the petitioner listed her hours on her Home Instruction work sheet. The Board also argued that the petitioner's decision to decline the District's offer of employment and accept employment in another district precluded the achievement of tenure. Citing *Solomon v. Princeton Bd. Of Education,* 77 S.L.D. 650, aff'd 77 S.L.D. 657 and *Kimless v. Woodbridge Twp. Bd. Of Ed.,* 78 S.L.D. 651, they argue that an employee who resigns and leaves a district, no matter what the length of time between resignation and re-employment, relinquishes her tenure rights and must commence the tenure probationary period anew. The break in service from September-October 1999, when she accepted a position in another district, represented a resignation and a relinquishment of her tenure rights.

The District further argued that, while there was no formal resignation, the petitioner effectively resigned her position by refusing the Board's offer of Employment in September 1999 and extinguished any tenure rights that may have accrued. The Respondent cited *Riemann v. Edison Bd. Of Education,* 80 *S.L.D.* 636 for the position that a staff member who resigns forfeits all tenure and seniority rights, that accrued prior to resignation. The petitioner's refusal to accept the Board's offer in June 1999 of a two-fifths position for September 1999,

and her decision to teach full-time in another district was essentially a resignation, which voided any tenure rights petitioner may have had. The Respondent cited a number of cases including *Ralph v. Highland Park Bd. Of Education,* 91 *S.L.D.* 2476, *Hagens v. Princeton Board of Education, Commissioner of Education* #25-82 (January 26, 1982) and *Bartz and Burke v. Green Brook Bd. Of Education*, 87 *S.L.D.* 2520 to support its position.

DISCUSSION

1. STANDARD FOR SUMMARY DECISION

The rules governing practice in the Office of Administrative Law provide that a motion for summary decision may be granted, if there is no genuine issue of material fact and the moving party is entitle to prevail as a matter of law. This provision mirrors the language of Rule 4:46-2 and the Supreme Court's decision in *Judson v. Peoples Bank and Trust Co. of Westfield,* 17 *N.J.* 67 (1954). Under *N.J.A.C.* 1:1-12.5(b), the determination to grant Summary Judgment should be based on the papers presented as well as any affidavits, which may have been filed with the application. In order for the adverse, i.e., the non-moving party to prevail in such an application, responding affidavits must be submitted showing that there is indeed a genuine issue of fact, which can only be determined in an evidentiary proceeding. The Court in *Brill v. Guardian Life Insurance Co. of American,* 142 *N.J.* 520, 523 (1995), set the standard to be applied when deciding a Motion for Summary Judgment.

> The determination whether there exists a genuine issue with respect to a material fact challenged requires the Motion Judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party... they are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party.

If the non-moving party's evidence is merely colorable, or is not significantly probative, summary judgment should not be denied. See *Bowles v. City of Camden*, 993 F. *Suppl.* 255, 261 (*D.N.J.* 1998).

Based on the Briefs and Affidavits presented by the parties, I **FIND**, that there is no genuine issue of material fact and the matter can be decided on Summary Decision.

2. WHETHER, UNDER ANY OF THE SCENARIOS PRESENTED, THE PETITIONER HAS ACQUIRED TENURE.

A. Tenure Law

The tenure of educational personnel is authorized by the Education Tenure Act, *N.J.S.A.* 18A:28-1 to –18. Tenure is a status in a particular position created by statute, not the agreement of the parties, therefore, it is a "statutory right imposed upon a teacher's contractual employment" ... that "may not be forfeited or waived." *Spiewak v. Rutherford Bd. of Educ.*, 90 *N.J.* 63, 77 (1982)(citing, *Zimmerman v. Newark Bd. of Educ.*, 38 *N.J.* 65, 72 (1962); *Red Bank Ed. Ass'n v. Red Bank Bd. of Educ.*, 78 *N.J.* 122, 141 (1978)).

Educators who are employed in public schools must hold a valid certificate "to teach, administer, direct or supervise the teaching, instruction or educational guidance of ... pupils in such public schools." *N.J.S.A.* 18A:26-2. The State Board of Examiners has implemented the certification requirement by authorizing three certificates that an educator may hold: (1) Instructional; (2) Administrative; and (3) Educational Services. *N.J.A.C.* 6:11-2.3. In order to obtain tenure, an educator must hold the appropriate certificate for his or her position. *N.J.S.A.* 18A:26-5. An educator may hold more than one type of certificate.

In addition to the three types of certificates, an educator may hold, the State Board of Examiners has designated special endorsements under each type

of certificate. *N.J.A.C.* 6:11-2.3. An educator must hold the appropriate certificate and endorsement for his or her position. *N.J.A.C.* 6:11-6.1, -6.2. An educator may possess multiple endorsements under a single certificate, qualifying him or her to fill any position covered by the respective endorsements. *N.J.A.C.* 6:11-6.2(a)(2), (a)(8).

Therefore, in order to obtain tenure, an educator must hold the appropriate certificate issued by the State Board of Examiners and maintain employment in a position for:

> (a) Three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or
> (b) Three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or
> (c) The equivalent of more than three academic years within a period of any four consecutive academic years.
>
> [*N.J.S.A.* 18A:28-5.]

Our Supreme Court has held that "teachers who provide remedial and supplemental instruction to educationally handicapped children may acquire tenure... if they meet the qualifications in the statute." *Spiewak, supra,* 90 *N.J.* at 66. The Court also held, "[b]y the express terms of the these statutes [*N.J.S.A.* 18A:1-1 and 18A:28-5], an employee of a board of education is entitled to tenure if (1) she works in a position for which a teaching certificate is required; (2) she holds the appropriate certificate; and (3) she has served the requisite period of time." *Id.* at 73-74.

The only applicable exception to the Tenure Act was addressed in *Spiewak.* There the court, citing *N.J.S.A.* 18A:16-1.1, provided:

> ... [a] Board of Education may designate some person to act in place of any officer or employee during the absence, disability or disqualification of any such officer or employee... [However,] no person so acting shall acquire tenure in the office or employment in which he acts pursuant to this section when so acting.
>
> Although, this statute denies tenure to temporary employees, it extends only to those who "act in place of" another employee who is absent or disabled.
>
> ********
>
> However, that exception is limited to employees hired to take the place of an absent teacher. The courts are not free to expand that exception by judicial fiat. *Id* at 74, 77.

B. CAN SERVICE AS A HOME INSTRUCTOR BE COUNTED TOWARD TENURE

Home instruction is the provision of one-to-one instruction in the student's home or other appropriate setting for reasons of discipline, safety, disability, or medical condition. *N.J.A.C.* 6A:16-1.3; *N.J.A.C.* 6A:16-4.8. Home instruction is generally requested when a student cannot attend regular classes due to temporary illness or injury, or if the student is disabled and receives home instruction pursuant to an Individual Education Plan. See *N.J.A.C.* 6A:16-4.8. The minimum number of hours required may vary based on the needs of the student, but in no case shall such instruction be completed in less than 3 days per week. *N.J.A.C.* 6A:14-4.8; -4.9.

There are no statutes, regulations or cases defining substitute teachers, except as noted above when discussing "temporary employees". The dictionary defines a substitute as "to put in place of"; "a person or thing that takes the place or function of another"; "to put or use in the place of another"; or "serving in lieu of another". Webster's Ninth New Collegiate Dictionary 1177 (1988); Barron's Law Dictionary 494 (4th ed. 1996). Pennsylvania Public School Code of 1949 specifically defines a substitute as:

> "any individual who has been employed to perform the duties of a regular professional employe[e] during such period of time as the regular professional employe[e] is absent, on sabbatical leave, or for other legal cause authorized and approved by the board of school directors or to perform the duties of a temporary professional employe[e] is absent."
>
> [*Richland Educ. Assoc. v. Richland School Dist.*, 418 A.2d 787, 789 (Pa. Commw. Ct. 1980).]

All parties argue the use of *Hyman, et al. v. Teaneck BOE,* 1983 S.L.D. 699, adopted in part, modified in part, Commissioner 1983 S.L.D. 722, modified St. Bd. 1985 S.L.D. 1940, aff'd in part, remanded in part, App. Div., No. A-3508-84 (Feb. 26, 1986). In *Hyman*, ALJ Dower-LaBastille concluded "home instructors are not teaching staff members pursuant to *N.J.S.A.* 18A:28-5 and their time is not tenurable ... Home instructors have no specific expectation of employment duration; they have full knowledge of the variability of the assignments and hourly rate of pay." *Id.* at 709 (citations omitted). In her findings of fact, which were adopted by the Commissioner, the ALJ made the following determinations:

> Since home instructors do not know from day to day and week to week whether or not or for how long they will be scheduled for such assignments and how many hours a month may be required, their work bears even less similarity to that of a

> regular teaching staff member than that of a substitute teacher.
>
> A home instructor is a substitute for a regular classroom teacher where substitution is necessitated by inability of the student to attend class at school.
>
> Home instruction is intermittent, temporary, and unscheduled employment.

Ibid.

In making her decision, the ALJ made reference to cases that were decided prior to *Spiewak*, *supra*, but she clearly had a full understanding of *Spiewak*, as it was discussed, where appropriate, in her decision. For other reasons, the State Board modified the Commissioner's decision. However, neither the State Board of Education nor the Appellate Division considered the "home instruction" issue, as the parties did not raise it in those appeals. Thus, the ALJ's determination that home instructors are akin to substitutes for purposes of tenure, which the Commissioner specifically adopted, stands. See *Id*. at 724. This definition of substitute, along with those noted earlier, S*upra*, is well within the scope of the temporary employee exception to tenure acquisition in *N.J.S.A*. 18A:16-1.1 and discussed in *Spiewak*, supra. I **FIND** the reasoning of the ALJ in *Hyman* to be persuasive on the issue of the tenure accrual of Home Instructors. Therefore, I **FIND** that the time that Ms. Donvito served as a Home Instructor cannot be used toward the accrual of tenure.

B. CAN TENURE STATUS ACCRUE FROM SERVICE AS A HSPT/SRA TUTOR

The petitioner puts forward the argument that, even if the service as a home instructor does not count toward the accrual of tenure, her position as a HSPT/Tutor for seven months should be counted toward her tenure time. It appears that the Petitioner takes this position based on the fact that HSPT/Tutor

does not fall into the substitute teacher exception and there are no other allowable exceptions according to *Spiewak*, *Supra* at 77. Based on this reasoning, the petitioner is entitled to tenure for her combined time as an HSPT/Tutor and her three contract positions. The Respondent school board relies on the decision in *Boney v. Pleasantville BOE,* 1971 S.L.D. 579 to counter this position. Boney involved a claim by a physical education teacher, who had been appointed as chairman of the physical education department. Mr. Boney claimed that he had acquired tenure in that position, after being appointed chairman for five years. The Commissioner of Education ruled that no tenure status accrues to extra-classroom assignments such as that performed by petitioner, and they are renewed or discontinued at the discretion of the Board, *Id.* at 585.

While the *Spiewak* case dealt with special education teachers, some of whom were funded through federal grants, they all performed their duties on a regular basis for a set number of hours per week. They were only distinguishable from other teachers based on the children they taught and the source of funding. In the case of the HSPT/SRA tutor, the position more closely resembles the Hyman home instruction model than the Spiewak situation. The petitioner, in fact, clocked her hours on the home instruction time sheet. While the name given to a position is not necessarily determinative, the title "Tutor" points to an auxiliary assignment as outlined in *Boney*. In addition, taking the reasoning of the petitioner to its natural conclusion, a tutor could work one hour per week for seven months and be entitled to count those seven months as tenure eligible time. It does not appear logical that a tutor, working sporadic hours in an auxiliary type position, would be entitled to tenure. It is my conclusion that the tutor position falls into the category of an extra-classroom assignment that is not subject to tenure.

3. WHETHER THE PETITIONER RESIGNED WHEN SHE ACCEPTED A FULL TIME POSITION OUT OF DISTRICT IN SEPTEMBER 1999.

Since I have previously found that the petitioner did not acquire tenure under any of the scenarios presented, it is unnecessary to reach a conclusion as to whether Ms. Donvito resigned, when she accepted the out of district position in September 1999. I will note that all parties agreed that there was no formal resignation. If we reached the issue of constructive resignation, the petitioner's position that she could not give up tenure rights that she had not yet acquired is a reasonable argument. In addition, the cases cited by the Respondent, dealing with resignation, all involve matters in which the petitioners were offered full time employment that they declined. This is not the case with Ms. Donvito. However, as previously stated, I will not reach a conclusion on this issue, since it does not affect the outcome of this matter.

4. WHETHER THE PETITIONER IS ENTITLED TO THE RELIEF SOUGHT.

Since I have found that the petitioner did not gain tenure, she is not entitled to the relief sought.

CONCLUSION

Based on the arguments presented by the parties and the exhibits produced, I **CONCLUDE** that the district and the intervener are entitled to Summary Decision. The petitioner has failed to prove that she attained tenure through any of the positions that she held within the District.

ORDER

It is hereby **ORDERED** that the Respondent and Intervener's Motion for Summary Decision be **GRANTED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

7/22/03
DATE

Carol I. Cohen
CAROL I. COHEN, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

7/22/03
DATE

7/24/03
M. Kathleen Duncan (La)
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 25 2003
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

id

KATHLEEN DONVITO,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE NORTHERN VALLEY REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	COMMISSIONER OF EDUCATION
	:	DECISION
RESPONDENT,	:	
AND	:	
LOUISE RYAN,	:	
INTERVENOR.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions and the Board's reply thereto were submitted in accordance with *N.J.A.C.* 1:1-18.4 and were duly considered by the Commissioner in reaching his determination herein.

In her exceptions, petitioner objects to the analysis in the Initial Decision which applied both *Hyman, supra,* and *N.J.S.A.* 18A:16-1.1 to the instant matter, submitting that "both instances represent a clear violation of the holding of the Supreme Court in *Spiewak et al. v. Rutherford Bd. of Ed.,* 90 *N.J.* 63 (1982)." (Petitioner's Exceptions at 2) Petitioner avers that, in *Hyman* the issue of tenure accrual for Home Instruction Teachers was not raised on appeal of the Commissioner's decision. (*Id.* at 1) Petitioner further argues that the fact that "substitute" employment is not defined in statute or regulation is not important because the only issue is

whether *N.J.S.A.* 18A:16-1.1 applies so as to prohibit home instruction teachers from achieving tenure. (*Id.* at 2)

Pointing to *Spiewak, supra* at 77, petitioner posits that the Supreme Court expressly interpreted *N.J.S.A.* 18A:16-1.1 to apply only to those taking the place of an absent teacher and clearly held that no court or agency can create exceptions to the tenure law. (*Ibid.*) Thus, petitioner asserts, there is no authority for the creation of a Home Instructor or HSPT/SRA Tutor exception. (*Ibid.*) Petitioner further asserts that the fact that home instructors do not know how much work they will be doing is no more relevant in this matter than it was in *Point Pleasant Beach, supra,* which was rejected in *Spiewak, supra.* (*Id.* at 3) Petitioner submits that the fact that a home instructor will not know how many students she or he will have does nothing to affect the accrual of tenure. In the instant matter, petitioner avers, the facts demonstrate that petitioner was continuously working as a home instructor from January 1997 through her years as a contracted classroom teacher until her termination in June 2002. (*Ibid.*) The time must count toward tenure, petitioner argues, because it is service requiring certification, is not temporary and does not fit within the exception set forth in *N.J.S.A.* 18A:16-1.1, and, therefore, no statutory exception applies pursuant to *Spiewak, supra.* (*Ibid.*)

Additionally, petitioner advances the argument that the ALJ's reliance on *Boney, supra,* as a basis for denying the tenurable nature of the work of an HSPT/SRA Tutor is in error because *Boney,* rendered eleven years prior to *Spiewak*, involved an assignment to a position which had no certification requirement. (*Ibid.*) In this instance, petitioner submits, preparing students for the HSPT/SRA was instructional work mandated by regulations dealing with graduation requirements. (*Ibid.*) Finally, petitioner points to *Lichtman v. Ridgewood Bd. of Ed.*, 93 *N.J.* 362 (1983), in averring that part-time service in a position requiring certification is tenure eligible. (*Ibid.*)

In its reply, the Board relies on *Hyman, supra,* at 709 in asserting that petitioner's claim that she earned tenure based, in part, on her service as a home instructor should be rejected because, as the ALJ in *Hyman* determined, and the Commissioner affirmed, "home instruction is 'intermittent, temporary, and unscheduled employment' akin to the work of a substitute." (Board's Reply at 2) Accordingly to *Hyman*, therefore, the Board asserts, petitioner is excluded from the acquisition of tenure pursuant to *N.J.S.A.* 18A:16-1.1. (*Id.* at 3) Therefore, in reaching her conclusions in the instant matter, the Board argues, the ALJ properly followed the sound reasoning underlying and supporting the conclusions in the *Hyman* decision. (*Id.* at 3)

Moreover, the Board asserts that petitioner's reliance on *Spiewak, supra,* is misplaced because the Court in *Spiewak* determined: 1) that remedial and supplemental teachers who were required to hold certificates and who provided instruction to educationally disabled children were entitled to tenure if they met the criteria set forth in *N.J.S.A.* 18A:28-5, and 2) that temporary employees and substitutes are not entitled to tenure. (*Id.* at 4, *citing Spiewak, supra,* at 84 and 74) The Board points out that the ALJ and the Commissioner in *Hyman, supra,* were aware of the *Spiewak* decision and recognized that, unlike supplemental instruction, home instruction is temporary, intermittent and unscheduled and, as such, the position of home instructor is "akin to that of a substitute, a non-tenure-eligible position." (*Ibid.*) The Board also avers that it would be impossible to calculate tenure rights for a home instructor given the unfixed and constantly changing schedule, as in this case, where petitioner worked from one to seven hours a day for certain days and weeks and sometimes did not work at all. (*Ibid.*)

Finally, the Board argues that petitioner's service as an HSPT/SRA tutor was an unrecognized, auxiliary assignment, was a part of her home instruction work, and was performed in a sporadic manner on random hours on various days. (*Id.* at 5) Thus, the Board concludes, petitioner's HSPT/SRA assignment would not count towards tenure. (*Ibid.*)

Upon careful and independent review of the record, the Initial Decision, the exceptions and the reply thereto filed in this matter, the Commissioner has determined to reject the ALJ's recommended decision in this matter and to grant summary decision to petitioner for the reasons set forth below.

Initially, the Commissioner notes that, pursuant to *N.J.A.C.* 1:1-12.5(b) and *Contini v. Bd. of Educ. of Newark*, 286 *N.J. Super.* 106, 121-122 (App. Div. 1995) (*citing Brill v. Guardian Life Ins. Co.*, 142 *N.J.* 520 (1995)), summary decision may be granted in an administrative proceeding if there is no genuine issue of material fact in dispute and the moving party is entitled to prevail as a matter of law. In the instant matter, the parties filed cross-motions for summary decision, submitted joint exhibits, and a joint stipulation of facts.[1] Based on a review of the stipulated facts, the joint exhibits, and the motion papers and briefs submitted by the parties, the Commissioner finds that a grant of summary decision is appropriate in this instance in that there is no genuine issue of material fact and petitioner is entitled to prevail as a matter of law.

The Education Tenure Act, *N.J.S.A.* 18A:28-1 to -18, grants tenure to teaching staff members who meet precise statutory conditions. *N.J.S.A.* 18A:28-5 provides, in pertinent part, that:

> The services of all teaching staff members employed in the positions of teacher, principal, other than administrative principal, assistant principal, vice-principal, assistant superintendent, and all school nurses including school nurse supervisors, head school nurses, chief school nurses, school nurse coordinators, and any other nurse performing school nursing services, school athletic trainer and such other employees as are in positions which require them to hold appropriate certificates issued by the board of

[1] To the Joint Stipulation of Facts, the parties attached a "Statement of Disputed Factual Issue," stating that, although there is a dispute as to whether petitioner was offered and rejected a two-fifths (2/5) teaching position to commence in September 1999, "[t]he parties agree that for purposes of this motion for summary judgment, the Judge may assume that such a position was offered and declined as proffered by respondent. In the event that the Judge determines that such an offer would be the basis for denying petitioner's claim, the parties request that judgment be reserved pending a hearing limited to the facts surrounding the alleged job offer." (Exhibit J-1, in evidence)

> examiners, serving in any school district or under any board of education, excepting those who are not the holders of proper certificates in full force and effect and school business administrators shared by two or more school districts, shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause and then only in the manner prescribed by subarticle B of article 2 of chapter 6 of this title, after employment in such district or by such board for:
>
> (a) Three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or
> (b) Three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or
> (c) The equivalent of more than three academic years within a period of any four consecutive academic years.

In *Spiewak, supra,* at 81, the Supreme Court held that "all teaching staff members who work in positions for which a certificate is required, who hold valid certificates, and who have worked the requisite number of years, are eligible for tenure unless they come within the explicit exceptions in *N.J.S.A.* 18A:28-5 or related statutes such as *N.J.S.A.* 18A:16-1.1."

The Court in *Spiewak* also addressed the only applicable exception to the Tenure Act relating to tenure accrual by teachers, *N.J.S.A.* 18A:16-1.1,[2] finding that, "although this statute denies tenure to temporary employees, it extends only to those who 'act in place of' another employee who is absent or disabled." *Id.* at 74. The Court further concludes that "[t]he courts are not free to expand that exception by judicial fiat." *Id.* at 77.

---

[2] *N.J.S.A.* 18A:16-1.1 provides:

> In each district the board of education may designate some person to act in place of any officer or employee during the absence, disability or disqualification of any such officer or employee subject to the provisions of section 18A:17-13.
>
> The act of any person so designated shall in all cases be legally binding as if done and performed by the officer or employee for whom such designated person is acting but no person so acting shall acquire tenure in the office or employment in which he acts pursuant to this section when so acting.

The ALJ in *Hyman, supra,* found that "home instructors are not teaching staff members pursuant to *N.J.S.A.* 18A:28-5 and their time is not tenurable***. Home instructors have no specific expectation of employment duration; they have full knowledge of the variability of the assignments and hourly rate of payment." *Hyman* at 709. Although the ALJ's finding in *Hyman* that home instructors were not tenure eligible was specifically upheld by the Commissioner, the petitioners in *Hyman* were all found to be tenured based on time served as supplemental teachers and entitled to full salary and, thus, did not appeal the Commissioner's decision. The Board appealed solely on the salary issue to the State Board and prevailed and the State Board's decision was subsequently appealed to the Appellate Division. The issue of whether home instruction is tenure eligible was not addressed by either the State Board or the Appellate Division as the parties did not raise it in those appeals.

Since the 1982-83 *Spiewak, supra,* and *Hyman, supra,* decisions, however, the courts have interpreted and clarified the exception to the Tenure Act relating to the tenure accrual exception set forth in *N.J.S.A.* 18A:16-1.1. In *Sayreville Educ. Ass'n v. Board of Educ., Etc.*, 193 *N.J. Super.* 424, 428 (App. Div. 1984), the court interpreted *N.J.S.A.* 18A:16-1.1, as follows:

> We construe the authorization of this provision as applying when the services of a substitute teacher are required because of the temporary absence, even if protracted, of a regular teacher whose return to duty is contemplated. We do not construe it as authorizing the use of a substitute to fill a vacant position on a long-term basis. This interpretation, in our view, accords with the plain meaning of the statutory provision. The phrase, "to act in place of any officer or employee during the absence, disability or disqualification of any such officer or employee," clearly implies a temporary arrangement. That is, the "place" which is the intended subject of the statute is the place of another which that other will reclaim when his period of absence is over. The substitute is appointed to act for the other during that period. If that other employee has, however, terminated his employment, then the place which the appointee is filling is not the place of the other but rather a vacant place, and the statute ordinarily does not apply. This interpretation is, moreover, in accord with the observation in

> *Spiewak v. Rutherford Bd. of Ed., supra*, 90 *N.J.* at 77, that the exception to the tenure statute which *N.J.S.A.* 18A:16-1.1 constitutes "is limited to employees hired to take the place of an absent teacher." Again the implication is clear that the place for which the temporary substitute teacher was hired is not vacant but only temporarily unoccupied by its incumbent.

Moreover, the Supreme Court in *Lammers v. Bd. of Educ.*, 134 *N.J.* 264, *citing Sayreville, supra*, noted that: "[t]he implication drawn by the Appellate Division in Sayreville between a vacancy and an absence is unmistakable. An absence exists when the missing teacher is scheduled ultimately to return to the position. A vacancy exists when the teacher leaves the position permanently, as in the case of a resignation or a retirement." *Id.* at 268.

The decisions in *Sayreville* and *Lammers* issued subsequent to *Spiewak and Hyman,* thus clarify that the statutory exception to tenure accrual set forth in *N.J.S.A.* 18A:16-1.1 is limited to situations where a person is serving in the place of an *absent employee* who is expected to return to work. That is not the case herein where the classroom teachers were present and teaching any students in attendance. As specifically stipulated by the parties, petitioner "was not working in a position that was previously held by a teacher who left it on a leave of absence or by a teacher who was otherwise absent from the position but expected to return.," (Exhibit J-1, #14, in evidence), but, instead, was serving in the individual position of a home instructor. Accordingly, the Commissioner rejects the argument that petitioner's position of home instructor is akin to that of a substitute in that petitioner is not serving in the place of an *absent employee* who is expected to return and, thus, cannot be excluded from tenure accrual under the exception set forth in *N.J.S.A.* 18A:16-1.1.

Moreover, as expressly found in *Spiewak, supra,* at 80, the courts, and by extension the OAL and the Commissioner, cannot create exceptions to the tenure law:

> To summarize, neither *Schulz* [*Schulz v. State Bd. of Ed.,* 132 *N.J.L.* 345 (E. & A. 1945)] nor *Biancardi* [*Biancardi v. Waldwick Bd. of Ed.*, 139 *N.J. Super.* 175 (App. Div. 1976), *aff'd o.b.*, 73 *N.J.* 37 (1977)] nor *Capella* [*Capella v. Bd. of Ed. of*

> *Camden County Voc. Tech. Sch.*, 145 *N.J. Super.* 209 (App. Div. 1976)] holds that courts may themselves define exceptions to *N.J.S.A.* 18A:28-5. To the extent those decisions imply that the right to tenure derives from contract rather than statute, they are wrong. To the extent they suggest that courts may create exceptions to the clear language of *N.J.S.A.* 18A:28-5 based on policy considerations, they are disapproved."

In that the Commissioner concludes, in light of *Spiewak* and the subsequent court decisions in *Sayreville* and *Lammers,* that the only applicable exception to the Tenure Act relating to tenure accrual by teachers, *N.J.S.A.* 18A:16-1.1, does not apply to teachers serving in the position of home instructor, and in that the Commissioner lacks the authority to create exceptions to the tenure law, petitioner's years of service as a home instructor are found to be tenure eligible. Moreover, the Commissioner agrees with petitioner that *Boney, supra,* does not apply so as to exclude petitioner's service as an HSPT/SRA Tutor from tenure eligibility, as, unlike the *Boney* decision, which dealt with the assignment to a job which had no certification requirement, petitioner's assignment herein as an HSPT/SRA Tutor was an instructional assignment necessitated by the regulations dealing with graduation requirements set forth in *N.J.A.C.* 6A:8-1.1 *et seq.*, and thus akin to an assignment as a remedial teacher, basic skills teacher or supplemental teacher.

During the period at issue, petitioner was a teaching staff member in the Northern Valley Regional High School District, pursuant to *N.J.A.C.* 18A:1-1,[3] and tenure eligible, pursuant to *N.J.S.A.* 18A:28-5, holding valid certificates and endorsements issued by the State Board of Examiners as an Elementary School Teacher, Teacher of English, Nursery School Teacher, Learning Disabilities Teacher Consultant, and Teacher of the Handicapped and assigned to teaching positions requiring valid certification, *i.e.*, home instructor (*see*

[3] *N.J.A.C.* 18A:1-1 defines a "teaching staff member" as "a member of the professional staff of any district or regional board of education, or any board of education of a county vocational school, holding office, position or employment of such character that the qualifications, for such office, position or employment, require him to hold a valid and effective standard, provisional or emergency certificate, appropriate to his office, position or employment, issued by the State Board of Examiners and includes a school nurse and a school athletic trainer."

N.J.A.C. 6A:16-9.2(b)2; *N.J.A.C.* 6A:14-4.8(a)(4); *N.J.A.C.* 6A:14-4.9(a)(4); and J-3, in evidence), a Special Education Teacher, and an HSPT/SRA Tutor. Although petitioner served in part-time teaching positions during this time period, it is well-established that a part-time position requiring certification is tenure eligible. *See Lichtman, supra*, and *Dudzinski v. Borough of Franklin*, 97 *N.J.A.R.* 2d (EDU) 531.

Moreover, the parties stipulated that petitioner was assigned the following teaching responsibilities and provided such service during the 1996-1997 through 1999-2000 school years:

School Year	Service Dates	Position	Academic Months
1996-1997	1/13/97-6/18/97 (J-3)	Home Instructor[4]	5
1997-1998	9/18/97-6/26/98 (J-4)	Home Instructor[5]	9
1998-1999	10/21/98-6/30/99 (J-5) 9/4/98-4/5/99 (J-9)	Home Instructor[6] HSPT/SRA Tutor	10
1999-2000	9/15/99-6/19/00 (J-6) 2/18/00-6/30/00 (J-13) 1/14/00-3/10/00 (J-10)	Home Instructor[7] 2/5 Special Ed. Teacher SRA Tutor	9.5
TOTAL			33.5 months

[4] Petitioner earned $19,150 during her five months as Home Instructor. (Exhibit J-3, in evidence)

[5] Petitioner earned $13,987.50 during her nine months as Home Instructor. (Exhibit J-4, in evidence)

[6] Petitioner earned $12,700 as a Home Instructor and $3,825 as an HSPT/SRA Tutor during her ten months of service. (Exhibits J-5 and J-9, in evidence)

[7] Petitioner earned $26,250 as a Home Instructor, $23,103.60 as a 2/5 Special Education Teacher and $1,650 as an SRA Tutor during her 9½ months of service. (Exhibits J-6, J-13 and J-10, in evidence) Notwithstanding the Board's claim that petitioner resigned her position when she was offered and rejected a 2/5 teaching position to commence in September 1999 and petitioner's denial that such position was offered to begin in September 1999, as noted above, the parties have stipulated that, for purposes of the summary decision motions, that such a position was offered and declined by respondent. Even assuming, *arguendo*, that a 2/5 teaching September 1999 teaching position was offered to petitioner and she declined the offer, the Commissioner cannot conclude that petitioner resigned from her position with the Board as the record reflects that petitioner continued to be employed as a home instructor for the Board, earning $14,450 in the period from 9/15/99 through 2/18/00 when she accepted a 2/5 teaching position.

Thus, petitioner achieved tenure, pursuant to *N.J.S.A.* 18A:28-5(c), by her service as a teacher in the District for the equivalent of more than three academic years (30 months) within four consecutive academic years. The Commissioner also observes that petitioner worked for the Board as a full-time Special Education Teacher in the 2000-2001 school year[8] and as a 4/5 Special Education Teacher in the 2001-2002 school year.[9] The Board did not renew petitioner's contract for the 2002-2003 school year. In the 2002-2003 school year, the Board employed 22 nontenured teaching staff members within the areas of petitioner's certification.[10] (Initial Decision at 2) The Commissioner, therefore, finds that the Board violated petitioner's tenure rights in deciding not to appoint petitioner to one of the positions held by nontenured individuals.

Accordingly, for the reasons set forth above, the Commissioner grants summary decision to petitioner and orders petitioner's reinstatement to a full-time position held by any nontenured or less senior teacher within petitioner's area of certification of the Board's choice, with full back salary and benefits, less mitigating income.

IT IS SO ORDERED.[11]

COMMISSIONER OF EDUCATION

Date of Decision: **12/04/03**

Date of Mailing: **12/05/03**

---

[8] Petitioner earned $58,914 as a full-time Special Education Instructor. (Exhibit, J-14, in evidence)

[9] Petitioner earned $50,282.40 as a 4/5 Special Education Instructor. (Exhibit J-1, #10, in evidence)

[10] These staff members were advised of their right to intervene, but only Louise Ryan chose to do so.

[11] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

647-03

EMILYANN GARDINER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF LONG BRANCH, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

December 8, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 06174-02S

AGENCY DKT. NO. 253-8/02

EMILYANN GARDINER,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF LONG BRANCH, MONMOUTH COUNTY,

Respondent.

Steven B. Hunter, Esq., for petitioner (Klausner and Hunter, attorneys)

J. Peter Sokol, Esq., for respondent (McOmber and McOmber, attorneys)

Record Closed: October 21, 2003 Decided: October 21, 2003

BEFORE **JEFF S. MASIN**, ACTING CHIEF ALJ:

This matter arises from the filing of a Petition of Appeal by the Emilyann Gardiner ("petitioner"), to the Commissioner of Education challenging a determination of the Board of Education of the City of Long Branch, Monmouth County, ("respondent") to withhold her employment and adjustment increments for the 2002-2003 school year. The case was transmitted to the Office of Administrative Law ("OAL") from the Department of Education on September 5, 2002, for a hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to – 13.

The parties agreed to a settlement of all issues in dispute and have prepared a Settlement Agreement, which is attached and fully incorporated herein. Also attached is an October 14, 2003, letter from counsel for the respondent indicating that the respondent approved the settlement as written in the minutes from their regular meeting of July 23, 2003, attached to his letter.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

October 24, 2003
DATE

JEFF S. MASIN, ACTING CHIEF ALJ

Receipt Acknowledged:

10-23-03
DATE

M. Kathleen Duncan/CR
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 27 2003
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

Attachments

mjm

A PROFESSIONAL CORPORATION

McOmber & McOmber

COUNSELLORS AT LAW

54 SHREWSBURY AVENUE
RED BANK, NEW JERSEY 07701

RICHARD D. McOMBER
ADRIENNE HAROUTUNIAN McOMBER
THOMAS J. WARREN
J. PETER SOKOL

R. ARMEN McOMBER

TELEPHONE
(732) 842-6500

FACSIMILE
(732) 530-8545

October 14, 2003

Hon. Jeff S. Masin, Acting Director
and Chief Administrative Law Judge
Office of Administrative Law
9 Quakerbridge Plaza
P. O. Box 049
Trenton, NJ 08625-0049

RE: Emilyann Gardiner v. Board of Education of the
City of Long Branch, County of Monmouth
OAL Docket No. EDU 06174-02S
Our File No. 8481

My dear Judge Masin:

As you know, this office represents the Board of Education of the City of Long Branch in the above captioned matter.

As per your letter dated September 24, 2003, enclosed please find a copy of the minutes from the Board of Education's regular board meeting dated July 23, 2003, wherein at #13, settlement was approved between Emilyann Gardiner and the Board of Education

Should you need any further information, please do not hesitate to contact me.

Respectfully yours,

J. PETER SOKOL

JPS:dcg
Enclosure
cc: Klausner & Hunter
Attn: Stephen B. Hunter, Esquire (w/enclosure)
Long Branch Board of Education
Attn: Archie Greenwood, Assistant Superintendent (w/enclosure)

3a

ACTION ITEMS (continued)

11. SUCCESS FOR ALL SUMMER TRANSPORTATION 2003 (continued)

The following quotes were received for route SFA3 to transport pre-school bilingual students to the Joseph M. Ferraina Early Childhood Learning Center. Effective July 14, 2003 – August 15, 2003 (25 possible days).

Coast Answering	No quote
DMC	No quote
J&M Keelen	$249.99 per diem
Seman-Tov	$152.00 per diem

That the Board approve the lowest bid of $152.00 per diem from **Seman-Tov, Inc.** Total Cost - $3,800.00 (pro-rated 25 days).

The following quotes were received for routes SFG1 and SFG2 to transport Gregory School students to/from the Long Branch Middle School. Effective July 16,2003 – August 15, 2003 (23 possible days):

J&M Keelen	No quote
Laidlaw	No quote
Murphy Transportation	No quote
Seman-Tov	$172.00 per diem/per bus

That the Board approve the only quote of **Seman Tov** for $172.00 per diem/per bus. Total Cost - $7,912.00 (pro-rated 23 days).

12. APPROVAL OF TRANSPORTATION ROUTES WITH MOESC

That the Board approve special education routes with Monmouth-Ocean Educational Services Commission for the summer of 2003 at a cost of $86,822.52.

13. SETTLEMENT AGREEMENT - GARDINER

That the Board ratify the attached agreement between Emilyann Gardiner and the Long Branch Board of Education.

14. SETTLEMENT AGREEMENT – WHEELER

That the Board ratify the attached agreement between Judith Wheeler and the Long Branch Board of Education.

15. STUDENT EXIT - CLASS ACADEMY PROGRAM

That the Board approve the exit of the following student from the Monmouth County Vocational School District Class Academy Program for the 2002-2003 school year (tuition: $4,750 per student): ID#06001121.

SETTLEMENT AGREEMENT

This Agreement, made this _____ day of April, 2003, by and between the Board of Education of the City of Long Branch, County of Monmouth ("Board") and Emilyann Gardiner ("Ms. Gardiner").

RECITALS:

A. The Board employs Ms. Gardiner as a tenured SFA reading teacher/tutor.

B. During the 2001-2002 school year, the principal of the Gregory School observed that Ms. Gardiner's performance required improvement in time management, curriculum implementation, fulfilling job responsibilities and quality of instruction.

C. Based on these observations, the principal recommended to the Board to withhold her employment and adjustment increments for the 2002-2003 school year.

D. The Board voted to withhold Ms. Gardiner's increments and the reasons were provided pursuant to *N.J.S.A.* 18A:29-14.

E. Ms. Gardiner then filed a Petition, asserting that the Board's actions in this regard were arbitrary, capricious and unreasonable, which the Board disputed in its Answer.

F. During the pendency of the Petition, Ms. Gardiner offered to resign for retirement purposes effective October 31, 2003, subject to certain terms and conditions.

G. The Office of the Superintendent of Schools entered into negotiations with Ms. Gardiner regarding her offer.

H. The Board has considered Ms. Gardiner's offer and has approved the settlement by resolution.

I. Ms. Gardiner has been advised that the Commissioner of Education is required to approve settlements of administrative proceedings.

THEREFORE, IN CONSIDERATION OF THE MUTUAL COVENANTS HEREIN CONTAINED, the Board and Ms. Gardiner agree as follows:

1. Ms. Gardiner shall immediately offer her irrevocable letter of resignation for retirement purposes to the Board, effective as of October 31, 2003.

2. Upon receipt, the Board shall immediately accept Ms. Gardiner's offered resignation for retirement purposes.

3. Upon acceptance of Ms. Gardiner's offered resignation for retirement purposes, the Board agrees to retroactively restore one-half of Ms. Gardiner's increments for the 2002-2003 school year by beginning their restoration on February 1, 2003.

4. Ms. Gardiner shall receive her employment and adjustment increments for the 2003-2004 school year until the date of her resignation for retirement purposes.

5. Ms. Gardiner will complete the 2002-2003 school year by actively teaching and improving her performance to the extent required by the principal and shall, during the months of September and October, 2003, be employed as a teacher with duties to act as a substitute at the discretion of the Office of the Superintendent, when required, but will not be assigned regular classroom duties.

6. Upon execution of this Agreement, the Petition filed by Ms. Gardiner shall be withdrawn with prejudice.

7. The Board and Ms. Gardiner shall exchange general releases, with the only exception to those general releases being the terms and conditions of this Settlement Agreement.

8. The terms and conditions of the settlement are contingent upon the approval of the Commissioner of Education. If approval is not given, then the increment withholding petition shall proceed to a hearing.

Attest:

MICHAEL PETRILLO
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires July 30, 2004

EMILYANN GARDINER

Attest:

BOARD OF EDUCATION OF THE
CITY OF LONG BRANCH, IN THE
COUNTY OF MONMOUTH

Secretary
PETER E. GENOVESE, III

By: President
ARMAND R. ZAMBRANO, JR.

OAL DKT. NO. EDU 06174-02
AGENCY DKT. NO. 253-8/02

EMILYANN GARDINER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF LONG BRANCH, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Settlement Agreement, and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 12/8/03

Date of Mailing: 12/8/03

651-03

IN THE MATTER OF THE TENURE :

HEARING OF ROSA SARDUY, : COMMISSIONER OF EDUCATION

SCHOOL DISTRICT OF THE CITY OF : DECISION

PASSAIC, PASSAIC COUNTY. :

SYNOPSIS

The Board certified tenure charges of unbecoming conduct and insubordination against respondent assistant principal who had been employed in the District since 1974 in a variety of positions, both teaching and administrative. The charges involved failure to perform certain assigned duties, failure to call in absences, refusal to perform duties even after receiving directives from the Superintendent and other unprofessional actions.

Following six days of hearing, the ALJ determined that the Board had established that Charges 1, 2, 4 and the first paragraph of Charge 7 had been sustained by a preponderance of the credible evidence and warranted respondent's removal from her position. The ALJ ordered respondent dismissed from her employment as a tenured assistant principal.

The Commissioner concurred with the ALJ and ordered respondent dismissed from her position as of the date of this decision and directed that a copy of this decision be transmitted to the State Board of Examiners for action as that body deems appropriate.

December 11, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 5474-02

AGENCY DKT. NO. 154-5/02

IN THE MATTER OF THE TENURE HEARING OF ROSA SARDUY, SCHOOL DISTRICT OF THE CITY OF PASSAIC, PASSAIC COUNTY

Cherie L. Adams, Esq., for petitioner, School District of the City of Passaic (Sills Cummis Radin Tischman Epstein & Gross, attorneys)

Robert F. Varady, Esq., for respondent Rosa Sarduy (La Corte, Bundy, Varady & Kinsella, attorneys)

Record Closed: August 25, 2003 Decided: October 31, 2003

BEFORE **STEPHEN G. WEISS**, ALJ:

PROCEDURAL HISTORY

In this case the School District of the City of Passaic ("District") has certified a variety of unbecoming conduct and insubordination charges against the respondent, Rosa Sarduy, a tenured assistant principal who has been employed by the District since September 1974 in a variety of positions, teaching and administrative, including bilingual teacher, guidance counselor, Director of Guidance, and Vice (or Assistant) Principal.

Following the District's certification of the charges to the Commissioner of Education the matter was transmitted to the Office of Administrative Law (OAL) on June 18, 2002, for determination as a contested case. Hearings commenced before the undersigned administrative law judge in December 2002 and continued intermittently until their conclusion on June 8, 2003. Delays in moving the case forward more quickly were occasioned by a variety of circumstances, including illness, efforts to settle and counsels' trial conflicts. Following the conclusion of the testimony a schedule was established for the filing of posthearing proposed findings of fact and conclusions of law. The time for issuing my initial decision was extended by order to November 24, 2003.

A total of eight witnesses testified at the hearing, seven on behalf of the District and respondent Sarduy. Since seven separate charges of unbecoming conduct and/or insubordination had been certified to the Commissioner, each charge and the relevant testimony and other evidence in support of, and in defense against, the charges will be discussed, *infra*.

THE TENURE CHARGES

Charge One alleged that during 1999-2000, Sarduy failed to perform certain assigned duties after having been directed by her building principal at School No. 8 to perform those duties. Charge Two alleged that in January 2002, Sarduy was directed by the Principal at School No. 6, where she had been reassigned in 2000-2001, to supervise a lunch period when the teacher so assigned was absent, but that she failed to do so for the entire period.

Charge Three alleged that in 1999-2000, while at School No. 8, Sarduy refused to assist in the implementation of certain aspects of "Whole School Reform" unless the Superintendent of Schools, not just the building principal, required her to do so. Charge Four maintained that during the 1999-2000 school year Sarduy informed the Superintendent that she would no longer perform observations of staff members at School No. 8, and then continued to refuse to do so even after having been directed by the Superintendent to perform them. Charge Five alleged that on some occasions in 2000-2001, while assigned to School No. 6, Sarduy failed to call to advise that she would be absent.

Charge Six alleged that on one occasion, after Sarduy took a child to his home after school since no one had come on time to do so, she addressed a person at the child's home in an abrasive and unprofessional manner. Charge Seven alleged that with respect to special education matters Sarduy had acted in an inappropriate and unprofessional manner in a variety of ways. First, that she rudely interrupted a meeting between a child study team member and a parent at School No. 6 and complained that the member did not act appropriately concerning another student's placement. She then threatened to call the Department of Education and the newspapers if the placement was not quickly resolved. In addition, the charge alleged that in 1999-2000, while assigned to School No. 8, Sarduy interrupted a CST team meeting to which she had not been invited, and that and other behavior that day towards faculty and parents was unprofessional and insulting.

TESTIMONY FOR THE DISTRICT

The first witness for the district was John Scozzaro who presently is the principal of School No. 11. During the 1999-2000 school year he was acting principal at School No. 8 where Sarduy was employed as his assistant principal. Scozzaro was new to School No. 8 that year and first met respondent when classes began in September 1999. He understood Sarduy had been serving there as "acting principal" for a short period of time in 19998-1999 since the principal was out ill.

Scozzaro met with Sarduy early in the 1999-2000 school year, described her expected role and told her to follow the prescribed job description for her position. However, soon thereafter Sarduy, referring to a, " ... long existing animosity created toward me by a few staff members of School No. 8", asked Scozzaro for specific directions as to her duties and responsibilities (Ex. P-18). He replied that Sarduy simply should follow her job description and if any specific directions were necessary he would inform her of the same (Ex. P-19). Subsequently, a problem did arise with respect to that very subject.

Specifically, it is alleged in Charge Four that Sarduy failed to perform required observations of teaching staff members at School No. 8. Scozzaro explained that he and Sarduy each were to observe one-half the staff members. However, when one of

the teachers on her list objected to her doing so because of a problem in the past (Sarduy gave her a poor rating), Scozzaro decided he would evaluate that teacher instead. Sarduy then wrote to the Superintendent concerning the removal and described it as having stemmed from a prior disagreement between the teacher and herself over an observation Sarduy had performed (Ex. P-34). Since all the teachers at School No. 8 were aware of the incident (removal from her list), Sarduy then declared she no longer would conduct any observations. The Superintendent directed Sarduy to meet to discuss the situation and in a memorandum he dispatched to her on March 1, 2000, advised that she remained responsible, as directed, to perform observations and evaluations and any disagreements she might have with the principal's decision should be discussed with him (Ex. P-40). Nevertheless, subsequent to receiving that memorandum from the Superintendent, respondent only belatedly began to conduct observations, and even then did so in a deliberately inappropriate manner by uniformly rating all the teachers she observed as "extremely excellent".

With respect to Charge Three concerning respondent's reluctance to assist in "Whole School Reform", Scozzaro identified the concept as the particular model chosen to be implemented at School No. 8. It centers on teaching practices developed at Yale University and a team composed of teaching and administrative staff members at School No. 8 was to develop strategies in all areas. Although Sarduy was expected to be involved in the process as well, when she appeared to deliberately present obstacles interfering with the work of the team he then was obliged to contact Yale to have a consultant sent to the school to discuss the matter (Ex. P-26).

With respect to respondent's alleged interference with child study team meetings at School No. 8, Scozzaro explained that because of the need to schedule meetings to include parental participation, a great deal of flexibility was required. Thus, a notice was posted giving meeting schedules in advance. An incident occurred, he said, in January 2000 when respondent learned that a meeting which was to include child study team members, the regular teacher and the parents of the child would proceed even though the regular teacher was absent from school that day. Since Scozzaro was out of the building at the time, one of the members asked Sarduy if another teacher could be made available to attend in her place. Respondent allegedly responded that she

would not make a teacher available without prior notice of at least one day even though the parents had come to school to attend the meeting.

Nevertheless, the meeting was convened after a speech therapist, who knew the student, was enlisted to attend in the regular teacher's place. Toward the end of the meeting, however, Sarduy entered the room, began to take notes and then questioned the participants about what had gone on. She angrily expressed concern about not having been given prior notice and the illegality of holding a meeting without the regular teacher present. After she left, she then attempted to cancel a meeting with another parent who had been waiting there, refusing to permit that meeting to go forward until she first obtained the Superintendent's approval.

These incidents prompted several memoranda describing what had happened and, according to Scozzaro, were demonstrative of the kind of insensitive behavior Sarduy too often displayed in the presence of staff and parents. (*See,* Exs. P-28,P-29, P-30, P-31).

Scozzaro next identified an evaluation form he had prepared with respect to respondent's performance during 1999-2000 (Ex. P-47), in which he rated her to be "below standards" in several categories, including requirements that she: (a) exercise educational leadership by serving as a positive role model; and (b) respect and adhere to the "chain of command". As Scozzaro described it, Sarduy's conduct actually "obstructed the flow of the educational process" and often he had to do her work because of her performance deficiencies and the low morale among staff members which she had created.

On cross-examination, Scozzaro conceded the evaluation form made no mention of any deficiencies he said she had with respect to Whole School Reform, and that she had a right to disagree with the way it had been implemented.

The next witness for the Board, Celinda Barreto, has been principal of School No. 6 for eight years. Like Sarduy, she has been employed by the District since 1974, both as a teacher (for twelve years) and as an administrator. Respondent was assigned to School No. 6 as her assistant principal for the 2000-2001 school year, but

she did not report to the building until September 11, 2000 when she told Barreto she had not come earlier because she had been ill. Barreto discussed what she expected Sarduy's role to be as the assistant principal and gave her a memorandum which set forth duties and responsibilities (Ex. P-52). School No. 6, she explained, contains grades kindergarten through six with approximately 800 students. Rather than using the "Whole School Reform" model, her school chose the "Success for All" model. When she so informed Sarduy, the respondent told Barreto she was not familiar with it since she had transferred from a school which used a different model.

According to Barreto, from the very outset Sarduy's attendance during the 2000-2001 school year was not "up to par." By the beginning of October 2000 she had been absent eight school days – 31 percent of the school days to that point (Ex. P-71p). Barreto understood that some absences are unavoidable, but the total number, and the percentage of sick days taken by respondent were "excessive". This poor attendance, she observed, set a poor example for staff and negatively impacted on the operation of the school since she and Sarduy were the only two senior administrators there.

According to Barreto, Sarduy's attendance did not improve very much, and when respondent failed to report for work for the first four school days immediately following the Christmas recess in January 2001, Barreto sent a memorandum in which she observed that on one of those four school days Sarduy had not called her absence in to the answering service as required (Ex. P-71(q)). Although a handwritten reply note at the bottom on the memorandum by Sarduy insisted that she did in fact call each day, Barreto could find no record of that call. During the rest of January 2001, Sarduy continued to be absent from time to time and told Barreto she was having health issues. As Barreto put it, respondent then was "in and out" until early April 2001, after which she remained out sick every day for the entire balance of that school year.

Sarduy returned to work when school opened in September 2001, and was given what Barreto described as "a whole litany" of duties she was expected to perform, one of which was to supervise third and fourth periods in the lunch room and to be available at such other times as might be required. If, for example, the regularly assigned teacher was absent, Sarduy might have to provide coverage herself.

Among other duties Barreto assigned to Sarduy in 2001-2002 was the obligation to make sure there were adequate supplies available, but according to the witness respondent failed properly to carry out that function as well. In particular, she untimely distributed supplies, not just "start up" items, leaving some classrooms short.

Then, on January 3, 2002, without prior notice to or discussion with Barreto, Sarduy dispatched a memorandum to staff members regarding, among other things, "plan books and monthly supply requisitions". In it she stated that since there were insufficient supplies for all teachers, when they filled out their monthly request forms she would permit them to come to the supply room, and " . . . take whatever items you need from what we have". Sarduy also expressed to staff her concerns about plan books and her need for "clarification" from Barreto concerning them. Thus, Sarduy declared that since," ... I have not received any response [from Barreto], I will not check your plan book until further notice" (Ex. P-71a).

When Barreto saw the memorandum that day it was, she said, the first time she was even aware of respondent's intent to refuse to review plan books, one of the major duties Sarduy was expected to carry out (Ex. P-52). As Barreto put it, she was "very surprised". As a result, the principal immediately dispatched her own memorandum to Sarduy reiterating that respondent was obliged to review plan books and was also expected to handle discipline referrals (which she had also refused henceforth to do). Whether or not Sarduy agreed with these duties was, in the principal's words, " ... irrelevant to your job responsibility" (Ex. P-71b). With respect to supplies, Barreto directed respondent to continue to distribute them to staff and, "... not allow them to take whatever they wish from the closet." She concluded the memorandum with the observation that Sarduy's failure to abide by her directives would be considered, "... as "dereliction of duty and insubordination."

In order to be sure that Sarduy received her memorandum, Barreto put one copy in a sealed envelope and personally took it to Sarduy's office where she put it on respondent's desk. She placed another copy in a sealed envelope in respondent's mailbox. Later that day, Barreto found one of the unopened envelopes on her desk with the notation "refused" written on it and the initials "RS". Also written on the outside

of the envelope was a handwritten directive to Barreto's secretary to give it to the principal, initialed by Sarduy (P 71c).

Because of the return of Barreto's memorandum in an unopened envelope on which Sarduy had marked "refused", Barreto then took yet another copy to Sarduy's office and hand delivered it to her. Later that day, Barreto received a ripped-up envelope (Ex. P 71d) inside another envelope which had Sarduy's handwriting on it stating, " ... the enclosed was left in my mailbox" (Ex. P 71e). *See also*, Ex. P-71.

As noted earlier, among other duties Sarduy was directed to carry out as assistant principal was the need to assure coverage in the cafeteria if the regularly assigned teacher would not be able to be there. On January 8, 2002, a teacher unexpectedly could not attend to her cafeteria obligation that day, having left work complaining of feeling ill. Sarduy was instructed to cover for her and went to the lunch area to do so. However, at some point during that period, Sarduy left the lunch room and went to Barreto's office where she told the principal she would not continue to undertake the coverage since she had received such late notice. The principal immediately directed Sarduy to return to her post since now it was left unsupervised. Later, before the lunch period ended, Sarduy returned to Barreto's office a second time and left a message which Barreto's secretary wrote down to the effect that she would not cover the cafeteria any further and Barreto, " ... can write [an] insubordination letter if you want" (Ex. P-71f). *See also*, Ex. P-71.

Charge Six involved the incident alleging rude and unprofessional conduct by Sarduy when the young student had not been picked up timely from school. Although Barreto was not present, she requested a written report concerning the incident from another teacher, Ms. Tavarez, who was there (Ex. P 71o). Tavarez (who later testified) wrote that on January 4, 2002, a family member who was supposed to pick up the child failed to arrive by 5:00 p.m. after everyone was gone. Tavarez could not contact the family because she did not have a telephone number to call. At that point, respondent happened to be driving past in her car and stopped to find out if there was a problem. When Tavarez explained the situation Sarduy contacted the local police who apparently told her it was not within their jurisdiction. Sarduy then decided that she would drive the child home herself and followed Tavarez who knew where he lived. When Tavarez,

Sarduy and the young boy arrived at the home, a person who Tavarez believed was the child's aunt met them at the door. According to Tavarez's memorandum to Barreto, Sarduy, "... gave her [the aunt] a piece of her mind. She demanded that the child learned [*sic*] his telephone number and address. She also demanded that the child's parent report to her office on the next school day, Monday 1/7/02."

Further according to Tavarez's memorandum, no parent reported to school on January 7. On the following day, Sarduy told Tavarez to bring the child to her office where Sarduy told him that if his parent did not come in with him the next day he would not be allowed to return to school. Tavarez then went to the main office at Sarduy's direction and obtained a "stay-home" letter which the boy had to take home with him. Barreto later spoke to an adult relative of the pupil who complained that Sarduy had been "rude" when she brought the boy home and had "screamed" at the person there. (Ex. P-71).

Another allegation against Sarduy had to do with her unauthorized attendance at a conference. In order to attend, a staff member had to submit a request for approval to the principal. In mid-November 2000, Barreto rejected a request by Sarduy to attend a conference on November 16, 2000 (Ex. P 71i). Apparently, Sarduy sent another request to Barreto asking permission to attend the same conference which contained a handwritten notation along the margin that Barreto should be aware it was respondent's intention to attend in any case. As a result, Barreto wrote to the Superintendent, attached the request form, and indicated it was for the same conference that had been rejected the first time. Barreto explained that the rejection was due to the fact that Sarduy already was approved to attend a more appropriate conference the following month. Barreto later learned that Sarduy spoke to the Superintendent and claimed there had been some mistake, *i.e.*, that the second request was for a different conference for which she had Barreto's approval. That was not true. The entire set of circumstances was, in the Barreto's view, insubordinate behavior.

Another charge discussed by Barreto was respondent's alleged non-compliance with the procedure for calling in expected absences in advance (Charge Five). Barreto explained that if a staff member expected to be absent, he or she was to call an answering service to provide all necessary information. Persons were to call as early

as possible, but no later than 6:00 a.m. The answering service then provided a list of those who called to the school so steps could be taken to obtain substitutes. According to Barreto, on some occasions Sarduy never called and, as a result, Barreto had to dispatch memoranda to her complaining about that neglect. Barreto was particularly concerned since she and Sarduy were the only senior administrators in the building.

Yet another area of concern about which Barreto testified had to do with implementation of the "Success for All" model at School No. 6. According to Barreto, it essentially was a reading program and at the start of each day students in grades 1-3 spent 90 minutes receiving instruction in reading. A student who reported twenty minutes or more late to school would be required either to wait in the office or be sent home and told to return with a parent. Sarduy told Barreto she disagreed with the policy of not allowing students to go into the classroom, even if late, and Barreto suggested that Sarduy could see to it that the student was occupied with other work (Ex. P-62). Respondent, she said, refused to do so unless specifically instructed to do so by the Superintendent of Schools (Ex. P-71j).

With respect to that part of Charge Seven surrounding Sarduy's conduct at School No. 6, Barreto related that in early January 2002, she learned of an incident wherein Sarduy essentially "barged in" to a meeting being held by a child study team member with a classified student's parent and another staff member (Ex. P-71h). Sarduy, in their presence, had demanded to know why no placement of <u>another</u> student (who Sarduy brought with her) had not yet been made and his evaluation not yet completed. Although Barreto was not an eyewitness to the event, the child study team staff member directly involved, Robert Mendez, later testified and his testimony will be discussed *infra*.

In summary, Barreto related that Sarduy's overall conduct as her assistant principal, rather than "assisting", actually interfered with and obstructed the principal's ability properly to administer the school building - - her primary responsibility. As Barreto put it, Sarduy chronically was "undermining my authority" and was "insubordinate".

Another incident descriptive of this untoward behavior occurred on January 23, 2002, which Barreto memorialized in a critical memorandum to Sarduy a few days later (Ex. P-72). In that incident, the guardian of a student who had been suspended came to the main office to look at the student's folder. A paraprofessional was assigned to copy materials from that folder. When Barreto saw Sarduy in the hallway she saw that respondent had the original folder in her possession and she told Sarduy it should not have been removed from her office. Sarduy then began to yell at Barreto, complaining that the principal was preventing her from doing her job and was wasting time having copies made instead of observing teachers. In her memorandum, Barreto noted that Sarduy continued to shout at her in the presence of secretaries, the attendance officer, a paraprofessional and three parents in the office, all of which conduct was described as "unprofessional and most inappropriate."

On cross-examination, Barreto explained that she first learned Sarduy would be assigned to School No. 6 as her assistant about one week before respondent actually reported for work. Although Barreto heard that Sarduy had experienced "some difficulties" with individuals in other schools, Barreto did not want to dwell in the past and hoped to "start fresh." She recalled giving Sarduy a list of her duties (Ex. P-52) but did not remember exactly how long they spent discussing the items on it. She specifically mentioned to Sarduy that she would be trained in the "Success for All" model and told her there was an educational session which Sarduy was approved to attend in December. Although Sarduy wanted to attend an earlier training session, Barreto believed it to be "inappropriate" since it was on an advanced level and Sarduy first needed basic foundation knowledge.

With respect again, to the distressing incident involving the destruction of her reply memorandum to respondent on January 3, 2002, (Ex. P-71b), Barreto repeated that after the unopened envelope addressed to respondent was returned and left on her desk, she brought Sarduy a second copy which she believed was the ripped up copy later returned as well.

Concerning the 90-minute reading period that Barreto described as an essential part of the "Success for All" program, it was designed to begin at about 9:00 a.m. and a child who arrived after 9:15 a.m. or 9:20 a.m. would be directed to remain in the office

or go home and return with a parent or guardian. Barreto agreed Sarduy took the position that a child should be receiving instruction from a teacher in class and not be made to stay in the office, but she had suggested ways that Sarduy could provide instruction to the late students in that situation. According to Barreto, the reason for the policy was to prevent children from coming to class late and disrupting the group.

Further with regard to lunchroom coverage, Barreto reiterated that if the assigned certified staff member could not be there it was imperative that proper coverage be provided since there are approximately 200 students present at the same time in need of supervision. It was, she said, Sarduy's absolute obligation to provide coverage if needed and she had no right to refuse to do so, whatever her reason. Although Sarduy did, at first, return to the cafeteria when told to do so by Barreto, apparently she stayed there for only a very short period and returned to Barreto's office before the period ended to announce she would not stay.

The next witness for the District was Josefa Tavarez, the teacher who accompanied Sarduy to the home of the child who had not been picked up when school ended. Tavarez waited with him outside school that day and Sarduy drove by in her car. After the assistant principal stopped to ask about the situation, she then went into the building to see if she could find a home telephone number. When she could not do so, she called the Passaic police, who apparently were unwilling or unable to provide help. As a result, Sarduy and Tavarez, in separate cars, drove to the boy's home where a woman who Tavarez believed identified herself as the child's "aunt" answered the door bell. Sarduy insisted that someone in charge of the boy come to school the next school day, using a tone of voice which Tavarez described as "a little high." The "aunt" seemed upset by the conversation and told Sarduy someone had gone to school to find him.

On the following Monday, when no parent or guardian came to school despite Sarduy's insistence, Tavarez was told by Sarduy to have a letter sent to the home directing that the child not return to school unless accompanied by a responsible adult. Tavarez was present when Sarduy told the boy he could not come back to school unless accompanied by a parent.

The next day (Tuesday) the boy's brother came to school to see Sarduy and Tavarez was called to the meeting. The brother was very upset because the "aunt" did not believe she had been spoken to properly by respondent. *See, also*, Ex. P-71(o).

The District's next witness, Roberto Mendez, is a school social worker who was in his first year of employment at School No. 6 during the 2001- 2002 school year. In January 2002, while meeting in his office with a classified student and a parent, Sarduy opened his door unannounced and interrupted the meeting. He recalled she had another student with her and expressed concern about that student - demanding to know why no out-of district placement had yet been secured for the student. Also, she threatened to take the matter to the Department and the newspapers if it was not resolved by "the following Monday."

Mendez insisted respondent came into the room unannounced and uninvited, accompanied by the other child. Although Mendez had been working on the student's case, Sarduy immediately demanded answers concerning the length of time the process was taking. He was very distressed that Sarduy would so freely discuss the particulars of another student's situation in front of other persons and was "shocked" and "taken aback by the whole experience". Even though only a first year employee, Mendez considered Sarduy's behavior to be so unprofessional that he personally apologized to the parent of the child with whom he was meeting.

The next witness, Lydia Agosto, is Barreto's secretary at School No. 6 and has been employed there for about 20 years. With respect to lunch duty coverage, it is Agosto's obligation to advise the principal if a teacher is not available so Barreto immediately could assign a certified person to provide the needed coverage.

One day in January 2002, a teacher who was assigned to cover one of the lunch periods became ill at work, which left a need for a substitute. Barreto told Agosto to page Sarduy and tell her to provide that coverage. Although Sarduy did go to the cafeteria in response to Barreto's directive, Sarduy shortly came to the office and told Agosto she would not remain on duty there because she was tired of being called so late. Agosto, at respondent's direction, wrote down Sarduy's exact words on a phone

message slip (Exhibit P-71f). In the message, Sarduy told Agosto to tell Barreto that she would not provide coverage and Barreto could cite her for insubordination.

Agosto also observed the incident involving the student folder. When respondent insisted she wanted the original folder and Barreto said she could not release the original to her (suggesting she make copies), Sarduy become quite upset.

The next District witness was Linda Kowalski who is a school social worker employed for the past six years. She worked about twice a week at School No. 8 where Sarduy was employed in 1999-2000. On January 7, 2000, Kowalski had a meeting scheduled with a parent to discuss an initial evaluation but was not aware until that day that the regular classroom teacher would not be able to attend. Rather than cancel the meeting (both parents were there), she determined a replacement teacher could attend the meeting to provide input. When Kowalski asked Sarduy to assign someone to undertake that function, she was told by respondent that no one was available because there were too many people out that day and there should be no meeting without the regular classroom teacher in attendance.

Nevertheless, since the parents had taken the trouble to come to school for a meeting, Kowalski was intent upon going forward and enlisted the child's speech teacher (Mrs. Kurland) to come with her to the meeting. Toward the end of the session Sarduy came into the room and, as the parents were ready to leave, Sarduy asked them to sit down and inquired if they had received a copy of a parental rights booklet, which they had. After some further discussion, the parents left.

On the same day, Kowalski had another meeting scheduled with a parent which had been rescheduled for her from the previous day. Sarduy told Kowalski not to meet with the parent until she spoke to the Superintendent. Ultimately, respondent told Kowalski she could hold the meeting. Kowalski felt that Sarduy's actions that day were unnecessarily "confrontational" and her behavior was, in Kowalski's view, inappropriate. It was wrong, she said, to heighten tension when the purpose of the meetings was to ease fears. Kowalski also identified a memorandum she prepared describing the two incidents (Exhibit P-29).

The final District witness, Susan Kurland, is a speech specialist also employed at School No. 8 for the last six years. On January 7, 2000, she was approached by Kowalski who advised her that she needed a replacement to attend a meeting with two parents since the regular teacher was not there that day. Since Kurland had the student for speech therapy, and also had special education certification, she arranged to attend the meeting too. At some point before the meeting began, Sarduy approached both Kurland and Kowalski and, "in a loud manner," told them to cancel the meeting because she, Sarduy, had not been informed about it. Kowalski and Kurland held the meeting anyway since the parents had come to school and wanted this to take place. Sarduy came into the room toward the end of the meeting and began making comments in a "loud and demeaning" manner about how she "knew the law". At that point, a secretary called to inform Kowalski that a parent had arrived for a second meeting. Kurland planned to be there as well since it also involved a child to whom she had been giving speech instruction. Sarduy then stood up, pointed her finger at Kurland and declared, "no one is to leave the room". This was done in front of the two parents and was very upsetting. Sarduy told the two of them not to have the next meeting until she spoke to the Superintendent. Later, Sarduy reported she had in fact reached an Assistant Superintendent who said the meeting could take place after all. Kurland, like Kowalski, prepared a memorandum detailing the events (Exhibit P-30).

TETIMONY FOR RESPONDENT

Sarduy then testified on her own behalf. She obtained a degree from a college in her native Cuba in 1961 and came to the United States in 1969. She attended Montclair State College (now Montclair State University) where she obtained both Bachelor's and Master's degrees. She has several teaching and supervisory certifications, including Student Personnel Services, Assistant Superintendent and English as a Second Language. She also received one week of training at Yale University in the Comer methodology of Whole School Reform and had training in "Success for All" at Johns Hopkins University as well.

After coming to the United States and obtaining her degrees, respondent first taught at St. Joseph's High School in Paterson. She began teaching in Passaic in 1974. In 1977, she became a guidance counselor at Passaic High School and served

in that capacity until 1993. Between 1993 and 1999, she held a variety of supervisory positions including Director of Guidance, Supervisor and Assistant Principal, first at School No. 10 in 1995-96. She was transferred to School No. 8 and in September 2000 received her assignment to School No. 6.

Sarduy reported to work at School No. 6 on September 11, 2000. She said she did not receive training nor special advice from Barreto concerning her responsibilities, although she did recall having a meeting, which lasted less than five minutes, at which Barreto merely handed her a list of duties and advised that the school was a "Success for All" school. Sarduy said she had no notice she was going to be assigned to School No. 6 until after school started in early September - no one had advised her before then – and she had no training or experience with "Success for All".

Respondent also explained that she has suffered from a variety of physical ailments, including fibromyalgia and depression, which cause her trouble in sleeping and to always function effectively. That is why she would be absent from time to time. She knew the call-in procedure if she was going to be absent and always did so. However, due to her varying illnesses, she would not always know far in advance how she would be feeling.

With respect to her January 3, 2002 memorandum to staff concerning supplies, plan books and discipline (P-71a), she explained that all three subjects were important to her. With regard to discipline, she was concerned that students referred to her likely were also in need of evaluation for behavioral problems and were being sent to her without consideration of their real needs.

With regard to inadequacy of supplies, prior to here assignment to School No. 6 Sarduy had never been involved with ordering supplies. When she arrived she found that there was not enough and she invited teachers to come and see for themselves. She insisted she never told the staff to take as many items as they wanted. Finally, with regard to her refusal to continue plan book review, she said she previously had questioned Barreto why lesson objectives were not required to be included, but since she never received any response she felt she could not properly continue to perform that duty.

Sarduy also explained that although she did find the reply memorandum from Barreto in her mailbox, she decided to return it unopened so that Barreto could tell her whatever she wanted to in person. In the past when she tried to have discussions with Barreto, the principal avoided meeting with her. Thus, by returning the envelope unopened it provided an opportunity for such a meeting. Only after she received a second envelope did she read the memo. She denied returning a ripped copy to Barreto's office.

With regard to the lunch period incident on January 8, 2002, on the day in question respondent only found out about the need for her to cover for an absent teacher at the last moment. Usually, she would receive a phone call from the office in advance. Thus, on this day, the request was "a big inconvenience" since she had to stop what she was doing, send the students with whom she was dealing back to their class, and then walk into the middle of a lunch period where it could be difficult to exercise control.

Specifically, Sarduy was about half-way through dealing with three students when she was advised to leave to go to the lunchroom. On her way there she was delayed when she had to stop in order to prevent some children from misconducting themselves. She then went to the cafeteria where she found only an aide in charge. Nevertheless, Sarduy shortly left to go to the principal's office to demand to know why only an aide was there. Although she conceded she was not comfortable about leaving the aide alone, she wanted felt so frustrated that she had to pursue the situation immediately with Barreto. When Barreto told her to return to the cafeteria, she did so. Sarduy estimated that she was gone for only two or so minutes.

With respect to the allegation that she refused to cooperate in preventing students who came late to school from going to reading class, she felt this rule was not educationally proper and had expressed concerns to Barreto about it. Sarduy felt it was unfair to penalize students who came late to school when, in many instances, it might have been their parents' fault. When Barreto ultimately did offer suggestions, including Sarduy having to provide instruction to the latecomers, respondent believed this now involved a "contractual thing" and wanted first to discuss the issue with the Superintendent.

Concerning Charge Four, respondent's alleged failure to perform observations of staff members at School No. 8 in 1999-2000, she said she told the Superintendent she could not continue to do them since one of the teachers given a bad rating by her in 1998-99 had succeeded in having herself removed from her list. The teacher, it seems, had complained that Sarduy was not truthful with respect to the observation and she (Sarduy) was asked to make changes on the observation. Thus, when the particular teacher was removed by Scozzaro, respondent considered this action to be detrimental to the integrity of the evaluation system; *i.e.*, she would not be allowed to observe people who previously she had criticized. Sarduy insisted, however, that after being directed to do so by the Superintendent, she again began to perform the observations.

With respect to Charge Five, failing to call in some of her absences, Sarduy again denied she had ever failed to do so.

Concerning Charge Six – respondent's alleged rudeness when the young student was not timely picked up at school, respondent corroborated much of what Tavarez testified had occurred. When Sarduy was told by the person at the home that she was not in charge of the boy, Sarduy told her to have the parent call the school to provide an address and also that she wanted to see the parents personally to make them aware of the seriousness of the situation She conceded she might have been "firm" in her approach, but she was extremely disturbed by the incident and had tried to prevent it from recurring. Sarduy denied she was rude or abusive, and at no time was she ever upbraided or disciplined by Barreto for her conduct.

Insofar as Charge Seven involving her allegedly interrupting the meeting conducted by Mendez is concerned, Sarduy explained it as follows. A student she had counseled had been referred for classification and she believed the process was taking much too long. One day, when she again saw the student sitting idly outside the office, she decided she had to take matters into her own hands and took him with her to see Mendez. Respondent said that she first knocked on the door and asked if she could interrupt and Mendez told her that she could enter the room. Although there was a parent there, she asked him if he understood English, and when he said "no" she spoke to Mendez only in English and urged prompt action be taken with regard to the student. She agreed she told Mendez that if the problem was not solved by the following

Monday, she would call the newspapers. However, Sarduy was very upset over the process taking so long. She fully understands she cannot barge into a meeting and denied that ever occurred.

Taking umbrage over the circumstances of her belated transfer to School No. 6 at the beginning of the 2000 – 2001 school year, Sarduy explained that in 1999-2000, after the principal at School No. 8 had become ill, and would not return, she and others had applied for the position. It was not until August 30, 2000, that she received a call from a secretary who told her Scozzaro, not she, would be selected. Respondent was particularly upset because even though she was the assistant principal at School No. 8 she had not even been interviewed. Although Sarduy received a letter from the Superintendent advising that administrators were to report on August 30, 2000, he had agreed that she would not have to report until September 2. When she did not report on that date either, the Superintendent wrote her to express his concern and he closed his letter with a request that she inform him of her intent regarding her assignment for the 2000-2001 school year (Exh. P-14). To that end, she identified another letter from the Superintendent, dated August 31, 2000, which directed her to meet with him on September 5, to discuss the assignment (Exh. P-50), which she did. Then, in a letter he sent to her on that date, the Superintendent confirmed their discussion and reiterated she would be transferred as an assistant principal to School No. 6 and should report there on September 7. In that letter the Superintendent explained that her transfer was necessitated by the Department of Education's denial of a District request to continue to fund her position at School No. 8 (Exh. P-51). Overall, Sarduy was miffed over her treatment and felt she was unfairly victimized by the late notice of her reassignment.

With respect, again, to the memorandum she sent to staff at School No. 6 on January 3, 2002 declining to review plan books, etc., Sarduy agreed she did not inform Barreto of that intent in advance, and never grieved it either. However, she felt she was placed in an awkward position regarding plan book review because Barreto told her one way to do it, and the central office told her another. Thus, she concluded it was in her best interest to refrain from doing it at all until the Superintendent cleared the matter up.

With regard to distribution of supplies, she again explained that her memorandum meant only that teachers should follow procedures and take what they need from her. As for her refusal to be involved in discipline referrals any further, Sarduy explained she took this position because students were being sent to her again and again who clearly needed screening for possible classification and should really not be treated as "discipline" problems at all. Thus, requiring her to discipline those students, whose needs were different, delayed the delivery of appropriate services to them and it was her intention to have superior authorities take notice of her concern.

Further with respect to the lunch duty coverage incident (Charge Two) Sarduy explained that she received Agosto's call in the middle of the period telling her to proceed to the lunchroom, which she did as soon as she could. When she arrived and found only an aide there, Sarduy felt she had to go to Barreto's office rather than wait until later since she was very upset over a situation which she described as "emergent." She agreed that in retrospect leaving the lunchroom was not the preferable course of action, but at the time felt she had no real choice. After she found Barreto and complained about having been called late yet again, she immediately returned as directed where, she said, the students were already in the process of leaving. She went back to tell Agosto that she was returning to her regular duties, but did tell Agosto to write down that Barreto could cite her for insubordination if she wished. Again, Sarduy was frustrated and upset at having been called to assist in the cafeteria in the middle of the period that day, which then required her to arrange coverage for three other students.

Concerning her alleged refusal to carry out teacher observations in 1999 – 2000 at School No. 8, Sarduy reiterated this occurred only after Scozzaro removed a teacher who had requested that she not be observed by respondent. According to Sarduy, it was unethical for Scozzaro to have acquiesced in that request and she told him what a poor precedent it would set and the untenable position in which she was placed. While Sarduy was aware that nontenured teaching staff members must be observed at least three times per year, she claimed she was not even requested by Scozzaro to do them in time to complete all three by April 15th. She was only able to start her observations in early March because, she said, she had not timely heard from the Superintendent

about her complaint over the removal of the teacher from her list. Ultimately, the Superintendent told her to begin the observations (Exh. P-40).

With regard, again, to that part of Charge Seven involving her allegedly interrupting Mendez while he was involved with another student and a parent, Sarduy reiterated she was extremely concerned about the student she brought with her since she had never received a status report concerning what was being done to place him. At times, she would see the boy sitting in the office for hours at a time, doing nothing, and she felt she had an obligation to step in to speed up the process. Respondent insisted she did not "discuss" the student's case in the other parent's presence, she simply asked Mendez to see to it that the student received classroom instruction while waiting for a placement rather than being given nothing to do for hours at a time. When Mendez told her he had no idea when the placement would occur, she did tell him that she would call the newspapers if nothing was done by the following Monday and she conceded that Mendez possibly could have been intimidated by her demeanor.

DISCUSSION

As noted, seven tenure charges were certified to the Commissioner with respect to respondent's alleged unbecoming conduct and insubordination. They will be discussed in order.

Charge One alleged that during the 2001-2002 school year Sarduy engaged in conduct unbecoming a tenured teaching staff member by failing to perform her assigned duties. In particular, the charge related to the January 3, 2002 missive which Sarduy dispatched to School No. 6 staff members respecting three separate topics: (a) inadequacy of available supplies and their distribution; (b) review of teacher plan books; and (c) discipline cases referred to her (Ex. P-71a). This memorandum was sent by her without any meaningful prior discussion with the principal concerning the topics. Nor did Sarduy alert the principal in advance that she intended to send that memorandum.

At the outset, Sarduy advised staff members that since the school did not have enough supplies, when they filled out monthly request forms for supplies she intended

to let them come on their own to the supply room and, "take what you need . . . ." In her second paragraph Sarduy specifically advised staff members that since September she had "some concerns about the plan books which I have asked on several occasions to be clarified by Ms. Barreto," and since Barreto had not given her a response she declared, "I will not check your plan book until further notice." Finally, Sarduy stated that, "I will not receive any discipline cases that you refer to me" and, further, that "My discipline records are not looked at and/or my opinion, suggestions or recommendations are not taken into consideration or asked at all."

At the very least, sending such a defiant memorandum to staff, especially without first discussing the topics in a meaningful way with Barreto, no less failing to alert her in advance that the memorandum was intended to be sent, was highly unprofessional. All three subjects were responsibilities which had been given to Sarduy, as Barreto noted in her reply memorandum (Ex. P-71b). As Barreto aptly pointed out in that memorandum, whether or not the two agreed on the issues, "is irrelevant to your job responsibility".

I totally agree with that observation. As Barreto noted, distribution of supplies in an orderly fashion was expected - it was not within Sarduy's province simply to allow teachers to come to the supply closet and take whatever they wished. So too, review of plan books and handling disciplinary referrals were vital matters which fell within the ambit of Sarduy's critical responsibilities as assistant principal. As Barreto explained, Sarduy's refusal to perform those duties, "must be viewed as a dereliction of duty and insubordination." Again, I agree. Decisions with respect to distribution of supplies, review of plan books and handling discipline cases referred to her were not to be made unilaterally by Sarduy, especially in a way that failed to accommodate her responsibilities as the assistant principal. To blatantly challenge her principal in this way was deliberately confrontational and bordered upon the appalling. With respect to her refusals vis-à-vis plan books and discipline, at least, Sarduy's behavior was palpably insubordinate.

As if sending the defiant memorandum to staff was not bad enough, when Barreto sent her reply memorandum to Sarduy concerning her expectations that respondent would continue to carry out her assigned duties, Sarduy's return of one of

the opened envelopes to Barreto's secretary, upon which she had written "refused", was petulant and unprofessional. Worse yet, another copy of the memorandum delivered to respondent by Barreto was ripped into pieces and placed back on Barreto's desk (Ex. P-71d.) Although Sarduy denied that action (she admitted she ripped up a copy but said she disposed of it in the trash can), her testimony is not credible. Who else would do that? By her actions on this occasion respondent demonstrated inexcusable rage against Barreto and clearly conducted herself in a highly unbecoming manner. I believe it was Sarduy who saw to it that the ripped copy was returned to Barreto's office. Indeed, yet a third copy of the memorandum was ripped up (likely by Sarduy as well) and placed back in Barreto's mailbox (Ex. P-71e). Such juvenile conduct is inexplicable.

This entire unfortunate chain of events concerning the above incident clearly constituted unacceptable behavior by Sarduy. As assistant principal, she was obliged to carry out her assigned responsibilities in a civilized fashion. If she disagreed with either the substance of the responsibilities, or the process by which they were assigned, it was her obligation as a senior professional staff member with 25 plus years' experience to bring her concerns in a proper fashion to the principal so they could be calmly discussed. Sarduy's conduct went well beyond the range of acceptable responses and easily rose to the level of unbecoming and/or insubordinate conduct. Sarduy knew better than to behave in that childish fashion, and her inability to control herself, followed by her unacceptable behavior in ripping up copies of the memorandum, cannot be tolerated.

With respect to Charge Two concerning the cafeteria coverage incident on January 8, 2002, I believe that Sarduy's behavior in that regard was particularly inappropriate and also constituted conduct both insubordinate and unbecoming a professional teaching staff member. Regardless of her disgruntlement concerning "late" notice to her, once she arrived at the cafeteria and found there was no certified staff member present it was her primary duty to remain there to provide proper supervision. Leaving the scene and proceeding to Barreto's office to complain was unacceptable conduct under any circumstances. To abandon her post in order to make a point concerning late notice and/or inadequate coverage was an extremely poor exercise of judgment. To make matters worse, even after Barreto directed respondent

immediately to return to the lunchroom, Sarduy again abandoned her post prior to the end of the period, returned to the principal's office, told Agosto she would not remain at the cafeteria and that she (Barreto), "can write insubordination letter if you want" (Ex. P-71f).

Particularly troubling about Sarduy's conduct on this occasion was the fact that even she acknowledged the real potential for danger that leaving 200 children in an unsupervised lunch area creates. As Sarduy herself observed, ". . . I was very afraid the student will have a fight, these are big, big boys - - sometimes they bring knives to the school and teacher, me and the students will see themselves and the whole cafeteria on the problem. I was very, very concerned about that." (Tr., June 5, 2003, p. 53-22 to -24.) For that very reason, Sarduy's leaving to go to Barreto's office to complain was extremely disturbing. That Sarduy, herself, knew her conduct was unacceptable (her comment to Agosto to write down "insubordination") reinforces my determination with respect to the unbecoming conduct committed by respondent as alleged in Charge Two. She abandoned her post not once, but twice, during the lunch period when obviously she could and should have remained to provide the coverage which even she agreed was necessary to prevent problems. Whether or not only an aide had been left to supervise the lunchroom in the past was not a justification or an excuse permitting Sarduy to act in the way she did.

Charge Three alleged that when Barreto asked respondent to assist in the implementation of certain aspects of Whole School Reform she responded that she would not do so unless specifically directed by the Superintendent. Testimony was received not only from Barreto with regard to School No. 6, but also from Scozzaro concerning conduct by Sarduy when she was his assistant at School No. 8. Because the testimony concerning the School No. 8 activities was too vague with respect to respondent's role, I will reject findings of culpability as it relates to her conduct in 1999-2000. On balance, while Sarduy may have been unfamiliar with some of the Whole School Reform requirements and/or unsure about the directives she was given pertaining to them, none of her conduct rises to the "unbecoming" level. While she might have been better advised to attempt to discuss the expectations concerning her participation in a more professionally apt fashion, her failure to do so is not a colorable offense.

Charge Four alleges that during the 1999-2000 school year, while serving as assistant principal at School No. 8 under the direction of Scozzaro, Sarduy unilaterally determined that she would no longer perform observations of teaching staff members. The charge continues that even after being directed by the Superintendent to perform those observations, and despite meetings with him as well as communications between them on the subject, respondent continued to refuse to carry out the assigned duty in timely fashion, if at all.

It is not entirely clear precisely when Scozzaro first instructed Sarduy to begin performing her observations with respect to half of the teaching staff members. However, since observations of non-tenured persons must be completed by April of any given school year, clearly the directions were given to her some months in advance. At some point, perhaps in December 1999 or January 2000, Sarduy expressed concern that one of the teaching staff members who she originally was assigned to observe had protested (because of a prior year's observation) and asked that her responsibilities with respect to observing that staff member be removed. When Scozzaro acquiesced in the teaching member's request not to be observed by Sarduy, respondent was disturbed over the propriety and the ethics of that determination and she decided in light of what she believed to be improper conduct by Scozzaro respecting the efficacy of the evaluation process not to carry out the observations (Ex. P-34).

Not unexpectedly, because she had declared she would not do any observations at all, the Superintendent directed Sarduy to meet with him on February 9, 2000 because he had, "serious concerns over several issues that are taking place". The meeting confirmed that Sarduy had determined not to conduct further evaluations.

Apparently, Sarduy nonetheless continued in her contumacious course of conduct not to observe, and in a letter from the Superintendent on March 1, 2000 (Ex. P-40) he pointed out to her that he believed the subject had adequately been addressed during their meeting in February and her obligation as assistant principal required her to perform observations as directed by Scozzaro. He concluded with the observation that, "I trust that I will not have to discuss this matter further".

Yet, even then, Sarduy either did not begin to conduct observations or stated that she would not since, just five days later, on March 6, 2000, the Superintendent sent her yet another letter pointing out her obligations to observe and requesting she meet with him on March 14, 2000 (Ex. P-41). At some point, thereafter, Sarduy apparently did begin to perform observations but, by then, there was inadequate time to do enough of them by April 15. While, technically, she may have performed the duty for a brief time, it was in an extremely limited, ineffective fashion and undertaken only after having been directed on more than one occasion to do so, not only by her immediate superior, Scozzaro, but by the Superintendent himself. Such conduct is both insubordinate and "unbecoming". Sarduy's role as assistant principal was to assist Scozzaro in the evaluation process, not create obstacles. While she may have had a valid complaint with regard to the propriety of removing a teacher from her list at the teacher's request, the self-help action she then took (refusing to conduct further observations at all) was not a tolerable alternative. It was her duty to perform as directed by her superior and she knowingly refused to do so. Placing her own needs ahead of the District's requirements was not an option.

Charge Five alleges that on "several occasions" respondent failed to give notice that she would be absent as required by District policy. While Barreto testified to some absences, the specific nature of the charge is limited to the procedure whereby staff members who expect to be absent must place a telephone call as early as reasonably possible to alert the central office or the school itself to the situation so that there will be time to obtain substitute coverage. The exhibits pertaining to this charge (Exhibit P-56, P-71K) relate to instances whereby Sarduy allegedly failed to provide that telephone notice (January 5, 2001 and September 12, 2001). It appears, as well, that a call she did make on January 4 regarding her absence was not made until shortly after 8:00 a.m.

For her part, Sarduy denied that she ever neglected to make phone calls to advise of her intended absences. On balance, given the relatively minor nature of the infractions (even if they occurred), I do not believe they rise to a level serious enough for me to determine that a tenure charge can be sustained. Thus, Charge Five should be dismissed.

Charge Six alleged that Sarduy performed in an unbecoming manner on the occasion when she had to take a child to his home because no one had picked him up after school on time and that she addressed an adult relative of the child in an "abrasive and unprofessional manner".

In my view, this charge cannot be sustained. First, respondent acted in an entirely appropriate fashion by stepping into a situation whereby a young child presumably was left "stranded" at school. She made proper inquiry to find out where he lived and whether he had a telephone so that a call could be made (apparently he did not), and she then attempted to enlist the aid of the local police, also to no avail. In order to safeguard the young boy, she and Tavarez accompanied him to his home and safely delivered him there. The only testimony with regard to the conversation Sarduy had on that occasion with the boy's "aunt" was offered by Tavarez and Sarduy. While Tavarez felt that Sarduy addressed the aunt in a "firm" manner, there is no direct evidence that she was rude, abusive or otherwise inappropriate in her remarks. Neither the "aunt" nor any other person testified concerning the conversation.

With regard to Sarduy's subsequent conduct in advising the boy he could not come to school unless he was accompanied by a parent or guardian, etc., this apparently was consistent with policy. While, on this occasion, as with many others, Sarduy could have acted in a less confrontational manner, her performance in respect to the entire incident does not rise to the level of unbecoming conduct. Thus, Charge Six should also be dismissed.

The last charge, Charge Seven, relates to Sarduy's conduct concerning child study team meetings. Although there was some general testimony on the subject by Scozzaro, Charge Seven does not relate to that testimony. Rather, it involves specific incidents which took place at School No. 8 during the 1999-2000 school year, and at School No. 6 in 2001-2002.

The first paragraph of Charge Seven relates to the incident at School No. 6 on January 4, 2002 whereby Sarduy, accompanied by a male student, interrupted a meeting conducted by Mendez with the parent of another child and began making demands concerning the status of the child who accompanied her. Whether or not

Sarduy "barged in" to the meeting unannounced (which I suspect she did), or first knocked and asked permission to enter, is not that important. While she may have entertained legitimate concerns with respect to the lack of progress she believed had been made in finding a proper placement for a student, she had no business marching him down to Mendez's office, intruding upon another meeting with a parent, and in the presence of others demand that steps immediately be taken or she would complain to the press. As in several other instances, Sarduy let her emotions get the better of her judgment, and without thinking the matter through in a reasonable fashion, as she was expected to do, taking it upon herself to engage in publicly improper behavior which was inimical to the best interests of the school system.

Simply put, respondent had no business discussing another student's situation in the presence of other persons. Her explanation that she spoke in English and that the parent in the room with Mendez did not understand that language was woefully unacceptable. Making threats in front of the student, a teaching staff member and a parent having no connection with the case she wanted to discuss is beyond the pale of acceptable behavior – it clearly was "unbecoming conduct" within the meaning of the tenure statutes. Sarduy should have known better than to comport herself in such an outrageous fashion. As Mendez aptly observed, even as a first year employee new to the profession it was obvious that what he observed in respect to Sarduy's actions was highly unprofessional. As he testified, "I was very taken aback. . . . . Again, I - - that was my first year. . . . I just - - I was just very taken aback by the whole experience. You know, - - you know I just question the professionalism. And I - - you know, I kinda of - - I was just taken aback. I was just very in shock, I guess." (Tr., April 7, 2003, p. 10-13 to –18.) In fact, Sarduy's conduct was so disturbing that Mendez had to apologize to the parent for the outburst.

The second paragraph of Charge Seven relates to the events which took place at School No. 8 on January 7, 2000 when Sarduy attempted to cancel child study team meetings because she felt the absence of the regular classroom teacher was unacceptable. Testimony was received from Sarduy, of course, and also from the two staff members directly involved, Kowalski and Kurland. Without again going into detail concerning the events which took place, suffice it to say I do not believe that Sarduy's conduct on those occasions rose to a level justifying tenure charges for unbecoming

conduct. While her activities generated a host of memoranda (see, e.g., Exs. P-29,P-30,P-31) the actual events only demonstrated that, at times, Sarduy could be abrasive, insensitive, and disagreeable. While clearly she may have exceeded tolerable limits on occasion, she did not do so with respect to the two meetings she attempted either to delay or cancel. Fortunately, neither meeting was cancelled and no untoward consequences occurred as a result of her actions. Thus, so much of Charge Seven as relates to the incidents at School No. 8 in January should he dismissed.

In reviewing the evidence related to the seven tenure charges, I have chosen not to discuss a variety of other incidents which were testified to during the hearings. I have attempted, instead, to relate my discussion directly to the specific allegations of the charges against which Sarduy was given a fair opportunity to defend. A broad series of minor incidents may, of course, provide a basis to prefer tenure charges. However, they must be more specific than appears in the charges in this case and, therefore, I have determined not to address them or to make any findings concerning them.

In summary, then, I have determined that the allegations against Sarduy contained in Charges One, Two and Four, and the first paragraph of Charge Seven have been sustained by a preponderance of the credible evidence. I have determined to recommend dismissal of the allegations contained in Charges Three, Five, Six and the second paragraph of Charge Seven.

PENALTY

Accordingly, there remains for consideration what penalty is appropriate for the findings of culpability that I have made in this case. Rosa Sarduy emigrated to the United States from her native Cuba after having been educated in that country in preparation for a teaching career. She obtained two degrees here, became employed in Passaic in 1974 and then served in a variety of responsible positions for over twenty-six years. In recent years she seems to have suffered from disabilities which may explain some of the problems which ultimately led to the instant proceedings. Nevertheless, she must account for the clearly unbecoming and persistent insubordinate conduct which I have found to exist in this case.

It is difficult to imagine what prompted someone with Sarduy's experience to behave the way she did on the occasions which led to these tenure charges. To dispatch a memorandum to staff members advising that henceforth she will not carry out her assigned duties, without even first discussing with Barreto both the substance of the communication and the fact that she was going to send it, is unfathomable. Unilaterally declining to review plan books or to engage in the student discipline process is particularly egregious conduct. At times Sarduy seemed intent upon exhalting her own interests over that of the District, and while her assignment to School No. 6 in 2000 was made in a manner which she felt to be precipitous, her disgruntlement with the process did not justify what she did thereafter. Assistant principals do not, as she did, decline to perform the responsibilities assigned to her by the principal, particularly where the two of them are the only administrators in an elementary school responsible for 800 students in kindergarten through sixth grade. Cooperation should be the hallmark of that relationship, not the defiance and confrontation which Sarduy seemed incapable of avoiding. It was not respondent's right to make up her own rules concerning distribution of supplies, and she had no business self-determining not to review teacher plan books or not to involve herself in disciplinary matters. Those were not her choices unilaterally to make. Although she claimed she attempted to discuss the matters with Barreto without success, the record is woefully inadequate in terms of what those efforts might have been. Even if respondent obtained less than satisfactory responses from Barreto, her proper course of action would have been to appeal to higher authority (as she seemed quite capable of doing on other occasions). Her memorandum of January 3, 2002 to the staff members at School No. 6 was not only unbecoming, it consisted, as well, of publicly insubordinate behavior which is not tolerable in any tenured teaching staff member, no less an assistant principal with over twenty-five years experience. Then, to make matters much worse, she deliberately and contumaciously ripped up memoranda delivered to her by Barreto concerning her misconduct. That infantile and petulant behavior was unbecoming and insubordinate in the extreme.

Of equally high concern was the behavior displayed by Sarduy with regard to the cafeteria coverage incident. She, herself, described the potential dangers which can arise when an experienced, certified teaching staff member is not present during a lunch period where 200 or more students are congregated in an informal setting like

that. Despite her admitted awareness of the pitfalls, she left the cafeteria unsupervised by a certified person not once, but twice, in order to complain to the principal about being notified "late" (which could have waited) and/or about the lack of coverage by a certified person which she, herself, was creating. I cannot conceive of any justification for that unbecoming conduct, and the abandonment of her post a second time was insubordinate as well.

Another highly disturbing event was the occasion involving Sarduy's interrupting the meeting conducted by Mendez. Clearly, Sarduy had no business taking a student to a meeting while the parent of another child was there to discuss his own child's situation and berating Mendez for the alleged lack of action in connection with the child who accompanied her. Even if I assume that her dismay was justified (and the testimony in that regard is not at all clear), and even if the parent meeting with Mendez did not understand English, how a senior administrator with respondent's special education certification and employment experience can behave in that way almost defies description, no less comprehension. Even a first year employee like Mendez knew her behavior was shockingly unprofessional, and to his credit he apologized to the parent for what had taken place.

These several incidents, alone, under normal circumstances could justify the removal of a tenured teaching staff member. When, added to them, are the additional findings I have made with regard to some of the other behaviors exhibited by respondent, that outcome appears to be inevitable. No school district need tolerate the arrogant behavior displayed by Sarduy toward Scozzaro (if not the Superintendent as well) by refusing to carry out observations even though directed to do so, or towards Barreto (defying her instructions, dispatching critical memoranda to staff without first discussing them with the principal and defying Barreto to cite her for insubordination). Dismissal of tenured teaching staff members has been found appropriate in situations involving much less untoward conduct than that.

In determining what an appropriate penalty recommendation to the Commissioner should be, it is difficult to ignore the service Sarduy has given to Passaic for many years in a variety of senior positions. Recommending the removal of any tenured teaching staff member is a regrettable action under any circumstances.

Nevertheless, Sarduy's service to the District and the parents, students and taxpayers it represents, clearly was so severely compromised by her unbecoming conduct and insubordinate behavior as to justify that her employment relationship be severed.

Even accounting for Sarduy's passionate beliefs and her concerns for students, sadly her deficient and largely self-interested behavior provides an ample basis for her removal. Indeed, it was as if respondent had embarked upon an almost deliberate course of career self-destruction. No staff member, particularly an assistant principal, can act in the manner Sarduy did and logically expect to be retained in his or her employment. No tenured teaching staff member, no less an assistant principal, can so militantly defy lawful directives from a superior, by ripping corrective memorandum and return them in that condition to the superior, leaving a busy lunchroom unattended by a certified staff person to challenge her superior to cite her for insubordination, and by intruding into meetings involving child study team members and parents where she has no business to be and comporting herself there in an entirely unacceptable fashion. As an assistant principal with her years of experience, Sarduy knew better than to embark upon the stridently negative path she seems to have chosen. Teaching staff members, including assistant principals, are required to be role models for students and staff. They are not permitted to be so confrontational, deliberately obstreperous and fiercely insubordinate as she was. Many staff members with whom Sarduy came in contact were negatively impacted by her - teaching staff, clerical workers, principals, child study team members, and even the Superintendent of Schools himself. As noted by the District, tenured teaching staff members (be they teachers or administrators) are expected, not just requested, to exhibit self-restraint and controlled behavior and not act in such a way as to so consistently impact upon the morale or the efficiency of the department or school in which they serve in such counterproductive ways. The high standards expected of someone in Sarduy's position, beginning in 1999-2000 and continuing into 2000-2001 and 2001-2002 were not met by her and the inexorable consequence, given the proven charges, is her removal from her tenured position.

Accordingly, in light of the circumstances described herein, I **ORDER** that the respondent, Rosa Sarduy, be **DISMISSED** from her employment as a tenured assistant principal.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 31, 2003
DATE

STEPHEN G. WEISS, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

10/31/03
DATE

Mailed to Parties:

NOV 0 3 2003
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

Md/mvh

APPENDIX

WITNESSES:

For School District of the City of Passaic

John Scozzaro
Celinda Barreto
Josefa Tavarez
Robert Mendez
Lydia Agosto
Linda Kowalski
Susan Kurland

For Respondent:
Rosa Sarduy

EXHIBITS

P-1 (For identification) Evaluation form, 6/13/97
P-2 (For identification) Letter from Rosa Sarduy to Dr. Robert Holster, 7/10/97
P-3 (For identification) Letter from Dr. Robert Holster to Rosa Sarduy, 9/24/97
P-4 (For identification) Letter from Dr. Robert Holster to Rosa Sarduy, 9/25/97
P-5 Job Description for Assistant Principal, 1/25/99
P-6 (For identification) Memo from Dr. Robert Holster to Rosa Sarduy, 5/24/99
P-7 (For identification) Letter from Rosa Sarduy to Education Association re Grievances, 6/8/99
P-8 (For identification) Letter from Rosa Sarduy to Dr. Robert Holster, 6/9/99
P-9 (For identification) Letter from Dr. Robert Holster to Rosa Sarduy, 6/10/99
P-10 (For identification) Memo from Dr. Robert Holster to Rosa Sarduy, 6/11/99
P-11 (For identification) Memo from Pamela Russell to Trena Araujo, 7/8/99
P-12 (For identification) Letter from Derlys Gutierrez, Esq., to Rosa Sarduy, 7/14/99

P-13 (For identification) Memo recommending John Scozzaro for Acting Principal of School No. 8, undated

P-14 Letter from Dr. Robert Holster to Rosa Sarduy, 9/3/99

P-15 (For identification) Letter from Dr. Robert Holster to Rosa Sarduy, 9/7/99

P-16 (For identification) Letter from Dr. Robert Holster to staff member of School No. 8, 9/7/99

P-17 (For identification) Letter from Rosa Sarduy to Dr. Robert Holster, 9/13/99

P-18 Letter from Rosa Sarduy to John Scozzaro, 9/14/99

P-19 Memo from John Scozzaro to Rosa Sarduy, 9/15/99

P-20 (For identification) Letter from Dr. Robert Holster to Rosa Sarduy, 9/21/99

P-21 (For identification) Letter from Dr. Robert Holster to Rosa Sarduy, 10/8/99

P-22 (For identification) Letter from Rosa Sarduy to Dr. Robert Holster, 11/8/99

P-23 (For identification) Letter from Dr. Robert Holster to Rosa Sarduy, 11/5/99

P-24 (For identification) Letter from John Scozzaro to Derlys Gutierrez, Esq., 11/30/99

P-25 (For identification) Memo from Rosa Sarduy to Derlys Gutierrez, Esq. and attached grievance, 12/3/99

P-26 Memo from John Scozzaro to Rosa Sarduy, 12/16/99

P-27 (For identification) Memo from Rosa Sarduy to John Scozzaro, 1/14/00

P-28 Memo from Violet Vazquez to Dr. Frank D'Ambra, 1/12/00

P-29 Memo from Linda Kowalskit re incident of 1/7/00 at School No. 8, undated

P-30 Memo from Susan Kurland re incident of 1/7/00 at School No. 8, undated

P-31 Memo from Carolyn Friedman to Dr. Frank D'Ambria re incident of 1/7/00, undated

P-32 (For identification) Two notes from Rosa Sarduy, undated

P-33 Memo from Rosa Sarduy to R. Holster, J. Scozzaro and F. D'Ambra, 2/3/00

P-34 Letter from Rosa Sarduy to Dr. Robert Holster, 2/3/00

P-35 (For identification) Memo from Dr. Robert Holster to Rosa Sarduy, 2/4/00

P-36 (For identification) Handwritten note by Rosa Sarduy to D'Ambra, 2/14/00

P-37 (For identification) Memo from D'Ambra to Rosa Sarduy, 2/15/00

P-38 (For identification) Notes from meeting with Rosa Sarduy, 2/10/00

P-39 (For identification) Memo from D'Ambra to Rosa Sarduy, 2/28/00

P-40 Letter from Dr. Robert Holster to Rosa Sarduy, 3/1/00

P-41 (For identification) Letter from Dr. Robert Holster to Rosa Sarduy, 3/6/00

P-42 (For identification) Letter from Rosa Sarduy to Dr. Robert Holster, 3/7/00

P-43 (For identification) Memo from Rosa Sarduy, 4/6/00

P-44 (For identification) Letter from Orlando Castro and Scott Henry to John Scozzaro, 4/10/00

P-45 (For identification) Memo from John Scozzaro to Rosa Sarduy, 4/20/00
P-46 (For identification) Letter from Dr. Robert Holster to David Ben-Asher, Esq., 5/1/00
P-47 Evaluation Form, 6/12/00
P-48 (For identification) Letter from Rosa Sarduy to Dr. Robert Holster, 7/30/00
P-49 (For identification) Attendance Record for Rosa Sarduy, 2000-2001
P-50 Letter from Dr. Robert Holster to Rosa Sarduy, 8/31/00
P-51 Letter from Dr. Robert Holster to Rosa Sarduy w/attachments, 9/5/00
P-52 (For identification) Memo from Celinda Barreto to Rosa Sarduy, 9/6/00
P-53 (For identification) Memo from Dr. Robert Holster to Rosa Sarduy, 10/30/00
P-54 (For identification) Letter from Celinda Barreto to Dr. Robert Holster, 11/16/00
P-55 (For identification) Memorandum from Dr. Robert Holster to Rosa Sarduy, 12/13/00
P-56 (For identification) Memo from Celinda Barreto to Rosa Sarduy, 1/5/01
P-57 (For identification) Memo from Celinda Barreto to Rosa Sarduy, 1/12/01
P-58 (For identification) Letter from Celinda Barreto to Dr. Robert Holster, B. Stein, J. Scozzaro and G. Henderson, 1/23/01
P-59 (For identification) Memo from Celinda Barreto to Rosa Sarduy, 2/28/01
P-60 (For identification) Evaluation Form for Administrators, undated
P-61 (For identification) Memo from Rosa Sarduy to Holster and Gutierrez, 10/5/01
P-62 Memo from Celinda Barreto to Rosa Sarduy, 10/12/01
P-63 (For identification) Memo from Rosa Sarduy to Steve Bondales & attached grievance, 10/19/01
P-64 (For identification) Memo from Rosa Sarduy to Steve Bondales & attached grievance, 10/19/01
P-65 (For identification) Memo from Rosa Sarduy to Steve Bondales & attached grievance, 10/19/01
P-66 (For identification) Letter from Rosa Sarduy to Dr. Robert Holster, 10/23/01
P-67 (For identification) Memo from Rosa Sarduy to Steve Bondales & attached grievance 5/1/02, 10/31/01
P-68 (For identification) Memo from Rosa Sarduy to Steve Bondales and attached grievance, 11/19/01
P-69 (For identification) Memo, Rosa Sarduy to Boudalis, etc., November 19, 2001

P-70 (For identification) Letter, Dr. Robert H. Holster to Regina DeLaCruz, Esq., January 7, 2002

P-71 Memorandum from Celinda Barreto to Rosa Sarduy w/encl.

P-71(a) Memorandum from Rosa Sarduy to staff members, January 3, 2002

P-71(b) Memorandum from Celinda Barreto to Rosa Sarduy, January 3, 2002

P-71 (c) Copy of sealed envelope containing notes from Rosa Sarduy

P-71 (d) Torn pieces of reply memorandum from Celinda Barreto to Rosa Sarduy

P-71(e) Torn pieces of Celinda Barreto memorandum to Rosa Sarduy

P-71(f) Copy of telephone message dictated to Agosto by Rosa Sarduy, January 8, 2002

P-71(g) Memorandum from H. Sullivan to Celinda Barreto, January 10, 2002

P-71(h) Memorandum from Dr. Frank D'Ambra to Rosa Sarduy, January 7, 2002

P-71(i) Request for attendance at training conference, November 9, 2000

P-71(j) Memorandum from Celinda Barreto to Rosa Sarduy, October 12, 2001

P-71(j) Memorandum from Celinda Barreto to Rosa Sarduy, October 12, 2001

P-71(k) Memorandum from Celinda Barreto to Rosa Sarduy, September 12, 2001

P-71(l) Copy of purchase order

P-71(m) Copies of plan book schedules

P-71(n) List of supplies and attached photographs

P-71(n)(a) (For Identification) Copies of photographs

P-71(o) Memorandum from Josefa Tavares to Celinda Barreto, January 14, 2002

P-71(p) Memorandum from Barreto to Rosa Sarduy, October 12, 2000

P-71(q) Memorandum from Celinda Barreto to Rosa Sarduy, January 5, 2001

P-71(r) (For identification) Log book

P-71(s)(For identification) Memorandum from Celinda Barreto to Rosa Sarduy, January 12, 2001

P-71(t) (For identification) Letter from Celinda Barreto to Dr. Robert H. Holster, January 23, 2001

P-72 Memorandum from Celinda Barreto to Rosa Sarduy, January 28, 2002

OAL DKT. NO. EDU 5474-02
AGENCY DKT NO. 154-5/02

IN THE MATTER OF THE TENURE	:	
HEARING OF ROSA SARDUY,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
PASSAIC, PASSAIC COUNTY.	:	

The record and Initial Decision issued by the Office of Administrative Law (OAL) have been reviewed. Respondent's exceptions and the District's reply thereto were filed in accordance with *N.J.A.C.* 1:1-18.4 and were fully considered by the Commissioner in his determination herein.

Upon his full independent review of the record in this matter, which included transcripts of the hearing at the OAL,[1] the Commissioner concurs with the Administrative Law Judge (ALJ) that Charges 1, 2, 4 and the first paragraph of Charge 7 have been sustained by a preponderance of the credible evidence.[2] The Commissioner further concurs with the ALJ, for the reasons fully and fairly presented on pages 29-32 of his decision, that the proven charges against respondent warrant termination from her tenured position.

Accordingly, the Initial Decision of the OAL is adopted for the reasons articulated therein. The Commissioner hereby directs that Rosa Sarduy be dismissed from her employment as a tenured assistant principal with the School District of Passaic as of the date of this decision.

[1] Hearing in this matter was conducted on December 3, 2002, January 22, 2003, March 7, 2003, April 7, 2003, May 28, 2003 and June 5, 2003.

[2] The Commissioner agrees, for the reasons aptly stated by the ALJ, that Charges 3, 5, 6 and the second paragraph of Charge 7 are appropriately dismissed.

A copy of this decision shall be transmitted to the State Board of Examiners for action as that body deems appropriate.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 12/11/03

Date of Mailing: 12/16/03

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

652-05

652-03SEC

IN THE MATTER OF DR. JONATHAN HODGES, BOARD OF EDUCATION OF THE STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

SYNOPSIS

The School Ethics Commission determined that respondent Board member violated *N.J.S.A.* 18A:12-24(a) of the School Ethics Act due to conflict of interest. A fellow Board member alleged that respondent had interest in a preschool that had a contract with the District and that he voted to approve payments to the preschool.

After considering the nature of the charges, and the fact that the preschool no longer was under contract to the District, the Commission recommended the penalty of reprimand. The Commission found that even though respondent sold his shares in the preschool, he held the note for the sale of his shares and had received at least one payment drawn on the preschool's general business account.

Upon review of the record, the Deputy Commissioner, whose decision was restricted solely to a review of the Commission's recommended penalty, concurred with the Commission's recommendation and, thus, ordered respondent reprimanded as a school official found to have violated the School Ethics Act.

December 15, 2003

IN THE MATTER	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
OF	:	
	:	**Docket No.: C13-03**
DR. JONATHAN HODGES	:	
PATERSON BOARD OF EDUCATION	:	**DECISION**
PASSAIC COUNTY	:	
	:	

PROCEDURAL HISTORY

The above matter arises from a complaint filed by Paterson Board of Education (Board) member Juan Santiago on March 7, 2003, alleging that fellow Board member Jonathan Hodges, M.D., violated the School Ethics Act, N.J.S.A. 18A:12-21 et seq. Specifically, the complainant alleges that Dr. Hodges had interest in a preschool that has a contract with the District and that he voted to approve payments to the preschool in violation of N.J.S.A. 18A:12-24(a) and (b).

Dr. Hodges filed an answer to the complaint on April 3, 2003 and filed an amendment to his answer on April 24, 2003. He admitted that he voted to pass resolutions during the Board meetings of September 18, 2002 and January 8, 2003, but was not specific as to the content of those resolutions. Dr. Hodges asserted that prior to his election to the Board, in April of 2002, he had a financial interest in the Kidz Pre-school Academy ("Academy"), but sold his interest in the Academy upon his election to the Board. He responded that he has had no role in the Academy's management, since that time. Dr. Hodges denies that he violated the Act.

The Commission invited the parties to attend its June 24, 2003, meeting to present witnesses and testimony to aid in the Commission's investigation. Mr. Santiago appeared represented by John D. Lynch, Esquire. The Commission also heard testimony from his witness, Toni Scholing, an internal auditor with the Board. Dr. Hodges appeared represented by Joel M. Miklacki, Esquire. Joseph Atallo, a member of the Board, was also present, as witness for Dr. Hodges. After hearing testimony, the Commission tabled the matter.

At its public meeting on July 22, 2003, the Commission found probable cause that Dr. Hodges' conduct was in violation of the Act, N.J.S.A. 18A:12-24(a) and (b) of the Act. The Commission asked Dr. Hodges to file a written submission in response to the finding of probable cause. He was also asked to comment on the appropriate penalty should the Commission determine that he violated the Act. Dr. Hodges filed a timely response. After consideration of Dr. Hodges' response to its probable cause decision, the Commission found, at its meeting of September 23, 2003, that Dr. Hodges violated N.J.S.A. 18A:12-24(a), but that he did not violate N.J.S.A. 18A:12-24(b) and dismissed this charge against him.

FACTS

The Commission find the following facts to be undisputed.

Dr. Jonathan Hodges was elected to serve on the Paterson Board of Education in April 2002. He and Malikah Abdulla incorporated Kidz Academy in the State of New Jersey in 1996 to provide daycare and after school care for children. Dr. Hodges and Ms. Abdulla were the two sole shareholders. The Paterson School District became an "Abbott" District in 1989 and, therefore, became entitled to receive State funding. In 1999, 2000 and 2001 the Academy contracted with the Paterson School District to provide pre-school services. The Academy was allotted a total of $354,000 in State funding for the 2001-2002 school year. Dr. Hodges was designated a salary of $30,000 for the same year, as the Academy's Chief Financial Officer.

In April 2002, Dr. Hodges was elected to the Board. On April 23, 2002, Dr. Hodges executed an agreement to sell his 500 shares in the Academy to Ms. Abdullah, who was the executive director of the Academy at that time. The agreement stipulated that the purchase price for the 500 shares was $500,000 to be paid in installments of $2,777.78 per month, with interest, commencing June 1, 2002 and concluding June 1, 2017.

In January 2003, the District prepared an audit of Kidz Academy which revealed that Dr. Hodges received a check from the Academy in the amount of $2,500, dated September 6, 2002. The memo at the bottom of the check notes it as a "mortgage payment." In his certification, Dr. Hodges indicated that Ms. Abdullah has other businesses that she runs in addition to the Academy that have no connection with the Board. He asserted that for business purposes, Ms. Abdullah channeled the proceeds of these businesses into the Academy's general business account.

Dr. Hodges testified that he advised the Board that for one year he would not vote on matters regarding early childhood education in an effort to avoid the appearance of conflict. At the Board's September 18, 2002 meeting, Dr. Hodges voted to pass a resolution to pay vendors' bills, including the payment of $52,115.40 to the Academy. Dr. Hodges also voted to approve the payment of $52,115.40 to the Academy at the Board's January 8, 2003 meeting.

The Board did not renew its contract with Kidz Academy for the 2003-2004 school year.

ANALYSIS

The Commission found probable cause that Dr. Hodges violated N.J.S.A. 18A:12-24(a) and (b) of the Act. Section (a) provides:

> No school official or member of his immediate family shall have an interest in a business organization or engage in any business, transaction, or professional activity, which is in substantial conflict with the proper discharge of his duties in the public interest.

The Commission noted in its decision on probable cause that under N.J.S.A. 18A:12-23, "interest" is defined as the ownership or control of more than 10% of the profits, assets, or stock of a business. While Dr. Hodges agreed to sell his 500 shares in the Academy to Ms. Abdullah for $500,000, the agreement stipulated that the payments were to be made in installments of $2,777.78 per month for a period of 15 years. As a result, Dr. Hodges holds the note for the sale of his shares. The Commission also recognized that Ms. Abdullah has only been paying on the note for one year. The Commission found that the note is an asset. Therefore, in its probable cause decision, the Commission found that Dr. Hodges held an interest in the assets of the Academy, due to the agreement, which is in substantial conflict with the proper discharge of his duties in the public interest.

In his response to the Commission's probable cause decision, Dr. Hodges argues that he divested all of his interest in Kidz Academy. He indicates that in exchange for the relinquishment of his interest and control of the business, he received an unsecured Promissory note from Malikah Abdullah. Dr. Hodges argues that the note does not provide for the return of stock or control of Kidz Academy upon default, is not collateralized with any security against the business and is not contingent upon Kidz Academy continuing to do business with the Board.

The Commission acknowledges the agreement binding Ms. Abdullah and not the Academy. However, the Commission recognizes that upon the default of the agreement, Dr. Hodges would have a legal claim to Ms. Abdullah's assets, which include the Academy. The Commission recognizes that Dr. Hodges does not currently hold interest in the Academy. However, it is undisputed that Dr. Hodges received at least one check from Ms. Abdullah that was drawn on the general business account of the Academy. The Commission finds that this one transaction was in substantial conflict with the proper discharge of Dr. Hodges' duties in the public interest, since the Academy receives funding from the District. The Commission, therefore, finds that Dr. Hodges violated N.J.S.A. 18A:12-24(a).

The Commission also found probable cause to credit the allegation that Dr. Hodges voted to approve the payment of $52,115.40 to the Academy in violation of N.J.S.A. 18A:12-24(b), which provides:

> No school official shall use or attempt to use his official position to secure unwarranted privileges, advantages or employment for himself, members of his immediate family or others.

The Commission reasoned that there was sufficient evidence that Dr. Hodges used his official position to ensure that by voting on the payments, Ms. Abdullah could

continue to pay him. In his response to the Commission's probable cause decision, Dr. Hodges asserts that the vote to pay the Academy "was not a preferential vote, but was one of hundreds of vendor bills approved for payment." Dr. Hodges argues that he did not use or attempt to use his position to secure unwarranted advantages or privileges.

The Commission is persuaded by Dr. Hodges' argument and finds that there is insufficient information to demonstrate that he cast the aforementioned vote to use or attempt to use his official position to secure an unwarranted advantage for himself or others. Therefore, the Commission finds that Dr. Hodges did not violate N.J.S.A. 18A:12-24(b).

DECISION

For the foregoing reasons, the Commission finds that Dr. Hodges violated N.J.S.A. 18A:12-24(a). The Commission, however, finds that Dr. Hodges did not violate N.J.S.A. 18A:12-24(b) and dismisses this charge against him.

PENALTY

Based on the findings set forth above that Dr. Hodges received funds drawn on the general account of the Academy, which was a vendor of the District, the Commission found that Dr. Hodges violated N.J.S.A. 18A:12-24(a), and should receive a reprimand. This penalty is warranted in that Dr. Hodges must be admonished that his action was wrong and that the Commission will not tolerate such action from him or others. The Commission does not recommend a higher penalty in this instance because it is mindful that Dr. Hodges initially took precautions to try to comply with the law. The fact that the Board no longer contracts with the Academy should preclude future conflicts. Therefore, the Commission recommends that the Commissioner of Education impose a penalty of a reprimand in this matter.

This decision, having been adopted by the Commission, shall now be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction only, pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, the respondent may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Paul C. Garbarini
Chairperson

Resolution Adopting Decision – C13-03

Whereas, the School Ethics Commission has considered the pleadings filed by the parties, the documents submitted in support thereof; and the testimony, and,

Whereas, the Commission found that Dr. Jonathan Hodges violated N.J.S.A. 18A:12-24(a) of the School Ethics Act, but found that he did not violate N.J.S.A. 18A:12-24(b) and dismissed the charges against him; and

Whereas, the Commission believes that the penalty of a reprimand is the appropriate sanction for Dr. Hodges;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter finding the respondent in violation of the School Ethics Act and recommends that the Commissioner of Education impose the penalty of a reprimand.

Paul C. Garbarini, Chairman

I hereby certify that the School
Ethics Commission adopted this decision
at its public meeting on October 31, 2003.

Lisa James-Beavers
Executive Director

(PG/LJB/JR/e:ethics/decisions/c13-03dec)

AGENCY DKT. NO. 401-10/03

IN THE MATTER OF DR. JONATHAN HODGES, BOARD OF EDUCATION OF THE STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The Deputy Commissioner, to whom this matter has been delegated pursuant to *N.J.S.A.* 18A:4-33, has reviewed the decision of the School Ethics Commission (Commission) and the record of this matter. The matter comes before the Commissioner pursuant to *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6A:3-9.1 to impose a sanction upon respondent, a member of the Board of Education of the Paterson State-operated School District, based on the Commission's finding that respondent violated the School Ethics Act. Specifically, the Commission found that respondent violated *N.J.S.A.* 18A:12-24(a) by maintaining an interest, through receipt of a Promissory Note payment drawn on the general business account of the program, from the new owner of a daycare/after-school program formerly co-owned by him and performing, during the time relevant to these proceedings,[1] under a contract with the District. For that violation, the Commission recommended that respondent be reprimanded.

Respondent filed a timely comment on the Commission's decision, wherein he notes his continuing disagreement with the Commission's interpretation of "interest" as set forth in *N.J.S.A.* 18A:12-24(a), but indicates that, if the Commission's

[1] As noted by the Commission, the program in question is no longer under contract to the District.

interpretation is accepted, the recommended reprimand is a fair penalty for the violation found. (Respondent's Comment at 1)[2]

At the outset, the Deputy Commissioner emphasizes that, in accordance with *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6A:3-9.1, only the School Ethics Commission may determine whether a violation of the School Ethics Act has occurred, and that the Commission's decision in that regard, including its underlying conclusions of law, is not reviewable by the Commissioner. Rather, the Commissioner's jurisdiction is limited to review of any sanction the Commission may recommend based upon its determination that a school official has violated the Act.

Given the limitations of the Commissioner's review and upon full consideration of the record in this matter, the Deputy Commissioner finds no cause to disturb the Commission's recommended sanction, which fairly considers both the nature and the circumstances of respondent's offense.

Accordingly, for the reasons expressed in the decision of the School Ethics Commission, IT IS hereby ORDERED that Dr. Jonathan Hodges be reprimanded as a school official found to have violated the School Ethics Act.[3]

DEPUTY COMMISSIONER OF EDUCATION

Date of Decision: 12/15/03

Date of Mailing: 12/16/03

[2] Comments were also submitted by the Complainant in the underlying school ethics matter; however, these were not considered by the Commissioner. *In re Pannucci*, decided by the State Board of Education March 1, 2000.

[3] This decision may be appealed to the State Board of Education in accordance with *N.J.S.A.* 18A:6-27 *et seq.*, *N.J.S.A.* 18A:12-29(d) and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to the latter, Commissioner decisions are deemed filed three days after the date of mailing to the parties.

653-03

K.J., on behalf of minor child, A.J.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner challenged the Board's residency determination that his brother, A.J., who came from the Palestinian area of Ramala, Israel, to live with him, was not entitled to a free public education under the "affidavit student" provision of *N.J.S.A.* 18A:38-1b.

The ALJ concluded that A.J., an American citizen, was entitled to a free public education in the District since he came to live with petitioner due to legitimate family or economic hardship and not solely in order to attend school in the District. Moreover, petitioner provided all of A.J.'s financial support. The ALJ granted petitioner's request that A.J. be permitted to attend school in the District without cost for the period from October 11, 2001 to April 17, 2003 and dismissed the Board's counterclaim for tuition.

The Commissioner adopted the Initial Decision as his own.

December 17, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8307-01
AGENCY DKT. NO. 404-10/01

K.J., ON BEHALF OF MINOR CHILD, A.J.,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,
Respondent.

Charles Ira Epstein, Esq., for petitioner

Georgia Tarachas Shikar, Esq., for respondent (Chasan, Leyner, Bariso & Lamparello, attorneys)

Record closed: October 30, 2003 Decided: November 6, 2003

BEFORE **ROBERT J. GIORDANO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, K.J., appealed the determination by respondent, Board of Education of the City of Clifton (Board/District), that his minor brother, A.J., was not entitled to a free public education in the District. Petitioner claimed that the minor child was entitled to a free public education pursuant to *N.J.S.A.* 18A:38-1(b). Respondent answered that

the application had not shown family or economic hardship or otherwise satisfied the requirements of *N.J.S.A.* 18A:38-1b(1). On September 25, 2001, the Board denied petitioner's application to have A.J. admitted to school in the District. On October 3, 2001, K.L. appealed the Board's denial pursuant to *N.J.S.A.* 18A:38-1 concerning this residency dispute. A.J.. was permitted to attend school in the District during the pendency of the appeal, commencing October 11, 2001. On November 9, 2001, the Board filed an answer denying the allegations in the petition, with a counterclaim for tuition.

On November 29, 2001, the Department of Education transmitted the matter to the Office of Administrative Law for a hearing as a contested case. A hearing was scheduled for August 8, 2002. Petitioner failed to appear on the hearing date. Counsel for respondent requested relief pursuant to the counterclaim for tuition. Respondent was to submit an affidavit in support of the application for tuition to the undersigned. No affidavit being received, the matter was rescheduled for hearing on the matter. After several adjournments, petitioner contacted the OAL and advised that he had not received notice of hearing in the matter. He had moved and no notices were received at that new address. The matter was rescheduled for hearing for July 17, 2003. At the hearing, petitioner requested additional time to retain an attorney. Since petitioner had moved from the district and the claim for tuition was fixed at the period from October 11, 2001 to April 17, 2003, an adjournment was granted. Charles Ira Epstein, Esq. entered an appearance on behalf of petitioner and the matter was rescheduled for September 16, 2003. At the conclusion of the hearing, the record remained open for the receipt of an amended affidavit regarding the *per diem* tuition charges in the District for the relevant time period. The affidavit was received on October 30, 2003. Thereafter, the record was closed.

STIPULATED FACTS

The parties agreed and stipulated that the minor student, A.J., was domiciled in Clifton and attended school in the District from October 11, 2001 to April 17, 2003.

FACTUAL DISCUSSION

Respondent called no witnesses but introduced documents in evidence. Included in the documents moved into evidence are the Affidavit of Karen Perkins, Business Administrator and Board Secretary for the Clifton Board of Education (R-1).[1] Additionally, respondent introduced the application submitted by petitioner (R-2), the letter from petitioner to the Commissioner of Education, requesting an appeal of the determination of the Clifton Board of Education (R-3), and the letter of determination by the Clifton Board of Education dated September 25, 2001 (R-4).

Testimony

T.J.

T.J., sixty years of age, is the father of petitioner, K.J., and the minor student, A.J. He is an American citizen who has resided in Ramala, Israel, since 1982. He lives there with nine family members for whom he is the sole means of support. Living with him are his wife and twelve-year-old son, B.J. Also living with them are his mother, two sisters, a sister-in-law and her three children. They live in an apartment with two bathrooms and three bedrooms. He indicated that there is little space for all of the family members. He is a teacher earning $1,200 per month. He has no other means of support or income. The household spends approximately $700 per month for food, $200 for insurance, and $300 for telephone and utilities. Often, he must borrow money from others to meet financial obligations.

The witness testified that he has three sons living in the United States. They are K.J., 26 years of age, and his brother, A.J., as well as another son, R.J., who is 27 years of age and also lives in Clifton, New Jersey. Both K.J. and R.J. came to the United States to live when they turned eighteen years of age. The minor son, A.J., came to the United States when he was fifteen years of age. None of the sons has any plans to return to Israel to live. The witness testified that he provided no financial

[1] The original affidavit marked R-1 was amended by subsequent affidavit dated October 23, 2003. The amended affidavit replaces the original affidavit and is also marked R-1 in evidence.

support for A.J. and that A.J. is supported solely by his brother, K.J. In fact, K.J. had to pay for the father's trip to the United States.

K.J.

The witness testified that he is the brother of the minor, A.J. He is employed as a salesman and is the sole support for A.J. He has been the sole support for his brother since he came to the United States to live. He testified that he would continue to support his brother beyond school years. In fact, his brother left school without graduating in April 2003 and K.J. has continued to support him. The witness testified that he receives no financial help in supporting his brother.

He further testified that his brother could not stay in Israel because of the situation there. The country is confronted with what was described by the witness as war. A.J. will have a better life in the United States.

K.J. himself came to the United States in 1994. His older brother had previously moved to the United States when he turned eighteen years of age. They each graduated from high school in Israel before coming to the United States. Only the younger brother, A.J., had not yet graduated before coming here.

FINDINGS OF FACT

Based on the testimonial and documentary evidence presented, and having had the opportunity to observe the demeanor of the witnesses and to assess their credibility, I make the following **FINDINGS** of **FACT**:

1. The minor child, A.J., was born on February 3, 1986.

2. His father, T.J., is an American citizen living in Israel, along with nine other family members, in a three-bedroom, two-bathroom apartment. They are his wife, son, mother, two sisters, a sister-in-law and her three children.

3. T.J. is a teacher in Israel, earning $1,200 per month. He is the sole support for the family members living together in Israel.

4. The family has monthly expenses of approximately $700 for food, $200 for insurance, and $300 for telephone and utilities. T.J. has difficulty supporting his family in Israel.

5. T.J. has three sons living in the United States. R.J. is 27 years old and living in Clifton, New Jersey.

6. K.J. is 26 years old and is also living in Clifton, New Jersey.

7. Both R.J. and K.J. came to the United States at the 18 years of age after graduating high school in Israel.

8. A.J. came to the United States when he was 15 years old, not yet having graduated from high school. He went to live with his brother, K.J., who has supported him since that time.

9. K.J. receives no remuneration for caring for A.J. and provides support and care for him *gratis*.

10. A.J. has no plans to return to Israel to live.

11. A.J. left high school before graduating in April 2003.

12. A.J. has continued to live with and to be supported by K.J. since that time.

13. A.J. attended school in the District for 157 days in the 2001-2002 school year.

14. The tuition cost for A.J. at Clifton High School for 157 days during the 2001-2002 school year was $7,264.74.

15. A.J. attended school in the District for 132 days in the 2002-2003 school year.

16. The tuition cost for A.J. at Clifton High School for 132 days during the 2002-2003 school year was $4,922.57.

LEGAL DISCUSSION

The State of New Jersey provides that "public schools shall be free to ... any child who is domiciled within the school district." *N.J.S.A.* 18A:38-1(a). The domicile of a minor child follows that of his parents. *See V.R. on behalf of A.R. v. Bd. of Ed. of Hamburg*, 2 *N.J.A.R.* 283, 286. The applicable statute, *N.J.S.A.* 18A:38-1(b)1, reads in pertinent part:

> Any person who is kept in the home of another person domiciled within the school district and is supported by such other person gratis as if he were such other person's own child, upon filing by such other person with the secretary of the board of education of the District, if so required by the board, a sworn statement that he is domiciled in the District and is supporting the child gratis and will assume all personal obligation for the child relative to school requirements and that he intends so to keep and support the child gratuitously for a longer time than merely through the school term, and a copy of his lease if a tenant, or a sworn statement by his landlord acknowledging his tenancy if residing as a tenant without a written lease, and upon filing by the child's parents or guardian with the secretary of the board of education a sworn statement that he is not capable of supporting or providing care for the child due to a family or economical hardship and that the child is not residing with the resident of the District solely for the purposes of receiving a free public education in the District. The statement shall be accompanied by documentation to support the validity of the sworn statement, information from or about which shall be supplied only to the board and only to the extent that it directly pertains to the support or nonsupport of the child. If in the judgment of the board of education the evidence does not support the validity of the claim by the resident, the board may deny admission to the child.

Therefore, the evidence must show that (1) petitioner is domiciled within the District; (2) petitioner is supporting A.J. *gratis*; (3) A.J.'s parents are not capable of supporting or caring for him due to family or economic hardship; and (4) A.J. is not residing with petitioner solely for the purpose of receiving a free public education in the District. Petitioner has the burden of proof to demonstrate family or economic hardship.

The position of the Board is that K.J. has not established that the parents have shown that they were incapable of supporting or providing care for A.J. due to a family or economic hardship. In *J.B. v Bd. of Educ. of Tp. of Ocean*, 96 *N.J.A.R. 2d* (EDU), *rev'd, Comm'r of Educ.* (March 25, 1996), *rev'd, State Bd. of Educ.* (Oct. 2, 1996), *on remand, Comm'r of Educ.* (Feb. 11, 1997), the Commissioner found that family strife had a detrimental affect on the student suggesting that the "parents, sadly, are

incapable of meeting his emotional, social, and developmental needs." Having determined by prior decision that these unique and compelling circumstances constitute family hardship, the Commissioner clarified on remand that for the above reasons, J.B.'s parents were not capable of providing care for him at the/that time due to such family hardship pursuant to *N.J.S.A.* 18A:38-1(b)(1). *Id.*

Where no hardship exists, the law requires that the resident shall be assessed tuition prorated to the time of the student's ineligible attendance in the school district. The statute, *N.J.S.A.* 18A:38-1(b)1, further reads in pertinent part:

> Tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance and shall be collected in the manner in which orders of the commissioner are enforced.

CONCLUSIONS

In the instant matter, the Board maintained that no family hardship was shown. The undisputed facts indicate that the situation is to the contrary. The family hardship here is that the parents were unable to provide sufficiently for A.J. to the extent that he came to a foreign country to live with a brother so that he would have a decent place to live. There is no evidence that A.J. moved for the sole purpose of attending school in the District. Indeed, A.J. moved to Clifton primarily because the brother lived there, not to avoid attending school in another district in the State. Moreover, there was no other district in the State where A.J. was eligible to attend school at the time, under *N.J.S.A.* 18A:38-1. I **CONCLUDE** that the compelling circumstances in this case rise to a level of family and economic hardship that meets the standard of the statute. "To hold otherwise harms a party the Legislature never meant to penalize ... and overlooks the substantial state interest in ensuring the education of all its children ... ." *Gundersen v Bd of Educ of the City of Brigantine*, 95 *N.J.A.R. 2d* (EDU) 39, 42. In *Gundersen*, in finding hardship in a child's reaction to marital conflict, the Commissioner quoted his previous decision with approval. "In interpreting a statute, the Commissioner must look to the fundamental purpose for which the legislation was enacted, and where a literal reading will not accord with that purpose, the spirit of the

law will control over its letter. Moreover, the meaning of a statute is to be gathered from the mischief sought to be eliminated as well as the proposed remedy."

The amendments to *N.J.S.A.* 18A:38-1

> were intended to ease the burden on local boards of education attempting to remove illegally enrolled students, specifically those living with a parent or guardian who claims to be, but is not, domiciled within the district, and those living with a person other than the parent or guardian in order to obtain the benefit of a free public education in a district other than that of their entitlement by parental domicile ... . The intent of the "affidavit student" law is not now, and never has been, to deny an education to a child whose living arrangements may not be as contemplated by the statutory scheme ... .
>
> [*R.H. v Ocean Co Bd of Educ.*, 96 *N.J.A.R. 2d* (EDU) 628, *citing Gundersen, supra.*]

The undisputed evidence showed that petitioner has taken A.J. into his home indefinitely to provide him with the necessities of life that the A.J.'s parents were not able to provide him in Israel. Hence, there was no goal of the family to move from one school district in New Jersey to another, which was a major reason for the stringent amendments to the law. *See N.J.S.A.* 18A:38-1, Legislative Statement. There was no evidence that this arrangement was entered into fraudulently for the purposes of obtaining a free public education in the District. Finally, A.J. is an American citizen, imbued with the same right to a free public education as any other citizen.

Based on the above, I **CONCLUDE** that petitioner has satisfied the requirements of *N.J.S.A.* 18A:38-1(b) in that petitioner was domiciled within the District; was supporting A.J. *gratis*; the parents were incapable of supporting A.J. in their own country due to economic hardship, and A.J. was not residing with petitioner solely for the purposes of receiving a free public education in the District. Therefore, I **CONCLUDE** that A.J. met the requirements of an affidavit student pursuant to *N.J.S.A.* 18A:38-1(b) and was therefore entitled to a free public education in the District during the 2001-2002 and 2002-2003 school years.

ORDER

For all of the foregoing reasons, it is hereby **ORDERED** that the determination of the Board of Education of the City of Clifton is and shall be **REVERSED**. Petitioner's

request to allow A.J. to attend school in the respondent District without cost for the period from October 11, 2001 to April 17, 2003 is **GRANTED**. Respondent's counterclaim for tuition is hereby **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

11/6/03
DATE

ROBERT J. GIORDANO, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

11/7/03
DATE

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

NOV 10 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

md

APPENDIX

WITNESSES

T.J.

K.J.

EXHIBITS

R-1 Affidavit of Karen Perkins

R-2 Application by Clifton Resident, September 21, 2001

R-3 Appeal letter, October 3, 2001

R-4 Denial letter, September 25, 2001

OAL DKT. NO. EDU 8307-01
AGENCY DKT. NO. 404-10/01

K.J., on behalf of minor child, A.J.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions.

Upon careful and independent review of the record in this matter,[1] the Commissioner concurs that petitioner has demonstrated that: 1) he is supporting his brother, A.J., *gratis*; 2) A.J.'s parents are incapable of supporting A.J. and caring for him in their own country due to economic and family hardship; and 3) A.J. is not residing with petitioner solely for the purpose of receiving a free public education in the District. A.J. was, therefore, entitled to attend school in the Board's District, free of charge, pursuant to *N.J.S.A.* 18A:38-1 *et seq.*, during the period from October 11, 2001 to April 17, 2003.

Accordingly, the Initial Decision of the ALJ is adopted for the reasons expressed therein.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 12/17/03

Date of Mailing: 12/17/03

[1] The parties stipulated that, during the time period at issue, *i.e.*, October 11, 2001 to April 17, 2003, petitioner and his brother, A.J., were domiciled within the Clifton School District. (Initial Decision at 2)

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

654-03

IN THE MATTER OF THE TENURE	:	
HEARING OF ANNE MC ALARY,	:	
STATE-OPERATED SCHOOL DISTRICT OF	:	COMMISSIONER OF EDUCATION
JERSEY CITY, HUDSON COUNTY.	:	DECISION
	:	

December 17, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 3400-03
AGENCY DKT. NO. 94-3/03

IN THE MATTER OF THE TENURE HEARING OF
ANNE MCCARLARY,
STATE OPERATED SCHOOL SYSTEM OF JERSEY CITY

Charlotte Kitler, General Counsel, for petitioner

Louis P. Bucceri, Esq., for respondent

Record Closed: October 29, 2003 Decided: November 3, 2003

BEFORE **STEPHEN G. WEISS**, ALJ:

STATEMENT OF THE CASE

This tenure matter was transmitted by the Department of Education to the Office of Administrative Law on April 3, 2003, following the certification of tenure charges by petitioner Board of Education of the School District of the City of Jersey City versus respondent, Anne McAlary, a tenured teaching staff member. A plenary hearing was scheduled to be commenced before the undersigned administrative law judge in August 2003 but was adjourned in advance of that date in light of the pendency of an application by respondent for an ordinary disability retirement.

Subsequently, a Stipulation of Settlement containing the terms and conditions of an agreement between the parties to resolve the dispute was submitted to me for review.

I have reviewed the attached Stipulated of Settlement submitted by the parties and find that it fully disposes of all issues in controversy and is consistent with law. In particular, respondent acknowledges that by entering into this settlement she understand that the Commissioner must approve and that he could refer the matter to the State Board of Examiners for possible revocation of her certificate. Also, the stipulation sets forth that the school district believes that the withdrawal of the tenure charges and resolution of the matter without the need for hearing would serve the public interest in light of the background circumstances involved.

The parties voluntarily have agreed to the terms of the settlement as is evidenced by the signatures appearing thereon.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

November 3, 2003
DATE

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

November 6, 2003
DATE

M. Kathleen Duncan (GJ)
DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

NOV 06 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

\mvh

CHARLOTTE KITLER
General Counsel
State-Operated School District
of Jersey City
346 Claremont Avenue
Jersey City, New Jersey 07305
(201) 915-6231
Attorney for Petitioner

IN THE MATTER OF THE TENURE HEARING OF	:	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY
	:	OAL Dkt. No. EDUTH 03400-03N
ANNE McALARY	:	Agency Ref. No. 94-3/03
STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY	:	STIPULATION OF SETTLEMENT

WHEREAS, Anne McAlary has been employed as a school nurse by the Jersey City School District since September 1, 1986; and

WHEREAS, the District filed charges with the Commissioner of Education on March 19, 2003, to terminate the employment of Ms. McAlary for excessive absenteeism and unbecoming conduct; and

WHEREAS, the Board of Trustees of the Teachers' Pension and Annuity Fund acted on September 4, 2003, to approve Ms. McAlary's application for retirement on ordinary disability, effective retroactively to March 1, 2003; and

WHEREAS, Ms. McAlary's retirement from the District's employment renders the charge of excessive absenteeism moot, *Barshatsky v. Freehold Reg'l High School Dist.*, 95 N.J.A.R.2d (EDU) 71, 73; and

WHEREAS, the charge of unbecoming conduct was based upon (1) an alteration in the beginning date of a medical leave of absence for Ms. McAlary in November 2001;

(2) two appointments for Ms. McAlary with Board physicians which were not kept; and (3) absence without approved leave; and

WHEREAS, Ms. McAlary has explained, in her certified answers to interrogatories, that (1) the date on the medical leave of absence submitted in September, 2001 was changed by her personal physician as a correction of dates; (2) she was unable to keep one of the two appointments with Board physicians because she received only two days' notice and was concerned with the terminal illness of her brother, and she was unable to keep the second appointment because of her own illness at the time; and (3) the applications for medical leave which she submitted were denied, and hence she was considered absent without leave, only because of her missed medical appointments and because of the change in date on the November 2001 submission; and

WHEREAS, Ms. McAlary's certified answers to interrogatories provide satisfactory explanations sufficient to negate the charge of unbecoming conduct; and

WHEREAS, the public interest would be best served by a withdrawal of the tenure charges and resolution of the matter without further adjudicatory proceedings; and

WHEREAS, Ms. McAlary acknowledges that she clearly understands the terms of this settlement agreement, that she entered into the settlement agreement voluntarily, that she was advised and understood that the Commissioner of Education had to approve the settlement agreement and that she was also advised and understood that the Commissioner could refer the matter to the State Board of Examiners for possible revocation of her certificate;

NOW, THEREFORE, the parties have agreed to the following terms of settlement:

1. The respondent Anne McAlary resigns from employment with the Jersey City School District on retirement, effective March 1, 2003.

2. The petitioner Jersey City School District agrees to accept Ms. McAlary's resignation, and agrees to withdraw the tenure charges bearing the OAL Docket Number EDUTH-03400-03N and the Agency Reference Number 94-3/03.

ANNE McALARY

Charlotte Kitler, General Counsel,
State-Operated School District of
Jersey City

DATED: 10/28/03

Bucceri & Pincus
Attorneys for Respondent Anne McAlary

DATED: 10/24/03

Mailing Address:
PO Box 295
Trenton, NJ 08625-0295
Location:
50 West State Street
Trenton, New Jersey

JAMES E. McGREEVEY
Governor

STATE OF NEW JERSEY
DEPARTMENT OF THE TREASURY
DIVISION OF PENSIONS AND BENEFITS
(609) 292-7524 TDD (609) 292-7718
www.state.nj.us/treasury/pensions

JOHN E. McCORMAC, CPA
State Treasurer

FREDERICK J. BEAVER
Director

TO: ANNE MCALARY
33 SMITHFIELD VILLAGE
EAST STROUDSBURG, PA 18301-0000

FROM: Board and Trustee Administration

RE: TPAF 399478

DATE: September 4, 2003

SUBJECT: APPROVAL OF DISABILITY RETIREMENT APPLICATION

The Teacher's Pension and Annuity Fund Board of Trustees at its meeting onSeptember 4, 2003, approved your application for Ordinary Disability Retirement effective March 1, 2003, under Maximum. You have the right to withdraw, cancel, or change your retirement application provided you notify the Division of Pensions and Benefits within 30 days of the date of the Board's approval or your retirement date, whichever is later; otherwise, the retirement will stand as approved and cannot be changed for any reason.

If you continue to receive a salary beyond the effective date of retirement, no retirement benefits shall be paid for the period where you received salary and no salary or service credit shall be provided for the service rendered after the approved effective date of retirement. In addition, your employer shall be required to complete an updated Certification of Service and Final Salary.

Your retirement allowance as a disability retirant is subject to adjustment if your earnings from employment after retirement exceed the difference between the pension portion of your retirement allowance and the salary attributable to your former position.

The statute permits the Board of Trustees to require a disability retirant to undergo annual medical examinations to determine if she/he continues to be totally and permanently disabled and therefore eligible for continued receipt of his/her disability retirement allowance.

If you were required to purchase service credit in order to qualify for your retirement, you must complete the purchase transaction before your retirement benefit can be paid.

The Board has waived the 30-day waiting period for all Retirements with an effective date of March 1, 2003, and earlier. However, the processing of your retirement allowance will take approximately 2 to 4 weeks.

Your file is being transferred to the Retirement Bureau to implement the Board's decision.

c: JERSEY CITY PUBLIC SCHOOLS
346 CLAREMONT AVE
7TH FLOOR PAYROLL OFFICE
JERSEY CITY, NJ 07305-0000

J-1

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OAL DKT. NO. EDU 3400-03
AGENCY DKT. NO. 94-3/03

IN THE MATTER OF THE TENURE	:	
HEARING OF ANNE MC ALARY,	:	
STATE-OPERATED SCHOOL DISTRICT OF	:	COMMISSIONER OF EDUCATION
JERSEY CITY, HUDSON COUNTY.	:	DECISION
	:	

The record, Stipulation of Settlement and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.*

Upon review, the Commissioner approves the settlement terms since they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *See In re Cardonick*, 1990 *S.L.D.* 842, 846, decided by the Commissioner of Education April 7, 1982, *aff'd* State Board April 6, 1983; and *N.J.A.C.* 6A:3-5.6(a). The matter is hereby dismissed, subject to compliance with the terms of the settlement. A copy of this decision will be transmitted to the State Board of Examiners for action as it deems appropriate.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 12/17/03

Date of Mailing: 12/18/03

* It is noted that the Initial Decision misspelled respondent's last name.

655-03

FRANK PIETROWSKI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WALDWICK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

December 17, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 9200-00

AGENCY DKT. NO. 277-8/00

FRANK PIETROWSKI,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF WALDWICK, BERGEN COUNTY,

Respondent.

Sanford Oxfeld, Esq., for petitioner
(Oxfeld Cohen, P.C., attorneys)

Vittorio S. LaPira, Esq., for respondent
(Fogarty & Hara, attorneys)

Record Closed: October 16, 2003 Decided: November 6, 2003

BEFORE **IRENE JONES**, ALJ:

On October 6, 2000 this matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F1 to -13. The matter was scheduled for hearing on several occasions but

adjourned pending the outcome of petitioner's Worker's Compensation case. On June 24, 2003 the Worker's Compensation case was settled and as a result of that settlement, petitioner agreed to withdraw any collateral action against the respondent. A signed Stipulation of Dismissal was filed in the OAL on October 16, 2003 and is attached hereto.

I have reviewed the record and terms of the attached settlement/dismissal and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties or their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with law.

I **CONCLUDE** that the agreement meets the safeguard requirements of *N.J.A.C.* 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

11/06/03
DATE

Irene Jones
IRENE JONES, ALJ

Receipt Acknowledged:

November 10, 2003
DATE

M. Kathleen Duncan (by)
DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

NOV 12 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

sej

FOGARTY & HARA, ESQS.
16-00 Route 208 South
Fair Lawn, NJ 07410
(201) 791-3340
Attorneys for Respondent
Our File No. 112

FRANK PIETROWSKI, Petitioner, v. BOARD OF EDUCATION OF THE BOROUGH OF WALDWICK, Respondents.	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY AGENCY REF. NO. 277-8/00 OAL DOCKET NO. EDUOA 09200-00N **STIPULATION OF DISMISSAL**

The matter in difference in the above entitled action having been amicably resolved by and between Petitioner, Frank Pietrowski, and Respondent, the Board of Education of the Borough of Waldwick, it is hereby stipulated and agreed that this matter is hereby dismissed with prejudice and without costs against either party.

OXFELD COHEN, P.C.
Attorneys for Petitioner

By: _____
Sanford Oxfeld, Esq.

FOGARTY & HARA, ESQS.
Attorneys for Respondent

By: _____
Vittorio S. LaPira, Esq.

State of New Jersey
Department of Labor
DIVISION OF WORKERS COMPENSATION
P.O. Box 381
Trenton, New Jersey 08625-0381

WC(DOL)-370 (R 11-99)

ORDER APPROVING SETTLEMENT WITH DISMISSAL
N.J.S.A. 34:15-20

CASE NO. 2000-12071

D.O. Mt. Arlington

PETITIONER

SOCIAL SECURITY NUMBER 154-50-1482

NAME
FRANK PIETROWSKI

ADDRESS (Including County) Sussex County
7 Woodland Trail
Sussex, NJ 07461

VS

RESPONDENT

NAME
WALDWICK BOARD OF EDUCATION

ADDRESS (Including County) Bergen County
155 Summit Avenue
Waldwick, NJ 07463

☐ FEDERAL EMPLOYER'S IDENTIFICATION NUMBER
OR
☐ NEW JERSEY REGISTRATION NUMBER

ATTORNEY FOR PETITIONER

☐ NEW JERSEY REGISTRATION #
☐ SS #
☐ FEDERAL EMPLOYER'S IDENTIFICATION # 01-0725848

NAME
OXFELD COHEN, P.C.

ADDRESS
50 Commerce Street
Newark, NJ 07102-4003

TELEPHONE (Area Code) (973) 642-0161

INSURANCE CARRIER

INSURANCE CARRIER NAME INSERVCO INS. SERVICES
Indicate If Self-Insured ☐ or If Not Covered ☐
FEIN OR N.J. REG. NO.:

ATTORNEY FOR RESPONDENT

NAME
CAPEHART & SCATCHARD

ADDRESS
8000 Midlantic Drive, Suite 300
Mt. Laurel, NJ 08054

TELEPHONE (Area Code) (856) 234-6800

This is a lump sum settlement between the parties in the amount of $ 7,500.00 (Seven Thousand Five Hundred Dollars and No Cents dollars) pursuant to N.J.S.A. 34:15-20 which has the effect of a dismissal with prejudice, being final as to all rights and benefits of the petitioner and is a complete and absolute surrender and release of all their rights arising out of this/these claim petition(s). The payment hereunder shall be recognized as payments of workers' compensation benefits for insurance rating purposes only.

☐ The parties agree that this settlement does not contemplate a complete and absolute surrender and release of any and all rights by the petitioner's dependents as defined by N.J.S.A. 34:15-13 arising out of this/these claim petition(s).

ALLOWANCES

MEDICAL FEES & COSTS	TOTAL ALLOWED	BY PETITIONER	BY RESPONDENT
Peter M. Crain, M.D.	200	200	
ATTORNEY FEES	1500	1500	
STENO FEES	85		85

Stenographic Service O Brien

Reason for Sec. 20 Questions of jurisdiction, liability and causal relationship - Daniel Zazzali - Lauri

We hereby consent to the entry of this Order and acknowledge receipt of it:

Attorney for Petitioner OXFELD COHEN, P.C. Date

Attorney for Respondent CAPEHART & SCATCHARD Date

Petitioner FRANK PIETROWSKI Date

After considering all the circumstances, I find this settlement fair and just.

Date 6-27-03 By S. Tuber
HON. STEPHEN TUBER Judge of Compensation

Others, where applicable: PETITIONER AGREES TO ABANDON ANY PENDING COLLATERAL LEGAL ACTION AGAINST RESPONDENT

DISTRIBUTION: Copy 1 - Office Copy Copy 2 - Respondent's Attorney Copy 3 - Petitioner's Attorney Copy 4 - Petitioner

OAL DKT. NO. EDU 9200-00
AGENCY DKT. NO. 277-8/00

FRANK PIETROWSKI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WALDWICK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and Stipulation of Dismissal, with appended Order of the Division of Workers' Compensation Approving Settlement With Dismissal, and the Initial Decision issued by the Office of Administrative Law have been reviewed. It is noted that this matter was characterized as a Settlement, pursuant to *N.J.A.C.* 1:1-19.1, by the Administrative Law Judge in her Initial Decision. Upon review of the file, the Commissioner concludes that the within matter, is more appropriately categorized as a withdrawal under *N.J.A.C.* 1:1-19.2, pursuant to a settlement agreement effectuated in another forum. The Commissioner approves the withdrawal and, consequently, this matter is no longer deemed to be a contested case before him and is, therefore, dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 12/17/03

Date of Mailing: 12/18/03

656-03

JAMES AND BARBARA BAILEY,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MAURICE RIVER, CUMBERLAND COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning parents challenged the Board's decision denying their request to relocate their children's bus stop at the intersection of Carlisle Place Road and Route 47. Rather, they sought relocation closer to their home on Carlisle Place Road, an unpaved, gravel road.

Having considered the testimony of witnesses and the record, including the video tapes and exhibits presented, the ALJ determined that petitioners failed to prove that the Board's actions were improper. The ALJ found that he could not substitute his judgment for that of the Board; that the Board's judgment was based on a professional evaluation of all of the surrounding circumstances; and that said judgment was not arbitrary, capricious or unreasonable, nor was it discriminatory. Petition was dismissed.

The Commissioner adopted the findings and determination in the Initial Decision as his own.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 924-03
AGENCY DKT. 70-1/03

JAMES AND BARBARA BAILEY,

Petitioners,

v.

BOARD OF EDUCATION OF MAURICE RIVER TOWNSHIP, CUMBERLAND COUNTY,

Respondent.

Gary Wodlinger, Esq., for petitioners (Lipman, Antonelli, Batt, Dunlap, Wodlinger & Gilson, attorneys)

Frank DiDomenico, Esq., for respondent

Record Closed: October 28, 2003 Decided: November 10, 2003

BEFORE **W. TODD MILLER,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The New Jersey Department of Education Bureau of Controversies received a request for

relief on March 6, 2003. Petitioners assert that respondent, Maurice River Township Board of Education, arbitrarily refused the relocate a school bus stop. The matter was transmitted to the Office of Administrative Law (OAL) on March 20, 2003. The Director of the OAL assigned the undersigned to hear this matter pursuant to pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. A prehearing telephone conference was held on June 24, 2003. A plenary hearing was conducted on September 4, 2003. The evidentiary hearing concluded on that date.

The matter was carried until October 3, 2003, so that petitioners could present their motion for reconsideration to the district. It was previously presented to the district in February 2003, but certain facts and pertinent engineering information was held back. It was held back under the advice of counsel due to pending litigation. During the evidentiary hearing, it was apparent the Board did not consider a letter from the Township Engineer that directly addressed a question regarding the adequacy of the road and location of the bus stop proposed by petitioners. Therefore, the district did not consider all of the information offered by petitioners at the time the motion for reconsideration was denied. Accordingly, in order to avoid any procedural issues, the motion, with all supporting documents, was re-offered to the Board for its consideration.

The Board considered the matter at its September 16, 2003, meeting. The Board voted not to alter its original decision. Post hearing briefs were submitted on September 30, 2003, (respondent) and October 27, 2003 (petitioner). Additionally, the minutes from the Board of Education meeting, as well as a video tape of the September 16, 2003, meeting, were submitted on October 28, 2003. (C-2, P-8)

SUMMARY OF RELEVANT FACTS

Petitioners, Mr. and Mrs. James Bailey, (hereinafter "petitioners or Bailey") are the parents of two children, ages 9 and 13, both whom attend the Maurice River Township Public Schools (hereinafter "respondent, Board or district"). They are currently in eighth grade and fourth grade. Petitioners live on Carlisle Place Road, Maurice River Township, New Jersey.

Carlisle Place Road is a Township dedicated roadway, which is unpaved and has a gravel surface. Petitioners are concerned for the safety of their children. They must walk approximately one mile down Carlisle Place Road to the nearest bus stop. The unpaved road is not well marked in terms of traffic safety devices. It does not have a signage for speed, guardrails, sidewalks or other similar safety devices. Carlisle Place Road is not well lighted. During rain, snow or ice the road becomes filled with potholes and the surface becomes bumpy, much like rumble strips found on the shoulder of highways. The Township has the responsibility to maintain the roadway. The testimony revealed that the Township performs a reasonable job maintaining the gravel road. Nevertheless, petitioners urge that it is not safe for their children to walk one mile to the bus stop in view of the aforementioned conditions. Petitioners's explored other options, but were unable implement any other alternative. For instance, petitioners both work in the morning and therefore they cannot oversee the bus pick up. Presently, the children's grandmother must drive them to petitioner's sister's house where they are picked up by a school bus. They also explored a developing a bus turn-a-round in front of the home, unsuccessfully.

During August 2002, petitioners appeared before the Maurice River Township Board of Education requesting a change of the school bus stop. The Bailey children's bus stop was and is located at the intersection of Carlisle Place Road and Route 47 (Delsea Drive). Carlisle Place Road extends approximately two miles between Route 47 and Route 347. Route 347 is recognized as a high fatality road; therefore, the Board does not schedule any bus stops on Route 347. The Baileys appeared before the Board on several additional occasions between September and December 2002, with regards to the bus stop issue. They urge that Carlisle Place Road is safe for a school bus.

Petitioners regularly drive this road and are familiar with its conditions. Contrary to the Board's opinion, petitioners suggest the road is more dangerous to walk than for a bus to transverse. Petitioner's offered several pictures depicting the conditions they regularly observe. (P-1, 2 & 7). Petitioners argue that the pictures and video reflect a smooth well-maintained road that is safe for bus travel. Additionally, they support their conclusion by reference to the Township Engineer's letter. The Engineer concludes, "It is my professional opinion that this

section of Carlisle Place Road is serviceable as a local street, and as such is sufficient for use by school busses." (P-4, 8).

In December 2002, the Board, during its public meeting, voted not to change the scheduled bus stop. The Board minutes reflect the following:

> Take from table Resolution #02/03-34.
>
> (#02/03-34 - Approve bus stop at Carlisle Place Road with the stipulation that a 60' by 90' turnaround be placed at the location.
> (Tabled at August 27, 2002 Board Retreat Meeting).
>
> Motion made by Mr. Chard, seconded by Mr. Ciaurelli to withdraw resolution #02/03-34. Motion passed by roll call vote with Mrs. Hess abstaining.
>
> Mr. Baumgarten noted that the condition of the dirt road at issue (Carlisle Place Road) is such that sometimes you can drive down it at 40 mph and at other times only 5 mph and it feels like the front end of your car will fall off. After a rain, the road is a mess. He is not sure what the Township can do or cannot do but suggests that Mr. & Mrs. Bailey go to the Township and request that the road be paved. He believes in its current condition, the road is unsafe for a bus of children to travel.
>
> Mrs. Costello stated that she believes the bus stop change request of the Baileys has been reviewed extensively by the board. She stated that the current location of the bus stop at Route 47 and Carlisle Place Road is in accordance with policy, regulation and law.
>
> Motion made by Mrs. Costello, seconded by Mr. Chard that the current location of the bus stop remain at Route 47 and Carlisle Place Road. Motion carried by roll call vote with Mrs. Hess leaving the room, and therefore being absent for the vote.
>
> (R-6)

The Board's written policy is that it will not require the bus driver to leave the main highway for pupils residing within one and one-half miles of the of the bus route. (R-3). The district explained, however, that Petitioner's request was not rejected based solely upon Board policy.

Prior the making a final decision, the Board referred the matter to its transportation committee. This is reflected in the Board minutes, *supra*. The committee included Robert Chard, a Board member and Eleanor Whildin, Transportation Supervisor. Both members testified at the OAL hearing. Mr. Chard was a five-year member of the Board and a retired police officer. Ms. Whildin has thirty-seven years experience as a bus driver for the district. Both committee members personally inspected and drove Carlisle Place Road on various dates and under various conditions. They concluded that it would not be safe for a school bus, with school-aged children, to drive on this road. The basis of their conclusions was that the road was too bumpy, it lacked traffic control devices such as speed signs, middle lane dividers, guardrails and the bus could not turn around or perform a K-turn without risking getting stuck.

In February 2003, petitioners filed a motion for reconsideration. The motion was discussed, but the written materials containing a letter from the Township Engineer were not presented. The Engineer had opined that Carlisle Place Road, while gravel, was safe for school bus operation and transportation. The letter was not presented to the Board prior to its vote in December 2002, or during reconsideration motion in February 2003. During the OAL hearing, the ALJ urged the parties to re-offer the motion for reconsideration, in its entirety, to the Board. This included the presentation of the Township Engineer's letter concluding that a school bus could be operated on Carlisle Place Road. Also, in February 2003, Whildin reported to the Board as follows:

> As the Board of Education is aware, I have lived in Maurice River Township for the past 63 years. I have worked for the Maurice River Township Board of Education for 37 years in the capacity of a school bus driver, and for the past 33 years I have been the Transportation Supervisor. I am very familiar with the Township and its roads. Carlisle Place Road is a gravel road that runs between Rt. 47 and Rt. 347. When Carlisle Place Road became an issue with the Transportation Committee, at the Committee's request, I drove down the road with an empty school bus during a dry period, after it had been scraped. With the road in this condition, I was able to drive at 25 mph in spots, but other spots were rutty and I had to slow down to maneuver the road. Although I was traveling at such a slow speed, the bus shook a great deal. I also drove an empty school bus down this road after a wet spell and I could not go over 15 mph. At 15 mph, with the road in this condition, the bus was jumping around because of the ruts and potholes.

> It is the District's practice not to go down gravel roads, and if a bus stop is placed on this road, a precedent will be established that can affect other roads and routs in the District. Additionally, it is my opinion as a school bus driver that this road is unsafe during inclement weather conditions to drive a 54 passenger bus down it with students on board. A bus stop is provided for residents on this road at the corner of Carlisle Place Road and Rt. 47.
>
> Finally, for the Transportation Committee's information, there is no adequate turn around on Carlisle Place Road. If a stop is placed on the road, the bus would have to travel straight through to Rt. 347, which is a very dangerous road. Rt. 347 has had more accidents and deaths than any other road in the Township, and because of this, I have designed routs so as to travel this road minimally.
>
> (R-2)

On September 16, 2003, the Baileys, through their attorney, re-offered the motion for reconsideration to the Board. The Baileys presented testimony from Kent Schellinger, P.E., Township Engineer. The Board also reviewed and considered the report of Ken Schellinger marked as Exhibit P-4. The Board again denied the request to relocate the bus stop. (See, letter of Frank DiDomenico, September 23, 2003 marked as C-1) (See also video tape of meeting, P-8) At the Board's September 16, 2003, meeting, it fully reconsidered petitioner's prior motion for consideration as well as new evidence. Petitioners came prepared with counsel and offered live testimony from Kent Schellinger, P.E., Township Engineer. Mr. Schellinger testified, under oath, that he was familiar with Carlisle Place Road. Again he opined that the road was suitable for a 54-passenger bus to traverse. However, he indicated he had not actually driven a 54-passenger bus on this particular road. The proper maintenance of Carlisle Place Road was of particular importance to the Board members. Mr. Schellinger indicated the road is adequately maintained by the Township, but that it is not on any fixed maintenance schedule. He was also questioned as to whether the Township had asked him to make any particular recommendations concerning Carlisle Place Road. His recommendations included signage, guardrails and a speed study. (C-2, p.3) The minutes reflect the following discussions and reasons:

> Motion made by Mr. Baumgarten, seconded by Mr. Chard to reconsider the board's earlier denial of a bus stop on Carlisle Place Road. After discussion by individual board members, (as detailed in the presentation summary attached), the motion was denied by roll call vote with Mrs. Hess recusing herself, six board members voting no and zero board members voting yes. Prior to voting, Mr.

Ewan stated that after considering the reports of Kent Schellinger and Eleanor Whildin, he was voting no. Prior to voting, Mrs. Ireland stated that based upon Eleanor Whildin's report and safety issues, she was voting no.

(C-2)

LEGAL ANALYSIS

Based upon the petition and evidentiary hearing, two issues must be decided: 1) Whether the Board's bus stop policy is valid? 2) Did the petitioner meet its burden of proof the by the preponderance of credible evidence establishing that the Board's application or interpretation of its policy was unreasonable? The thrust of petitioner's argument is that the Board acted in an unreasonable and arbitrary manner when it denied petitioner's request to relocate the bus stop.

It is undisputed that a Board of Education has both the prerogative and obligation to establish bus stop locations. *N.J.S.A.* 18A:39-1 et seq. and *N.J.A.C.* 6A:27-1.1. The applicable regulations provide a minimum standard for students who live in remote locations from their school. For instance, for K-8 students transportation must be provided if they reside beyond two miles and for grades 9-12 two and one-half miles. *N.J.A.C.* 6A:27-1.1(a)1.

It is a well-settled principle that policy, legislative and quasi-legislative determinations are committed to the judgment of local governmental bodies. *Riggs v. Long Beach Tp.,* 109 *N.J.* 601, 610-11, 538 *A.2d* 808 (1988); *United Advertising Corp. v. Metuchen,* 42 *N.J.* 1, 8, 198 *A.2d* 447 (1964). Such determinations enjoy a distinct presumption of validity, *First Peoples Bank of N.J. v. Medford Tp.,* 126 *N.J.* 413, 418, 599 *A.2d* 1248 (1991); *Hutton Park Gardens v. West Orange Town Council,* 68 *N.J.* 543, 564, 350 *A.2d* 1 (1975), and will remain undisturbed absent a showing of arbitrary, capricious or unreasonable action on the part of the governmental agency. *Palamar Constr., Inc. v. Pennsauken Tp.,* 196 *N.J. Super.* 241, 250, 482 *A.2d* 174 (App.Div.1983).

These principles apply to policy determinations made by local Boards of Education. See *Parsippany-Troy Hills Educ. Ass'n v. Board of Ed. of Tp. of Parsippany-Troy Hills,* 188 *N.J.*

Super. 161, 167, 457 *A.2d* 15 (App.Div.), certif. denied, 94 *N.J.* 527, 468 *A.2d* 182 (1983); *Kopera v. Board of Ed. of West Orange,* 60 *N.J. Super.* 288, 294, 158 *A.2d* 842 (App.Div.1960). When such a body acts within its authority, its decision is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious or unreasonable. The agency's factual determinations must be accepted if supported by substantial credible evidence. *Quinlan v. Board of Ed. of North Bergen Tp.,* 73 *N.J. Super.* 40, 179 *A.2d* 161 (App.Div.1962); *Schinck v. Board of Education of Westwood Consol. School Dist.,* 60 *N.J. Super.* 448, 159 *A.2d* 396 (App.Div. 1960).

In the present matter, there was little dispute regarding the validity of the Board's bus stop policy. The policy provides that school buses will not leave the main route unless the student is within one and one half miles of the route for K-8 children and two miles for high school students. (R-3). The policy is presumed to be correct. I **FIND** and **CONCLUDE** that presumption was not overcome in the matter at hand. The policy is consistent with *N.J.A.C.* 6A:27-1.1(a)1. In fact, the Board's policy is more favorable to petitioner than the administrative regulations. (1.5 and 2 miles vs. 2 and 2.5 miles).

Therefore, the only issue to be addressed is whether the District acted in an arbitrary or capricious manner when it denied petitioner's request to move the bus stop. Petitioner presented safety and hardship issues. Moreover, petitioner suggested that the Board failed to appreciate or understand the issues. For instance, the Board concluded that the gravel road was unsafe for a bus with school-aged children. The bus would bounce and rattle. The District's bus driver tested the road and concluded the road was unsafe as the bus was "jumping around because of ruts and potholes." (R-2). The transportation supervisor candidly admitted that, at times, the road was safe to drive at 15-25 miles per hour. However, she was not comfortable driving the road. Issues such as ice, snow, potholes, road maintenance as well as bus mechanical maintenance were a concern for her and the Board. Several members of the Board transportation committee test-drove the road on their own or in a 54-passenger bus with the transportation supervisor. They reached the same conclusions. Parties offered numerous photographs and a VHS video into evidence. (P-7) The photographs depict the road on various dates and times that reflect conditions favorable to positions asserted by the both parties.

In the law, "arbitrary" and "capricious" means having no rational basis. *Bicknell v. United States*, 442 *F.2d* 1055, 1057 (5 Cir. 1970). The terms "arbitrary" and "capricious" embrace a concept which emerges from the due process clauses of the 5th and 14th Amendments of the United States Constitution and operate to guarantee that acts of government will be grounded on established legal principles. See *Canty v. Bd. of Education, City of New York,* 312 *F.Supp.* 254, 256 (D.C.S.D.N.Y.1970). Arbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration and in disregard of circumstances. Where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached. *State v. Jones,* 66 *Wash.2d* 199, 401 *P.2d* 841, 842 (Wash.Sup.Ct.1965). Moreover, the court should not substitute its judgment for that of an administrative or legislative body if there is substantial evidence to support the ruling. *Kansas City Southern Ry. Co. v. Louisiana Public Service Comm'n,* 254 *La.* 160, 223 *So.2d* 132, 136 (La. Sup. Ct., 1969).

This rationale has been applied to bus stop location controversies. The Commissioner of Education will not overturn a district's decision pertaining to the location of school bus stops and will not second guess such exercise of discretion unless it is arbitrary, capricious or unreasonable. *See Lemma v. Branchburg Board of Education*, EDU 8953-97 Initial Decision (July 22, 1998), adopted Commissioner (August 28, 1998) (upholding the local district's refusal to change the bus stop): *Mandaglio v. Mendham Township Board of Education* 1998 *S.L.D.* 1380, 1384 (Comm'r 1990) (upholding uniformly – applying school policy prohibiting the school buses from turning around on dead end streets); *J. O'D. v. Peapack Gladstone Board of Education*, 1989 *S.L.D.* 1303, 1313 (Comm'r March 15, 1989) (upholding appropriateness of the local district's bus stop and rejecting a proposed alternate route as patently dangerous).

Based upon the evidence, including the investigation performed by the transportation committee together with the testimony of the Board members, I **FIND** that a reasonable person could come to two different opinions. The Board struggled with the decision for several months. The original request for relief was presented to the Board in or around August 2002. The matter

was tabled for investigation. Various options were explored. This included construction of a turn-a-round in front of petitioner's home. A thorough investigation followed. The Board decided the not relocate the bus stop at its December 2002 meeting. The minutes from the meeting reflect the debatable concerns. A motion for reconsideration was filed in February 2003. The motion was not fully discussed and reviewed by the Board. A letter from the Township Engineer opining that the gravel road was safe for school bus travel was not presented or considered. The motion for reconsideration was not fully discussed because of pending litigation. Between the conclusion of the evidentiary portion of the within matter and the close of the record, the Board was directed to reconsider the motion. This was completed at the Board's September 16, 2003 meeting. The Board reaffirmed its earlier decision not to relocate the bus stop. (C-1, C-2). The import from the abovementioned history is that the Board fully, fairly and justly considered the issue. The Board made a rational decision based upon facts derived from an investigation that spanned several months. A Court should not substitute its judgment for that of an administrative or legislative body if there is substantial evidence to support the ruling. *Bacoli v. Board of Education of Ramapo Indian Hills Regional School District*, OAL Dkt. No. EDU 1839-98 (January 22, 1999) citing, *Bayshore Sewerage Company v. The Department of Environmental Protection*, 122 *N.J. Super.* 184, 199-200 (Ch. Div. 1973), *affirmed* 131 *N.J. Super.* 37 (App. Div. 1974). The Board's factual conclusions, while possibly debatable, were nevertheless reasonable. I so **FIND**.

Petitioner also eluded that the Board was engulfed in a small town controversy. Consequently, petitioner argues that the Board did not approach petitioner's request for relief with an open mind. The proofs offered by petitioner in this respect were mere inferences or allegations. While that may have been the impression by petitioner, I **FIND** that there were no reliable proofs offered to support this belief. Stated differently, the proofs offered on the issue were not to the degree that I can conclude the Board acted with malice, bias or unfairly.

Petitioner's presented legitimate safety concerns for their children. The road in question clearly poses real concern for parents of school aged children. It is dark during winter mornings, and the gravel road lacks the ordinary traffic control devices of a paved road. The area is developing and more children are using the unpaved portion of the road. Unfortunately,

petitioners are both employed and their work hours do not allow them to oversee the bus pickup. If the road were paved, the Board may consider altering the bus route. I encourage the Board and petitioners (and the Township) to revisit this matter in the future if the circumstances materially change. This includes, additional paving or temporary paving, increased students living on Carlisle Place Road or other significant changes.

CONCLUSION AND ORDER

I **CONCLUDE** that the school district's bus stop location policy is valid and its application in the present matter was reasonable. Therefore, the petition requesting a change in the bus stop at the intersection of Rt. 47 and Carlisle Place Road must be **DENIED** and the petition is **DISMISSED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

11-10-03
DATE

W. TODD MILLER, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

11-10-03
DATE

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

NOV 17 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

sd

EXHIBITS

For Petitioner:

P-1 Photographs (1 page)

P-2 Photographs (1 page)

P-3 Letter dated November 14, 2002 from Karen Johnson (1 page)

P-4 Memo dated January 24, 2003 from Kent W. Schellinger, P.E. (1 page)

P-5 Maurice River Township Board of Education Equal Educational Opportunity (2 pages)

P-6 Letter dated February 4, 2003 from James and Barbara Bailey (6 pages)

P-7 Video Tape (9/3/03)

P-8 Video tape presented at the September 16, 2003 Board Meeting

For Respondent:

R-1 Letter dated February 19, 2003 from Donald E. Beineman, Ed.D. (1 page)

R-2 Memorandum dated February 10, 2003 from Eleanor Whildin (1 page)

R-3 Maurice River Township Board of Education Transportation Routes and Services Policy (4 pages)

R-4 Maurice River Township Board of Education Retreat Meeting Minutes dated August 27, 2002 (2 pages)

R-5 Maurice River Township Board of Education Regular Meeting Minutes dated October 15, 2002 (4 pages)

R-6 Maurice River Township Board of Education Regular Meeting Minutes dated December 17, 2002 (4 pages)

R-7 Maurice River Township Board of Education Regular Meeting Minutes dated February 18, 2003 (7 pages)

R-8 Maurice River Township Bus Stop File Information Listing as of 8/07/02 (14 pages)

R-9 EMC Student Transportation System (16 pages)

R-10 Interrogatories propounded by petitioner on respondent (5 pages)

R-11 Respondent's answers to petitioner's interrogatories (5 pages)

R-12 Photographs (4 pages)

R-13 Photographs (1 page) and 7 individual photographs

R-14 Letter dated February 3, 2003 from Frank DiDomenico, Esq. (3 pages)

For Court:

C-1 Letter dated September 23, 2003 from Frank DiDomenico, Esq. (2 pages)

C-2 Board of Education Minutes from September 16, 2003 meeting

WITNESSES

For Petitioner:

Barbara Bailey

For Respondent:

Robert Chard, Board of Education Member

Eleanor Whilden, Transportation Supervisor

Ellyn Walters, Board of Education Member

Patricia Powell, School Board Secretary

OAL DKT. NO. EDU 924-03
AGENCY DKT. NO. 70-1/03

JAMES AND BARBARA BAILEY,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MAURICE RIVER, CUMBERLAND COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon careful and independent review of the record, and after full consideration of all of the particular circumstances existing here, the Commissioner agrees with the conclusion of the Administrative Law Judge that petitioners have failed to sustain their burden of establishing by a preponderance of the credible evidence that the Board's refusal to change the location of their children's bus stop was arbitrary, capricious, unreasonable or discriminatory; therefore, its determination in this regard must be upheld.

Accordingly, the Initial Decision of the OAL is adopted for the reasons stated therein and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 12/17/03

Date of Mailing: 12/18/03

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

657-03

THOMAS F. GRIGGS,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF MAGNOLIA, CAMDEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

December 17, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER FOR IMMEDIATE REVIEW, PURSUANT TO *N.J.A.C.* 1:1-12.5(e)

OAL DKT NO. EDU 6404-02

AGENCY DKT. 242-8/02

THOMAS F. GRIGGS,

Petitioner,

v.

THE BOARD OF EDUCATION OF THE BOROUGH OF MAGNOLIA,

Respondent.

Andrew Babiak, Esq. for petitioner (New Jersey Association of School Administrators)

George Wilgus, III, Esq. for respondent (Lenox, Socey, Wilgus, Fornidoni, Brown, Giordano & Casey, attorneys)

BEFORE **W. TODD MILLER,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The New Jersey Department of Education Bureau of Controversies received a request for relief on August 6, 2002. Petitioner, a School Principal for the Borough of Magnolia School District contends that the non-renewal of his alleged contract was improper and unlawful. The district asserts that position was eliminated pursuant to a reduction in force (RIF). The matter was transmitted to the Office of Administrative Law (OAL) on September 11, 2002. The Director of the OAL assigned the undersigned to hear this matter pursuant to *N.J.S.A.* 52:14B-1

to -15 and *N.J.S.A.* 52:14F-1 to -13. A prehearing telephone conference was held on January 3, 2003. A settlement conference was scheduled for May 27, 2003, and hearing dates for June 11 and 12, 2003. On May 7, 2003, petitioner submitted a letter motion seeking to compel discovery of information in certain personnel files. The letter motion was preceded by a telephone conference regarding the discovery request and procedure. During the May 27, 2003, conference the plenary hearing was adjourned until October 1, 2003. Thereafter, on August 27, 2003, petitioner submitted a motion for partial summary judgment concerning the contract claims and issues. Respondent filed opposition and oral argument was heard on October 27, 2003.

Petitioner requested, in the interest of avoiding unnecessary litigation and expense, that this Order be submitted to the Commissioner of Education for immediate review as an initial decision, as it makes up the primary claims sought to be adjudicated by petitioner. *N.J.A.C.* 1:1-15.5(c).

UNDISPUTED FACTS

1. Petitioner, Thomas F. Griggs (hereinafter "Griggs" or "petitioner") is a former employee of respondent, Board of Education of the Borough of Magnolia (hereinafter "respondent" or "Board"). From July 1, 1999 to June 30, 2002, Griggs was employed by the Board as Principal of its elementary school.

2. During the 2001-2002 school year, Griggs was the Acting Principal pursuant to an unsigned contract.

3. On May 28, 2002, the seven member Board voted 6 to 1 to eliminate Griggs' position effective June 30, and to continue the position of Principal with the position of Superintendent of Schools.

4. The school budget, which had been approved on March 26, 2002 by the Board, was defeated in an election held in April 2002. Once the budget was defeated, there were legitimate concerns regarding numerous programs and services being slated for elimination from the budget due to its defeat in the April election.

5. On May 28, 2002, the Board approved the reduction of force with abolishment, for economic reasons, of the Principal's position, effective June 30, 2002.

6. In accordance with the RIF, the Superintendent's job title and description was revised to reflect the chief school administrator's duties and responsibilities. By letter dated May 29, 2002, Dr. Gibson advised Griggs that the Board of Education had met on May 28, 2002 and had abolished his position as part of a RIF procedure. Dr. Gibson informed petitioner that a letter of May 29, 2002 would serve as a 60 day notice of termination wherein he would receive compensation until July 30, 2002.

7. During the period 2001 through May 2002, Griggs and the Board, through its agents and representatives, had been actively negotiating contractual terms and provisions. On May 28, 2002, Griggs notified the Board and the Superintendent, in writing, that he accepted continued employment in the district for the 2002-2003 school year. The written notification was forwarded to the Superintendent's office via telefax and it provided as follows:

> Based on my attorney's advice, I accept the employment contract as Principal for the 2002-2003 school year. Respectfully, Thomas F. Griggs

The fax indicates that it was transmitted at approximately 2:25 p.m. on May 28, 2002.

SUMMARY OF LIMITED TESTIMONY

The present motion for partial summary judgment revolves around contract law in a school law setting. Petitioner also asserts that respondent violated the RIF provisions, but has chosen to submit the contract issues for summary decision in the interest of judicial economy and cost savings. The testimony of Superintendent Gibson and Petitioner Griggs were offered at oral argument. From their testimony the following facts were developed.

It is undisputed that, in or around June 1999, petitioner and the district entered a two-year agreement wherein petitioner would serve as the principal. This agreement was executed and its term was from July 1, 1999 to June 30, 2001. There remains a legal question as to whether it was appropriate for the district to enter into a multi-year contract for the position of principal. (Petitioner's letter dated October 6, 2003, page 2.) This agreement expired on June 30, 2001, pursuant to its terms, or on June 30, 2000, if multi-year contracts are prohibited as a matter of law.

On June 26, 2001, the Board of Education authorized the hiring of petitioner as its principal for another two years. The Board solicitor was authorized and directed to prepare the necessary contract. No contract was ever prepared by the solicitor. In or around January 2002, petitioner marked up his old 1999-2001 contract and submitted it to Superintendent Gibson. Gibson and petitioner met sometime between January 2002, and April 2002, to discuss the marked up contract. Petitioner's proposed changes were generally minor, except that he wanted to be paid at the superintendent's daily rate in situations where he temporarily served in that capacity. Petitioner was advised by Dr. Gibson that this modification "would not fly" because it was contrary to school law. Also, at this time, the district was preparing the 2002-2003 budget. Petitioner's title as principal was contained in the budget.

In or around May 2002, Gibson also marked up the draft agreement and forwarded it to the solicitor for review and comment. The district did not provide petitioner with notice on or before May 15, 2002, that it intended not to renew his agreement *N.J.S.A.* 18A:27-10. On May 28, 2002, petitioner faxed a handwritten note to Dr. Gibson stating that he accepted the employment contract for the 2001-2003 school year. On May 28, 2002 the Board voted 6 to 1 to eliminate petitioner's position pursuant to a RIF. The position was abolished as of June 28, 2002. The Board however, gave petitioner 60 days notice and, therefore, paid his salary until July 30, 2002.

ARGUMENTS OF THE PARTIES

Petitioner Griggs argues that he is entitled to all the rights and benefits that flow from the unexecuted or unsigned employment contract for the 2002-2003 school year, citing *N.J.S.A.*

18A:27-11. This includes, but is not limited to, full salary, vacation, sick time and other benefits arising from the district's failure to provide notice of termination pursuant to what petitioner argues is a valid contract. More specifically, petitioner relies upon *N.J.S.A.* 18A:27-11, which provides as follows:

> Should any Board of Education **fail** to give any non-tenured teaching staff member either an **offer of contract for employment** for the next succeeding year or **notice that such employment will not be offered,** all within the time and manner provided by this Act, then the Board of Education shall be deemed to have offered to the teaching staff member continued employment for the next succeeding school year upon the same terms and conditions but with such increases in salary as may be required by law or policies of the Board of Education.

Petitioner's argument is that the board is required to provide him with notice by May 15, 2002, of its intention not to renew his employment contract. *N.J.S.A.* 18A:27-10. If the district failed to provide such notice of non-renewal, his contract is automatically renewed. The contract that would be renewed is the agreement that was signed back in 1999. Petitioner refers to termination provisions in the unexecuted 2001-2003 contract and places significant reliance thereupon. The termination provisions in the unexecuted contract provide as follows:

> 8. TERMINATION OF EMPLOYMENT CONTRACT.
>
> A. Mutual Agreement. This contract may be terminated by mutual agreement of the parties.
>
> B. Notice of Termination. By notice of the Principal, this contract may be terminated upon giving 60 days notice to the Board.

Petitioner argues that he cannot be terminated unless it is reached by mutual agreement as expressed in the unsigned 2001-2003 contract. Again, petitioner urges that if the Board fails to notify him by May 15th of the given calendar year, his employment contract is automatically renewed.

In the present matter, petitioner argues that he never agreed to be terminated. Petitioner also argues that, while the present matter arose pursuant to the RIF statute, the Board does not have unfettered authority to override contractual notice provisions, even if it is proceeding

pursuant to a good faith RIF action, *citing, Siegel v. Board of Education of the City of Garfield*, 93 *N.J.A.R.* 2d (EDU) 766, *aff'd,* 94 *N.J.A.R.* 2d (EDU) 319. Petitioner offers the aforementioned authority to support the theory that the district must honor the notice and termination provisions of a non-teaching staff member's employment contract.

In opposition, respondent district argues that the board of education has complete authority to determine if a RIF should be implemented for reasons of economy. *In Re Maywood Board of Education*, 168 *N.J. Super.* 45 (App. Div. 1979); *cert. denied* 81 *N.J.* 292 (1979). Furthermore, the district argues that a reduction in force is non-negotiable and non-grievable. *Jamison v. Morris School District Board of Education*, 198 *N.J. Super.* 411 (App. Div. 1985). The district suggests that each and every contract between the board of education and teaching staff member must be in writing and signed by the President and the Secretary of the Board of Education, in addition to being signed by the teaching staff member. *N.J.S.A.* 18A:27-5. The district argues that the RIF statute and provisions supercede the non-teaching staff member's contract rollover provisions contained in *N.J.S.A.* 18A:27-11. Therefore, so long as the RIF was performed in good faith and for economic reasons, a teaching staff member can be terminated.

STANDARD FOR SUMMARY DECISION

The rules governing practice in the OAL provide that a Motion for Summary Decision may be granted if there is no genuine issue of material fact and the moving party is entitled to prevail as a matter of law. This provision mirrors the language of *Rule* 4:46-2 and the Supreme Court's decision in *Judson v. Peoples Bank and Trust Co. of Westfield*, 17 *N.J.* 67 (1954). Under *N.J.A.C.* 1:1-12.5(b), the determination to grant summary judgment should be based on the papers presented as well as any affidavits, which may have been filed with the application. In order for the adverse, *i.e.*, the non-moving party to prevail in such an application, responding affidavits must be submitted showing that there is indeed a genuine issue of fact, which can only be determined in an evidentiary proceeding. The Court, in *Brill v. Guardian Life Insurance Co. of American*, 142 *N.J.* 520, 523 (1995), set the standard to be applied when deciding a Motion for Summary Judgment. Therein the Court stated:

> The determination whether there exists a genuine issue with respect to a material fact challenged requires the Motion Judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party... are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party.

If the non-moving party's evidence is merely colorable, or is not significantly probative, summary judgment should not be denied. See *Bowles v. City of Camden,* 993 *F. Supp.* 255, 261 (D.N.J. 1998).

Based upon the testimony, briefs, affidavits and interrogatory answers and having considered the oral argument of the parties, I **FIND** that there are no genuine issues of material facts and the contract issues and claims can be decided by summary decision. Petitioner's claims and issues concerning the validity of the RIF action have not been submitted with this motion. They are reserved for a plenary hearing.

LEGAL ANALYSIS AND DISCUSSION

Petitioner filed a Motion seeking an Order for Partial Summary Judgment carrying forth the terms and condition of petitioner's employment contract for the 2000-01 school year to the 2001-02 school year; binding the Board by contractual notice provisions and not arbitrarily determining the length of notice to be given; granting the equivalent of one year's compensation (less mitigation); and compensation for petitioner's unused sick leave days.

Petitioner argues that his contract automatically rolls over pursuant to *N.J.S.A.* 18A:27-11. Specifically, the statute provides that if the district fails to give a nontenured teaching staff member either an offer of a contract for employment for the next succeeding year or notice that such employment will not be offered, then the board of education shall be deemed to have offered continued employment under the same terms and conditions. The only executed agreement between petitioner and the district was in June 1999. Neither the original nor a copy of that agreement could be located. The parties agreed that multi-year contracts are generally forbidden, except for the position of superintendent. *See, N.J.S.A.* 18A:17-15. Therefore, the

district was required to offer employment and prepare agreements for 2000, 2001, 2002 and 2003. The district did not comply with the applicable statutes in 2000, 2001 and 2002. It prepared multi-year agreements and therefore, skipped 2000, 2001 and 2002. It did not retain on file or cannot locate the original agreement from 1999. The solicitor was authorized to prepare the 2001-2003 employment agreement, but did not do so. Dr. Gibson summarized the contract status in her September 5, 2002, memorandum as follows:

> The original contracts were with Mr. Wade and were to be forwarded to Mr. Sahli so that renewal contracts could be prepared. Believe it or not, we tried but we were not able to get them. As a last resort, Mr. Sahli asked that I do the changes by hand and his office would re-type the re-newal contracts. As you and former board members know, **all of our contracts were up in the air for that one year and with no signatures**. We can blame the former Board, we can blame the Solicitors, the administrators, the current Board and everyone else till doomsday, but the bottom line is that **neither Mr. Griggs nor I had any legally signed contract at the time that the Board made a decision to restructure the school district and abolish the Principal's position**. I know you recognize that a Board has the authority to restructure, abolish, or cut positions as needed and I did personally call and advise the County Superintendent of their intent to re-structure in order to downsize administration and free up funds to bring back other services. The current Board has complied with getting all current administrative and association contracts completed and signed.
>
> Respondent's Brief –Exhibit 5

For purposes of employment in 2001-2002, petitioner was left to mark up and submit his old 1999 contract almost 6 months after the official Board action. This was done in January 2002. The marked up version was reviewed by Dr. Gibson and the Board and than sent to the solicitor in May 2002. This occurred substantially after the board directed the solicitor to prepare agreements in June 2001. Almost one year passed and a simple six-page employment contract was left unfinished. The administrative contracts for this title were poorly handled.

Petitioner complicated matters when he marked up the agreement in January 2002, and added a material change to the former agreement. He effectively made a new offer or a counter offer when he requested payment at the superintendent's daily rate. This proposal caused the district and its solicitor, to further mishandle petitioner's employment agreement.

In spite of all of the inappropriate handling of the employment agreement, petitioner served the district for the 2001-2002 school year pursuant to the terms of the original 1999 contract. Similarly, petitioner and the district operated pursuant to the terms in the 1999 agreement in all subsequent years even though they never signed the contract. Therefore, when the May 15, 2002, deadline passed, the district was obligated to have responded in some fashion. *N.J.S.A.* 18A:27-10 and -11. There were unequivocally ongoing contract negotiations. Superintendent Gibson sent the Board solicitor a memorandum regarding this subject on May 2, 2002. (Respondent's Brief exhibit 2.) But, by all indications, the material terms from 1999 were operational. Therefore, the Board either had to reject petitioners marked up counter offer, reject the 1999 agreement in its original form or provide notice that employment would not be offered.

The district's lack of diligence in finalizing its administrative contracts is analogous to *W.V. Pangborne & Co. v. New Jersey Dept. of Trans.,* 116 *N.J.* 543 (1989). In *Pangborne,* the Court held that government bodies must "turn square corners" when dealing with taxpayers. The "square corners" doctrine applies even where the party cannot satisfy the stricter evidentiary requirements that justify equitable estoppel. The Court, in *Pangborne,* stated:

> [W]e have insisted that in the exercise of statutory responsibilities, government must "turn square corners' rather than exploit litigational or bargaining advantages that might otherwise be available to private citizens. [Citing to *FMC Stores Co.*] ["The government's primary obligation is to comport itself with compunction and integrity, and in doing so government may have to forego the freedom of action that private citizens may employ in dealing with one another."]

Here, the district, a government body, neglected to finalize the 2001-2002 administrative contract for petitioner for almost an entire year. It did not deal fairly with petitioner in terms of preparing his employment contract. It is inexcusable that his employment contract was not reduced to writing and executed. Having done very little on or before May 15, 2002, I **FIND** and **CONCLUDE** that the 1999 original employment contract rolled over pursuant to *N.J.S.A.* 18A:27-10 and -11. The district was in the better position and is statutorily obligated to maintain executed employment contracts on file. *N.J.S.A.* 18A:27-5. It failed to fulfill its statutorily obligation for all years. The original contract cannot be located and admittedly no formal

contracts were prepared and executed in any years after 1999. The district improperly prepared multi-year contracts.

Having determined that petitioner's 1999 agreement rolled over on or after May 15, 2002, the question remains what contractual notice is petitioner entitled to a since the contract was terminated pursuant to a RIF. The actual contract terms provide that the agreement may be terminated by mutual agreement of the parties and the principal of this contract may unilaterally terminate it by giving sixty (60) days notice to the board.

Petitioner argues that, notwithstanding the RIF action, the board, only upon mutual agreement of the parties, can terminate the contract. Therefore, the RIF action does not "trump" the contract termination notice requirements. Petitioner suggests that he is entitled to one-years notice as a mutually agreeable termination date and, therefore, he is entitled to one-years salary and benefits. The district argues that its RIF action supersedes an employment contract and awarding a full years salary would, in effect, nullify the important function of the RIF statute. *Old Bridge Twp. Bd. Of Educ. v. Old Bridge Educ. Ass'n*, 98 *N.J.* 523, 531-533 (1985); *N.J.S.A* 18A:29-9. Moreover, the district contends that 60 days notice is reasonable absent mutual agreement of the parties. Sixty days notice is also consistent with other RIF actions for nontenured teaching staff members. *Old Bridge*, *supra*. Finally, the district urges that 60 days notice is reasonable because it is the same period of time petitioner proposed to give the board if he terminated the contract.

Since the parties did not reach a mutual agreement as to the length of notice before effective termination, it has been submitted to this tribunal for determination. Petitioner relies upon *Siegle v Garfield Board of Education*, 93 *N.J.A.R.* (EDU) 766, decided August 10, 1993. In *Siegle*, the boilerplate employment contract contained notice provisions that were left blank at the time the agreement was executed. The ALJ observed:

> Here, however, the contractual language is not susceptible of such interpretation. Language chosen by the Board itself plainly provides that "[I]n the absence of any provision herein for a definite number of days' notice, the contract shall run for the full term[.]" Under these unique circumstances, where the Board could have easily limited its liability by using the appropriate language in its contract, it does

not seriously interfere with managerial prerogatives to require the Board to honor the commitment that it voluntarily made.

The ALJ and Commissioner agreed that since the notice clause was left blank and the general provisions in the agreement specifically required the agreement to run for its full term, the teacher was entitled to entire years salary. The decision was an exception to the more typical 60 day notice requirement set forth in *Old Bridge*. *Siegle* also turned on the fact that the teacher was terminated in October. The teacher was unable to obtain a new teaching position because of the timing of the RIF in October.

In *Seigle* the ALJ stated:

> Had this been a non-tenured teacher, the Commissioner of Education would have looked to the standard contract of employment to find the correct resolution. 98 *N.J.* at 531. Relying on prior school law decisions, the Court elaborated:
>
> > To determine the amount of the award the State Board has drawn upon the provisions in the standard contract of employment for non-tenured teachers requiring 60 days. *Armstrong v. East Brunswick Bd. of Educ.,* 1975 *SLD* 117, *aff'd* 1976 *SLD* 1104 (App. Div. 1976) (non-tenured teacher who did not receive notice of nonrenewal until two days after statutory deadline awarded 60 days salary). Had the reduction in force occurred in mid-term to a non-tenured teacher, the Commissioner would presumably draw upon the same provisions in teachers' contracts calling for 60 days notice of termination to value the claim. *Cf. Contaldi v. Board of Educ. of Jersey City* (Commissioner of Education, January 23, 1981) (non-tenured teacher awarded 60 days pay when he was not properly notified of his dismissal until the new school year had begun and he had already taught for one school day). 98 *N.J.* at 532.
>
> While 60 days' notice of cancellation seems to have become the generally-recognized practice in the educational field, it is not enshrined in any statute or regulation. Review of the two administrative decisions cited by the Supreme Court reveals that in each instance the underlying contract or salary policy specified 60 days' notice. *Armstrong*, 1975 *S.L.D.* at 1104. *Contaldi*, slip op. at 4. *Accord, Mozier*, 450 *F.Supp.* at 748 n.4, where it was said that the presence of an express 60-day notice provision in a teacher's contract "vitiates any expectancy of year long employment." *See also, Canfield v. Pine Hill Bd. of Educ.* 97 *N.J. Super.* 483, 492 (App. Div. 1967) (Gaulkin, S.J.A.D. dissenting), rev'd for reasons expressed in the dissent, 51 *N.J.* 400 (1968), suggesting that, absent a

> cancellation clause, "the teacher would, at most, be entitled to his salary for the full term of the contract, but not to tenure."

Nothing prohibits the parties from negotiating a shorter or longer notice period. *Rahway Educ. Ass'n v. Rahway Bd. of Educ*, 1986 *S.L.D.* 1588, 1600 (wherein the Commissioner declared that any agreement which extends salary benefits to nontenured teachers beyond the 60-day termination provision included in their employment contracts is contrary to law.) Even if the cancellation clause was silent as to time, the Commissioner would be likely to impute 60 days as a "reasonable" time period. Ordinarily, if a contract contains no express terms as to its duration, it is terminable at will or after a reasonable time. *In re Miller's Estate*, 90 *N.J.* 210, 219 (1982); *West Caldwell v. Caldwell*, 26 *N.J.* 9, 27 (1958).

Here, petitioner was RIF'd before the start of the next school year (2002-2003) and compensated through July 30, 2002, while only obligated to work through June 28, 2002. Moreover, there was no specific contract clause that required the agreement to run for its full term as in *Seigle*. These facts distinguish this matter from *Siegle* and make it more analogous to *Old Bridge*. Finally, petitioner included 60 days a reasonable period to give the board notice if he terminated the agreement. Absent more specific language, 60 days is reasonable for both parties.

In sum, petitioner's original 1999 contract rolled over each year, but remained subject to a good faith RIF action. The RIF action is a statutorily sanctioned breach of the agreement. Petitioner may be entitled to the full benefit of the termination clause in his employment agreement. However, in this matter, the termination provisions were left vague and unclear. Therefore, if a contract contains no clear expressed terms as to its duration, it is terminable at will or after a reasonable time. *In re Miller's Estate, supra.* There is sufficient decisional law citing 60 days as a reasonable period for notice for termination, if the notice was given in a way the future employment opportunities were not adversely impacted. A RIF'd teacher should be given notice at or near the end of one school year so that future employment may be explored during the summer recess for the start of the next year. Petitioner was given notice of the RIF in May 2002. Accordingly, in the school law tradition, 60 days notice and compensation was reasonable. I so **FIND**.

CONCLUSION AND ORDER

For the reasons set forth above, I **CONCLUDE** that petitioner's employment contract rolled over for the years 2000, 2001 and 2002. I further **CONCLUDE** that the contract termination clause was vague and unclear and therefore, sixty (60) days notice of termination was reasonable. Accordingly, petitioner's motion for summary decision is **GRANTED,** in part and **DENIED,** in part.

Petitioner requested that this Order be submitted to the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for immediate review as if it were an initial decision. *N.J.A.C.* 1:1-12.5(e).

This order granting petitioner's motion for summary judgment in part and denying petitioner's motion for summary judgment in part is being submitted under *N.J.A.C.* 1:1-12.5(e) for immediate review. This recommended order may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make the final decision in this matter. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days and unless such time limit is otherwise extended, this recommended order shall become a final decision in accordance with ***N.J.S.A.*** 52:14B-10.

Within thirteen (13) days from the date on which this order was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

11-10-03
DATE

W J Miller
W. TODD MILLER, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

11-17-03
DATE

Mailed to Parties:

NOV 18 2003
DATE

ACTING DIRECTOR AND ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

sd

APPENDIX

Documents considered

For petitioner:

Motion and Brief with exhibits, August 27, 2003

Letter, September 16, 2003

Letter, October 6, 2003

For respondent:

Opposition Brief with exhibits

Letter, September 30, 2003

Letter, October 7, 2003

Witnesses

For petitioner:

Thomas Griggs, petitioner

For respondent:

Dr. Gibson, Superintendent

OAL DKT. NO. EDU 6404-02
AGENCY DKT. NO. 242-8/02

THOMAS F. GRIGGS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MAGNOLIA, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has received the Order of the Administrative Law Judge (ALJ) and the record of this matter, together with petitioner's exceptions and the Board's reply thereto. Pursuant to *N.J.A.C.* 1:1-12.5(e), however, the Commissioner determines that immediate review of the Order will not avoid unnecessary litigation, in that petitioner has not abandoned his claim, as raised in Count III of the Petition of Appeal, that "Respondent had no reasonable financial or other reason to eliminate Mr. Griggs' position as Principal," (Petition of Appeal at 4) and as such, the Board's reduction in force was in bad faith.[1]

Accordingly, the Commissioner determines that the within Order shall be reviewed at the end of the contested case, and returns this matter to the Office of Administrative Law for continued proceedings.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 12/17/03
Date of Mailing: 12/18/03

[1] Indeed, petitioner challenges the ALJ's recitation of undisputed facts at pages 2 and 3 of the Order, asserting that "No evidence was presented by the parties in their motion papers or during oral argument proceedings which could have led the ALJ to the conclusion that that 'there were legitimate concerns regarding numerous programs and services being slated for elimination from the budget.'" (Petitioner's Exceptions at 10)

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

658-03SEC

655-03

IN THE MATTER OF KAREN	:	
JACKSON, GALLOWAY COMMUNITY	:	COMMISSIONER OF EDUCATION
CHARTER SCHOOL BOARD OF	:	DECISION
TRUSTEES, ATLANTIC COUNTY.	:	
	:	

December 18, 2003

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	
	:	**RESOLUTION**
KAREN JACKSON	:	
Galloway Community Charter School	:	**SEC Docket No.: T31-03**
Board of Trustees	:	
Atlantic County	:	
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-33 requires new board members to attend training within one year of election or appointment to the board to gain the skills and knowledge necessary to serve as a school board member; and

WHEREAS, Karen Jackson was appointed to the Galloway Community Charter School in July 2001; and

WHEREAS, the New Jersey School Boards Association (NJSBA) advises prospective board members of the training requirement in the "candidate kit"; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on January 3, 2003 and February 19, 2003; and

WHEREAS, the NJSBA conducted eight training sessions between July 2001 and April 2003 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes;* and

WHEREAS, the last training session to fulfill the requirement was held in March 2003; and

WHEREAS, the Commission issued an Order against Ms. Jackson on June 9, 2003, via regular and certified mail, directing her to Show Cause why she had not attended training up until that time; and

WHEREAS, the Commission granted an extension for similarly situated board members to attend one of the October training sessions; and

WHEREAS, Respondent provided no response to the Order, and

WHEREAS, the Commission notified her by letter dated June 12, 2003, that the Commission would discuss this matter at its October 28, 2003 meeting, and if she did not attend training by that time, she could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission found on October 28, 2003, that this failure to attend board member training from July 2001 to April 2003, well beyond the one year required by law, constitutes a violation of N.J.S.A. 18A:12-33; and

WHEREAS, Ms. Jackson filed a letter and doctor's note with this Commission on October 29, 2003, and a letter stating that she intended to attend the October 2003 training session but had caught influenza and suffered from a pulmonary disorder related to an asthmatic condition which prevented her from attending the October 2003 training session, but that she has registered to attend the January 2004 session; and

WHEREAS, the principal of the Galloway Community Charter School submitted a letter via facsimile on October 30, 2003, and correspondence from the NJSBA to illustrate that there has been some debate as to whether this individual was required to attend training; and

WHEREAS, the Commission reconsidered this matter based on Respondent's submissions of October 29, and October 30, 2003, at its meeting of October 31, 2003, and found suspension to be inappropriate under these circumstances, but that a penalty of removal would be appropriate if she fails to attend one of the trainings in January, 2004;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Ms. Jackson violated N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education remove her from the board if she fails to attend one of the January 2004 training sessions.

Dated: October 31, 2003

Paul C. Garbarini, Chairperson

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed, the board member may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 River View Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on October 31, 2003.

Lisa James-Beavers, Executive Director

(psc/ljb/m: ethics/trainingresT31-03#2.doc)

IN THE MATTER OF KAREN	:	
JACKSON, GALLOWAY COMMUNITY	:	COMMISSIONER OF EDUCATION
CHARTER SCHOOL BOARD OF	:	DECISION
TRUSTEES, ATLANTIC COUNTY.	:	

Whereas, the School Ethics Commission (Commission) has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named Board member from office for failure to attend the Board member training sessions required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-1.6; and

Whereas, *N.J.S.A.* 18A:12-33 requires new school board members to attend training within one year of election or appointment to the board to gain skills and knowledge necessary to serve as a school board member; and

Whereas, the above-named Board member was appointed to the Galloway Community Charter School in July 2001; and

Whereas, the above-named Board member was duly apprised of the training requirement via the New Jersey School Boards Association's (NJSBA) "candidate kit," together with correspondence to her dated January 3, 2003 and February 19, 2003; and

Whereas, the NJSBA conducted eight training sessions between July 2001 and April 2003 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

Whereas, the last training session to fulfill the requirement was held in March 2003; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.6(e), on June 9, 2003, the Commission issued an Order to Show Cause why she had not attended a training up until that time; and

Whereas, the Commission granted an extension for similarly situated board members to attend one of the October 2003 training sessions; and

Whereas, the above-named Board member provided no response to the Order; and

Whereas, the Commission notified her by letter dated June 12, 2003 that it would discuss this matter at its October 28, 2003 meeting and, if she did not attend training by that time, she could be found in violation of the School Ethics Act and receive a penalty up to removal; and

Whereas, the Commission found at its meeting on October 28, 2003 that this failure to attend board member training from July 2001 until April 2003 constitutes a violation of *N.J.S.A.* 18A:12-33; and

Whereas, on October 29, 2003, the above-named Board member filed a letter and doctor's note with the Commission, explaining that she had intended to attend training in October but had been prevented by illness from doing so; and

Whereas, on October 30, 2003, the Charter School principal submitted a letter including correspondence from the NJSBA illustrating some confusion over whether the above-named Board member was required to attend training; and

Whereas, at a meeting on October 31, 2003, the Commission reconsidered this matter based on the aforementioned submissions and found suspension to be inappropriate under the circumstances, deciding instead to recommend removal if the above-named Board member failed to attend training by the end of January 2004, memorializing such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, on November 12, 2003, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to said resolution; and

Whereas, no response was submitted; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the Commission, and, while he has determined to adopt the recommendation of the Commission that the above-named Board member not be suspended pending her completion of training, he also finds that some penalty is warranted for her violation of the School Ethics Act as found by the Commission; now therefore

IT IS ORDERED that, in the event the above-named Board member fails to complete a training session during January 2004, she shall be summarily removed from office as of the date of the final session offered that month. Additionally, IT IS ORDERED that the above-named school official shall be reprimanded for her failure to abide by the requirements of the School Ethics Act, thereby causing administrative and adjudicative time to be wasted by local, county and state education officials. [1] [2]

COMMISSIONER OF EDUCATION

Date of Decision: 12/18/03

Date of Mailing: 12/19/03

[1] It is noted in this regard that respondent was appointed to the Board of Trustees in July 2001 and made no apparent attempt to arrange for training or clarify her status as to training requirements until after issuance of the Commission's June 2003 Show Cause Order, to which she filed no response. Additionally, she gave the Commission no indication of her intention to attend the October training session prior to the Commission's October 28, 2003 meeting, and waited until after that meeting to communicate, directly or though the charter school, with the Commission regarding the circumstances of her nonattendance.

[2] This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

659-03

IN THE MATTER OF AFIFAH	:	
MUHAMMAD, ELYSIAN CHARTER	:	COMMISSIONER OF EDUCATION
SCHOOL BOARD OF TRUSTEES,	:	DECISION
HUDSON COUNTY.	:	
	:	

December 18, 2003

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	
	:	**RESOLUTION**
AFIFAH MUHAMMAD	:	
Elysian Charter School	:	**SEC Docket No.: T30-03**
Board of Trustees	:	
Hudson County	:	

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WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-33 requires new board members to attend training within one year of election or appointment to the board to gain the skills and knowledge necessary to serve as a school board member; and

WHEREAS, Afifah Muhammad was appointed to the Elysian Charter School in April 2002; and

WHEREAS, the New Jersey School Boards Association (NJSBA) advises prospective board members of the training requirement in the "candidate kit"; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on January 3, 2003 and February 19, 2003; and

WHEREAS, the NJSBA conducted four training sessions between April 2002 and April 2003 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes;* and

WHEREAS, the last training session to fulfill the requirement was held in March 2003; and

WHEREAS, the Commission issued an Order against Mr. Muhammad on June 9, 2003, via regular and certified mail, directing him to Show Cause why he had not attended training up until that time; and

WHEREAS, the Commission granted an extension for similarly situated board members to attend one of the October training sessions; and

WHEREAS, Respondent provided no response to the Order; and

WHEREAS, the Commission notified him by letter dated June 12, 2003, that the Commission would discuss this matter at its October 28, 2003 meeting, and if he did not attend training by that time, he could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission finds that this failure to attend board member training from April 2002 to April 2003 constitutes a violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds suspension to be the appropriate penalty for failure to attend through October; and

WHEREAS, the Commission finds that if Mr. Muhammad fails to attend by the end of **January 2004**, the Commission finds that it would be appropriate to have him removed from the board;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Mr. Muhammad violated N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education suspend him until he attends, but remove him from the board if he fails to attend one of the January 2004 training sessions.

Dated: October 29, 2003

Paul C. Garbarini, Chairperson

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed, the board member may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 River View Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on October 28, 2003.

Lisa James-Beavers, Executive Director

(psc/ljb/m: ethics/trainingresT30-03.doc)

AGENCY DKT. NO. 432-11/03

IN THE MATTER OF AFIFAH	:	
MUHAMMAD, ELYSIAN CHARTER	:	COMMISSIONER OF EDUCATION
SCHOOL BOARD OF TRUSTEES,	:	DECISION
HUDSON COUNTY.	:	
	:	

Whereas, the School Ethics Commission (Commission) has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named Board member from office for failure to attend the Board member training sessions required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-1.6; and

Whereas, *N.J.S.A.* 18A:12-33 requires new school board members to attend training within one year of election or appointment to the board to gain skills and knowledge necessary to serve as a school board member; and

Whereas, the above-named Board member was appointed to the Elysian Charter School in April 2002; and

Whereas, the above-named Board member was duly apprised of the training requirement via the New Jersey School Boards Association's (NJSBA) "candidate kit," together with correspondence to him dated January 3, 2003 and February 19, 2003; and

Whereas, the NJSBA conducted four training sessions between April 2002 and April 2003 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

Whereas, the last training session to fulfill the requirement was held in March 2003; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.6(e), on June 9, 2003, the Commission issued an Order to Show Cause why he had not attended a training up until that time; and

Whereas, the Commission granted an extension for similarly situated board members to attend one of the October 2003 training sessions; and

Whereas, the above-named Board member provided no response to the Order; and

Whereas, the Commission notified him by letter dated June 12, 2003 that it would discuss this matter at its October 28, 2003 meeting and, if he did not attend the training session by that time, he could be found in violation of the School Ethics Act and receive a penalty up to removal; and

Whereas, the Commission finds that this failure to attend board member training from April 2002 until April 2003 constitutes a violation of *N.J.S.A.* 18A:12-33; and

Whereas, at its meeting on October 28, 2003, the Commission recommended that the above-named Board member be suspended from the Board until he attends a January 2004 session and removed if he fails to attend by the end of January 2004, memorializing such decision through a resolution forwarded to the Commissioner of Education, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, on November 12, 2003, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to said resolution; and

Whereas, no response was submitted; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the Commission and concurs with and adopts as his own the recommendations of the Commission; now therefore

IT IS ORDERED that the above-named Board member is suspended from office as of the filing of this decision and shall remain suspended pending completion of the requisite training, and, in the event he fails to complete a training session during January 2004, the above-named Board member shall be summarily removed from office as of the date of the final session offered that month.*

COMMISSIONER OF EDUCATION

Date of Decision: 12/18/03

Date of Mailing: 12/19/03

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

660-03SEC

IN THE MATTER OF JOHN F.	:	
KROSCHWITZ, II AND WENDY	:	COMMISSIONER OF EDUCATION
STURGEON, BOARD OF EDUCATION	:	DECISION
OF THE TOWNSHIP OF HAMILTON,	:	
MERCER COUNTY.	:	

SYNOPSIS

The School Ethics Commission determined that respondent Board members violated *N.J.S.A.* 18A:12-24(f) of the School Ethics Act by surrendering their independent judgment concerning the District's food service contractor to a special interest group (HTEA and HTSSA) which supported their candidacy and opposed the renewal of the existing food service contract. Respondent Sturgeon also violated *N.J.S.A.* 18A:12-24.1(j) by taking her complaints directly to the media instead of first giving the administration an opportunity to address them. After considering the nature of the charges, the Commission recommended the penalty of censure.

Upon review of the record, the Commissioner, whose decision was restricted solely to a review of the Commission's recommended penalty, concurred with the Commission's recommendation and, thus, ordered respondents censured as school officials found to have violated the School Ethics Act.

December 19, 2003

IN THE MATTER	**BEFORE THE SCHOOL ETHICS COMMISSION**
OF	
	Docket #C29-03
JOHN F. KROSCHWITZ, II and WENDY STURGEON, Respondents,	
HAMILTON BOARD OF EDUCATION MERCER COUNTY	**DECISION**

PROCEDURAL HISTORY

This matter arises from a complaints filed against John Kroschwitz, II and Wendy Sturgeon for violations of the School Ethics Act, N.J.S.A. 18A:12-21 et seq. Specifically, the Hamilton Township Board of Education alleges that respondent Sturgeon entered schools and took photographs of the kitchens in order to damage the reputation of food service contractor Sodexho whose contract the teachers' union opposed. Ms. Sturgeon and Mr. Kroschwitz had been endorsed by the union. The complaint also alleges that Mr. Kroschwitz and Ms. Sturgeon appeared on a television program broadcast on WZBN complaining of Sodexho's management of the kitchens.

Mr. Kroschwitz filed an answer to the complaint admitting to having been endorsed by the political action committee of the unions, but stating that the board president and two other board members were also so endorsed. He admitted to being interviewed on WZBN and expressing concerns about the sanitary conditions and management of the kitchens by Sodexho. He denied having committed any violation of the School Ethics Act. Ms. Sturgeon filed an answer to the complaint admitting that she was endorsed by the union's political action committee, but stating that because she was elected in April 2003, she was not present for the majority of meetings where the union expressed its objections to Sodexho. She stated that it was her belief that it was her duty to inspect the cafeterias prior to voting on whether to renew the contract and does not believe that she violated any provision of the School Ethics Act.

The School Ethics Commission advised the parties that it would discuss this matter at its meeting of September 23, 2003. The parties were advised of their right to bring counsel and witnesses. All parties appeared with counsel and witnesses. The complainants were represented by board attorney, Dennis DeSantis, Esq. The respondent was represented by Diane Proulx, Esq. The Commission heard testimony from the parties and complainant's witness, Robert Foster, Board President. At its public meeting on September 23, 2003, the Commission voted to find probable cause to credit the allegations that Ms. Sturgeon violated N.J.S.A. 18A:12-24.1(j) of the Code of Ethics for School Board Members of the School Ethics Act in connection with the conduct taken in opposition to Sodexho. The Commission neglected to render a decision on Mr. Kroschwitz and therefore, the matter was placed on the agenda of the October 28, 2003 meeting. The Commission adopted this decision at a special meeting of October 31, 2003 that was called to continue the agenda from its regularly scheduled meeting of October 28, 2003.

The decision concludes that Ms. Sturgeon and Mr. Kroschwitz violated N.J.S.A. 18A:12-24.1(j) of the Code of Ethics for School Board Members of the School Ethics Act and recommends a penalty of censure.

FACTS

Mr. Kroschwitz is a member of the Hamilton Township Board of Education who was elected in April 2002. Ms. Sturgeon is a member of the Hamilton Township Board of Education who was elected in April 2003. Both respondents were endorsed by the Hamilton Township Friends of Education, the political action committee formed by the Hamilton Township Education Association (HTEA) and the Hamilton Township School Secretaries' Association (HTSSA) when they ran for election to the Board. The HTEA represents all teaching staff members, educational assistants, custodians and kitchen workers. The HTSSA represents all school secretaries employed by the Complainant Board.

On June 26, 2002, the Board entered into a contract with Sodexho Management, Inc. to manage the food services in the District. Sodexho began performing these services on July 1, 2002. The agreement provided that the District would continue to maintain its current staff of kitchen workers who were members of the HTEA. However, these workers would be managed by Sodexho and any further vacancies would be filled by Sodexho and those replacement employees would no longer be employees of the complainant or members of the HTEA.

After July 1, 2002, HTEA and HTSSA representatives appeared repeatedly at monthly Board meetings objecting to the hiring of Sodexho and criticizing its performance. The Sodexho contract was scheduled to expire on June 30, 2003 and the Board agenda for May 28, 2003 set forth the consideration of the renewal of the contract for an additional one year period.

On May 8, 2003, two board members visited Nottingham High School to inspect the cafeteria. On May 9, 2003, Mr. Kroschwitz and another board member visited the school. Ms. Sturgeon was aware of the visits by these board members.

On May 13, 2003, Ms. Sturgeon made visits to Nottingham High School, Grice Middle School and Reynolds Middle School. The principals of all the middle and high schools in the District were attending a meeting at the Board office that day. Ms. Sturgeon did not notify any of the administrators in those buildings of her visit in advance nor did she ask for any administrator when she arrived. She wore her badge identifying her as a board member. She went to the main office and asked to enter the kitchen where she took photographs. She did not sign in or out and did not advise the Board's central administration of what she had done or inform them of what she had found. At Grice and Reynolds Middle Schools, she asked for a specific custodian that she had been told to request by a staff member. The custodian, who had been advised by a union representative that Ms. Sturgeon would be coming, took her through the kitchen and answered her questions.

At no time after her visits to the three schools did Respondent Sturgeon advise any administrators of the three schools or any members of the Central Office Administration that she

had visited, the reason that she did so or the result of her visits. She did not provide copies of the photographs to the administrators.

On May 19, 2003, Ms. Sturgeon went to a television station with the pictures and taped a program that was to air on May 20, 2003. Mr. Kroschwitz appeared on the program with Ms. Sturgeon. Members of the Board saw the program and were upset that neither they nor the Board had been given advance notice of her findings. On May 21, 2003, the *Trenton Times* newspaper printed an article quoting both Respondents regarding their complaints as to the sanitary conditions of the kitchens in the three schools. At the Board's agenda meeting on May 21, 2003, the Respondents advised the Board and the chief administrative officer for the first time of Ms. Sturgeon's visit to the schools and their complaints about the condition of the schools' kitchens. Officers and members of the HTEA and HTSSA publicly spoke about the cleanliness of the kitchens managed by Sodexho in opposition to the renewal of its contract.

Respondents voted not to renew the contract with Sodexho at the Board meeting on May 28, 2003. The contract with Sodexho was not renewed.

ANALYSIS

Complainants allege that Ms. Sturgeon's conduct violated N.J.S.A. 18A:12-24.1(c), (d) and (j) of the Code of Ethics for School Board members. In addition, complainants allege that both respondents violated N.J.S.A. 18A:12-24(c) and N.J.S.A. 18A:12-24.1(f) because they undertook such action after having been endorsed by the political action committee of the HTEA and the HTSSA.

N.J.S.A. 18A:12-24.1(c) provides:

> I will confine my board action to policy making, planning and appraisal, and I will help to frame policies and plans only after the board has consulted those who will be affected by them.

The Commission reviewed Ms. Sturgeon's conduct in relation to N.J.S.A. 18A:12-24.1(c) and concludes that Ms. Sturgeon's conduct could arguably be viewed as "appraisal," which is permitted under the Code of Ethics. The Commission does not view the rest of this section to be particularly pertinent to the facts of this case. Ms. Sturgeon undertook an appraisal of the kitchens in order to inform her vote as to whether to renew the contract with Sodexho. She was not setting out to formulate a policy. The Commission does not view this conduct as a violation of N.J.S.A. 18A:12-24.1(c).

N.J.S.A. 18A:12-24.1(d) sets forth:

> I will carry out my responsibility, not to administer the schools, but, together with my fellow board members, to see that they are well run.

The Commission does not view Ms. Sturgeon's conduct as an attempt to administer the schools. Further, one could argue that she was attempting to see that the schools are well run although she undertook the investigation without the knowledge of the other board members.

The Commission believes that there are other sections that are more applicable to the conduct alleged and concludes that Ms. Sturgeon did not violate N.J.S.A. 18A:12-24.1(d).

N.J.S.A. 18A:12-24.1(j) provides:

> I will refer all complaints to the chief administrative officer and will act on the complaints at public meetings only after failure of an administrative solution.

Ms. Sturgeon admitted that she did not advise the chief administrative officer of her intent to visit the schools because she heard complaints of less than sanitary conditions at the schools that she visited. She further admitted that she did not take her complaints to the chief administrative officer after she visited the kitchen and took pictures of what she believed confirmed the complaints. Instead, she took her complaints to a television station and provided an interview to the local newspaper. In doing so, she gave the chief administrative officer no opportunity to solve the problem before making her complaint public. The Commission finds that her doing so was a clear violation of N.J.S.A. 18A:12-24.1(j).

Complainants next allege that both Ms. Sturgeon and Mr. Kroschwitz violated N.J.S.A. 18A:12-24(c) and N.J.S.A. 18A:12-24.1(f) in connection with the fact that both were endorsed by the political action committee of the HTEA and the HTSSA.

N.J.S.A. 18A:12-24(c) provides:

> No school official shall act in his official capacity in any matter in which he, a member of his immediate family, or a business organization in which he holds an interest, has a direct or indirect financial involvement that might reasonably be expected to impair his objectivity or independence of judgment. No school official shall act in his official capacity in any matter where he or a member of his immediate family has a personal involvement that is or creates some benefit to the school official or member of his immediate family.

The Commission advised in Public Advisory Opinion A13-02 that board members who were endorsed by the local education association would violate N.J.S.A. 18A:12-24(c) if they were to participate in negotiations and vote on the contract in the year of the endorsement. In such a case there was a direct relationship between the union endorsement and the union contract. Therefore, the Commission concluded that a personal involvement was created by the endorsement by the association and that a benefit was created by the services attached to that endorsement and the board members endorsed in the year in which contract negotiations began had a personal involvement with the association that constituted a benefit to them. Thus, the board members' participation in negotiations and voting on the teachers' contract would violate N.J.S.A. 18A:12-24(c). In the present case, the complainants seek to broaden that opinion and rule that a board member endorsed by the teachers' union is not only prohibited from negotiating and voting on the union contract, but is also prohibited from voting on matters coming before the board where the union has advocated a certain position. The Commission declines to expand the prohibition to this extent. The Commission declines to rule that board members endorsed by the union have a personal involvement that constitutes a benefit to them in issues that impact upon

the union outside of the contract. The benefit that such board members would acquire is not clear. Also, such a ruling could conflict endorsed board members from voting on any matter before the Board that could impact the union either positively or negatively. For the foregoing reasons, the Commission finds no probable cause to credit the allegation that the Respondents' conduct violated N.J.S.A. 18A:12-24(c).

Last, complainants argue that both Respondents' conduct violated N.J.S.A. 18A:12-24.1(f), which provides:

> I will refuse to surrender my independent judgment to special interest or partisan political groups or to use the schools for personal gain or the gain of friends.

The opposition of the HTEA and the HTSSA to the Sodexho is undisputed. While the Commission believes that both Respondents could have exercised independent judgment in voting against the renewal of Sodexho's contract, the Commission believes that the motivating factor behind Ms. Sturgeon's visits to the schools and her and Mr. Kroschwitz's appearance on television describing the poor conditions of the schools' kitchens was the opposition of the unions to Sodexho's contract with the Board. The Commission finds this to be a reasonable inference that can be drawn from the Respondents' endorsement by the HTEA and HTSSA's political action committee, the surreptitious investigation into the kitchens without the knowledge of the administration and the Respondents' choice to present the information to the media rather than the administration. This is evidence that they were more concerned about seeing that the contract was not renewed than correcting the problem. For the foregoing reasons, the Commission finds that there is ample evidence that Ms. Sturgeon and Mr. Kroschwitz surrendered their independent judgment to a special interest group in violation of N.J.S.A. 18A:12-24.1(f).

DECISION

For the foregoing reasons, the Commission finds that Ms. Sturgeon violated N.J.S.A. 18A:12-24.1(j) by not presenting her complaints to the chief administrative officer and giving him an opportunity to address them before discussing them on a television program and finds that Ms. Sturgeon and Mr. Kroschwitz violated N.J.S.A. 18A:12-24.1(f) for surrendering their independent judgment to a special interest group.

In determining the penalty to recommend, the Commission had to consider that the Respondents were addressing a potential hazard to students in the Hamilton School District. The Commission disagreed with their methods for addressing the problem and concluded that those methods were motivated by the involvement of the union in the contract issue. For this violation of the Code of Ethics, the Commission recommends that the Commissioner of Education impose a penalty of censure against both Respondents.

Paul C. Garbarini K

Paul C. Garbarini
Chairperson

Resolution Adopting Decision – C29-03

Whereas, the School Ethics Commission has considered the pleadings filed by the parties, the documents submitted in support thereof and the testimony presented; and

Whereas, at its meeting of September 23, 2003, the Commission found that Wendy Sturgeon violated N.J.S.A. 18A:12-24.1(j) and at its meeting of October 31, 2003, the Commission found that both Ms. Sturgeon and John Kroschwitz, II violated N.J.S.A. 18A:12-24.1(f) of the Act and recommended that the Commissioner of Education impose a sanction of censure for both; and

Whereas, the Commission staff prepared a decision consistent with the aforementioned conclusion; and

Whereas, at its meeting of October 31, 2003, the Commission reviewed the draft decision and agrees with the decision;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter and directs its staff to notify all parties to this action of the Commission's decision herein.

Paul C. Garbarini, Chairperson

I hereby certify that this Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on October 31, 2003.

Lisa James-Beavers
Executive Director

IN THE MATTER	**BEFORE THE SCHOOL ETHICS COMMISSION**
OF	
	Docket #C29-03
JOHN F. KROSCHWITZ, II and WENDY STURGEON, Respondents,	
HAMILTON BOARD OF EDUCATION MERCER COUNTY	**AMENDED DECISION**

PROCEDURAL HISTORY

This matter arises from a complaints filed against John Kroschwitz, II and Wendy Sturgeon for violations of the School Ethics Act, N.J.S.A. 18A:12-21 et seq. Specifically, the Hamilton Township Board of Education alleges that respondent Sturgeon entered schools and took photographs of the kitchens in order to damage the reputation of food service contractor Sodexho whose contract the teachers' union opposed. Ms. Sturgeon and Mr. Kroschwitz had been endorsed by the union. The complaint also alleges that Mr. Kroschwitz and Ms. Sturgeon appeared on a television program broadcast on WZBN complaining of Sodexho's management of the kitchens.

Mr. Kroschwitz filed an answer to the complaint admitting to having been endorsed by the political action committee of the unions, but stating that the board president and two other board members were also so endorsed. He admitted to being interviewed on WZBN and expressing concerns about the sanitary conditions and management of the kitchens by Sodexho. He denied having committed any violation of the School Ethics Act. Ms. Sturgeon filed an answer to the complaint admitting that she was endorsed by the union's political action committee, but stating that because she was elected in April 2003, she was not present for the majority of meetings where the union expressed its objections to Sodexho. She stated that it was her belief that it was her duty to inspect the cafeterias prior to voting on whether to renew the contract and does not believe that she violated any provision of the School Ethics Act.

The School Ethics Commission advised the parties that it would discuss this matter at its meeting of September 23, 2003. The parties were advised of their right to bring counsel and witnesses. All parties appeared with counsel and witnesses. The complainants were represented by board attorney, Dennis DeSantis, Esq. The respondent was represented by Diane Proulx, Esq. The Commission heard testimony from the parties and complainant's witness, Robert Foster, Board President. At its public meeting on September 23, 2003, the Commission voted to find probable cause to credit the allegations that Ms. Sturgeon violated N.J.S.A. 18A:12-24.1(j) of the Code of Ethics for School Board Members of the School Ethics Act in connection with the conduct taken in opposition to Sodexho. The Commission neglected to render a decision on Mr. Kroschwitz and therefore, the matter was placed on the agenda of the October 28, 2003 meeting. The Commission adopted this decision at a special meeting of October 31, 2003 that was called to continue the agenda from its regularly scheduled meeting of October 28, 2003.

The decision concludes that Ms. Sturgeon and Mr. Kroschwitz violated N.J.S.A. 18A:12-24.1(j) of the Code of Ethics for School Board Members of the School Ethics Act and recommends a penalty of censure.

FACTS

Mr. Kroschwitz is a member of the Hamilton Township Board of Education who was elected in April 2002. Ms. Sturgeon is a member of the Hamilton Township Board of Education who was elected in April 2003. Both respondents were endorsed by the Hamilton Township Friends of Education, the political action committee formed by the Hamilton Township Education Association (HTEA) and the Hamilton Township School Secretaries' Association (HTSSA) when they ran for election to the Board. The HTEA represents all teaching staff members, educational assistants, custodians and kitchen workers. The HTSSA represents all school secretaries employed by the Complainant Board.

On June 26, 2002, the Board entered into a contract with Sodexho Management, Inc. to manage the food services in the District. Sodexho began performing these services on July 1, 2002. The agreement provided that the District would continue to maintain its current staff of kitchen workers who were members of the HTEA. However, these workers would be managed by Sodexho and any further vacancies would be filled by Sodexho and those replacement employees would no longer be employees of the complainant or members of the HTEA.

After July 1, 2002, HTEA and HTSSA representatives appeared repeatedly at monthly Board meetings objecting to the hiring of Sodexho and criticizing its performance. The Sodexho contract was scheduled to expire on June 30, 2003 and the Board agenda for May 28, 2003 set forth the consideration of the renewal of the contract for an additional one year period.

On May 8, 2003, two board members visited Nottingham High School to inspect the cafeteria. On May 9, 2003, Mr. Kroschwitz and another board member visited the school. Ms. Sturgeon was aware of the visits by these board members.

On May 13, 2003, Ms. Sturgeon made visits to Nottingham High School, Grice Middle School and Reynolds Middle School. The principals of all the middle and high schools in the District were attending a meeting at the Board office that day. Ms. Sturgeon did not notify any of the administrators in those buildings of her visit in advance nor did she ask for any administrator when she arrived. She wore her badge identifying her as a board member. She went to the main office and asked to enter the kitchen where she took photographs. She did not sign in or out and did not advise the Board's central administration of what she had done or inform them of what she had found. At Grice and Reynolds Middle Schools, she asked for a specific custodian that she had been told to request by a staff member. The custodian, who had been advised by a union representative that Ms. Sturgeon would be coming, took her through the kitchen and answered her questions.

At no time after her visits to the three schools did Respondent Sturgeon advise any administrators of the three schools or any members of the Central Office Administration that she

had visited, the reason that she did so or the result of her visits. She did not provide copies of the photographs to the administrators.

On May 19, 2003, Ms. Sturgeon went to a television station with the pictures and taped a program that was to air on May 20, 2003. Mr. Kroschwitz appeared on the program with Ms. Sturgeon. Members of the Board saw the program and were upset that neither they nor the Board had been given advance notice of her findings. On May 21, 2003, the *Trenton Times* newspaper printed an article quoting both Respondents regarding their complaints as to the sanitary conditions of the kitchens in the three schools. At the Board's agenda meeting on May 21, 2003, the Respondents advised the Board and the chief administrative officer for the first time of Ms. Sturgeon's visit to the schools and their complaints about the condition of the schools' kitchens. Officers and members of the HTEA and HTSSA publicly spoke about the cleanliness of the kitchens managed by Sodexho in opposition to the renewal of its contract.

Respondents voted not to renew the contract with Sodexho at the Board meeting on May 28, 2003. The contract with Sodexho was renewed.

ANALYSIS

Complainants allege that Ms. Sturgeon's conduct violated N.J.S.A. 18A:12-24.1(c), (d) and (j) of the Code of Ethics for School Board members. In addition, complainants allege that both respondents violated N.J.S.A. 18A:12-24(c) and N.J.S.A. 18A:12-24.1(f) because they undertook such action after having been endorsed by the political action committee of the HTEA and the HTSSA.

N.J.S.A. 18A:12-24.1(c) provides:

> I will confine my board action to policy making, planning and appraisal, and I will help to frame policies and plans only after the board has consulted those who will be affected by them.

The Commission reviewed Ms. Sturgeon's conduct in relation to N.J.S.A. 18A:12-24.1(c) and concludes that Ms. Sturgeon's conduct could arguably be viewed as "appraisal," which is permitted under the Code of Ethics. The Commission does not view the rest of this section to be particularly pertinent to the facts of this case. Ms. Sturgeon undertook an appraisal of the kitchens in order to inform her vote as to whether to renew the contract with Sodexho. She was not setting out to formulate a policy. The Commission does not view this conduct as a violation of N.J.S.A. 18A:12-24.1(c).

N.J.S.A. 18A:12-24.1(d) sets forth:

> I will carry out my responsibility, not to administer the schools, but, together with my fellow board members, to see that they are well run.

The Commission does not view Ms. Sturgeon's conduct as an attempt to administer the schools. Further, one could argue that she was attempting to see that the schools are well run although she undertook the investigation without the knowledge of the other board members.

The Commission believes that there are other sections that are more applicable to the conduct alleged and concludes that Ms. Sturgeon did not violate N.J.S.A. 18A:12-24.1(d).

N.J.S.A. 18A:12-24.1(j) provides:

> I will refer all complaints to the chief administrative officer and will act on the complaints at public meetings only after failure of an administrative solution.

Ms. Sturgeon admitted that she did not advise the chief administrative officer of her intent to visit the schools because she heard complaints of less than sanitary conditions at the schools that she visited. She further admitted that she did not take her complaints to the chief administrative officer after she visited the kitchen and took pictures of what she believed confirmed the complaints. Instead, she took her complaints to a television station and provided an interview to the local newspaper. In doing so, she gave the chief administrative officer no opportunity to solve the problem before making her complaint public. The Commission finds that her doing so was a clear violation of N.J.S.A. 18A:12-24.1(j).

Complainants next allege that both Ms. Sturgeon and Mr. Kroschwitz violated N.J.S.A. 18A:12-24(c) and N.J.S.A. 18A:12-24.1(f) in connection with the fact that both were endorsed by the political action committee of the HTEA and the HTSSA.

N.J.S.A. 18A:12-24(c) provides:

> No school official shall act in his official capacity in any matter in which he, a member of his immediate family, or a business organization in which he holds an interest, has a direct or indirect financial involvement that might reasonably be expected to impair his objectivity or independence of judgment. No school official shall act in his official capacity in any matter where he or a member of his immediate family has a personal involvement that is or creates some benefit to the school official or member of his immediate family.

The Commission advised in Public Advisory Opinion A13-02 that board members who were endorsed by the local education association would violate N.J.S.A. 18A:12-24(c) if they were to participate in negotiations and vote on the contract in the year of the endorsement. In such a case there was a direct relationship between the union endorsement and the union contract. Therefore, the Commission concluded that a personal involvement was created by the endorsement by the association and that a benefit was created by the services attached to that endorsement and the board members endorsed in the year in which contract negotiations began had a personal involvement with the association that constituted a benefit to them. Thus, the board members' participation in negotiations and voting on the teachers' contract would violate N.J.S.A. 18A:12-24(c). In the present case, the complainants seek to broaden that opinion and rule that a board member endorsed by the teachers' union is not only prohibited from negotiating and voting on the union contract, but is also prohibited from voting on matters coming before the board where the union has advocated a certain position. The Commission declines to expand the prohibition to this extent. The Commission declines to rule that board members endorsed by the union have a personal involvement that constitutes a benefit to them in issues that impact upon

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the union outside of the contract. The benefit that such board members would acquire is not clear. Also, such a ruling could conflict endorsed board members from voting on any matter before the Board that could impact the union either positively or negatively. For the foregoing reasons, the Commission finds no probable cause to credit the allegation that the Respondents' conduct violated N.J.S.A. 18A:12-24(c).

Last, complainants argue that both Respondents' conduct violated N.J.S.A. 18A:12-24.1(f), which provides:

> I will refuse to surrender my independent judgment to special interest or partisan political groups or to use the schools for personal gain or the gain of friends.

The opposition of the HTEA and the HTSSA to the Sodexho is undisputed. While the Commission believes that both Respondents could have exercised independent judgment in voting against the renewal of Sodexho's contract, the Commission believes that the motivating factor behind Ms. Sturgeon's visits to the schools and her and Mr. Kroschwitz's appearance on television describing the poor conditions of the schools' kitchens was the opposition of the unions to Sodexho's contract with the Board. The Commission finds this to be a reasonable inference that can be drawn from the Respondents' endorsement by the HTEA and HTSSA's political action committee, the surreptitious investigation into the kitchens without the knowledge of the administration and the Respondents' choice to present the information to the media rather than the administration. This is evidence that they were more concerned about seeing that the contract was not renewed than correcting the problem. For the foregoing reasons, the Commission finds that there is ample evidence that Ms. Sturgeon and Mr. Kroschwitz surrendered their independent judgment to a special interest group in violation of N.J.S.A. 18A:12-24.1(f).

DECISION

For the foregoing reasons, the Commission finds that Ms. Sturgeon violated N.J.S.A. 18A:12-24.1(j) by not presenting her complaints to the chief administrative officer and giving him an opportunity to address them before discussing them on a television program and finds that Ms. Sturgeon and Mr. Kroschwitz violated N.J.S.A. 18A:12-24.1(f) for surrendering their independent judgment to a special interest group.

In determining the penalty to recommend, the Commission had to consider that the Respondents were addressing a potential hazard to students in the Hamilton School District. The Commission disagreed with their methods for addressing the problem and concluded that those methods were motivated by the involvement of the union in the contract issue. For this violation of the Code of Ethics, the Commission recommends that the Commissioner of Education impose a penalty of censure against both Respondents.

Paul C. Garbarini K
Paul C. Garbarini
Chairperson

Resolution Adopting Decision – C29-03

Whereas, the School Ethics Commission has considered the pleadings filed by the parties, the documents submitted in support thereof and the testimony presented; and

Whereas, at its meeting of September 23, 2003, the Commission found that Wendy Sturgeon violated N.J.S.A. 18A:12-24.1(j) and at its meeting of October 31, 2003, the Commission found that both Ms. Sturgeon and John Kroschwitz, II violated N.J.S.A. 18A:12-24.1(f) of the Act and recommended that the Commissioner of Education impose a sanction of censure for both; and

Whereas, the Commission staff prepared a decision consistent with the aforementioned conclusion; and

Whereas, at its meeting of October 31, 2003, the Commission reviewed the draft decision and agreed with the decision;

Whereas, at its meeting of November 25, 2003, the Commission noted an error in its prior decision;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed amended decision referenced as its decision in this matter and directs its staff to notify all parties to this action of the Commission's decision herein.

Paul C. Garbarini, Chairperson

I hereby certify that this Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on November 25, 2003.

Lisa James-Beavers
Executive Director

AGENCY DKT. NO. 429-11/03

IN THE MATTER OF JOHN F.	:	
KROSCHWITZ, II AND WENDY	:	COMMISSIONER OF EDUCATION
STURGEON, BOARD OF EDUCATION	:	DECISION
OF THE TOWNSHIP OF HAMILTON,	:	
MERCER COUNTY.	:	

This matter comes before the Commissioner pursuant to *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6A:3-9.1 to impose a sanction upon respondents, members of the Hamilton Township Board of Education, based on the finding of the School Ethics Commission (Commission) that respondents violated the School Ethics Act. Specifically, the Commission found that Respondent Sturgeon violated *N.J.S.A.* 18A:12-24.1(j) by taking her complaints about the District's food service contractor directly to the media without first presenting them to the chief school administrator for resolution, and that both respondents violated *N.J.S.A.* 18A:12-24.1(f) by surrendering their independent judgment to a special interest group consisting of District employee associations which had supported respondents' candidacy for Board membership and strongly opposed renewal of the existing food service contract. For these violations, the Commission recommended that both respondents be censured.

The Commissioner has reviewed the Commission's decision and the record of this matter. Additionally, the Commissioner has reviewed respondents'

comments, jointly submitted, on the Commission's recommendation that they be censured.

In their comment, respondents urge the Commissioner to reject the Commission's recommendation, contending that:

> Contrary to the stated fact in the Decision, the Sodexho [food service] Contract was, in fact, renewed at the Meeting of the Hamilton Township Board of Education on May 28, 2003. This is public record. Although *N.J.A.C.* 6A:3-9.1 states that the findings of fact and determinations of violations are not reviewable by the Commissioner, this particular fact is not a "finding," but a matter of public record. The Commission found that both Respondents violated *N.J.S.A.* 18A:12-24.1(f) which states, "I will refuse to surrender my independent judgment to special interest or partisan political groups or to use the schools for personal gain or the gain of friends." A finding of fact by the Commission that is contrary to the actual public record is a significant error that the Commission should address prior to recommending any sanctions in the above-mentioned Complaint. This is particularly egregious since the outcome of the vote is relevant to the alleged violation. (Respondents' Comment at 1-2)

At the outset, the Commissioner emphasizes that, in accordance with *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6A:3-9.1, and as recognized by respondents, only the School Ethics Commission may determine whether a violation of the School Ethics Act has occurred, and the Commission's decision in that regard is not reviewable by the Commissioner. Rather, the Commissioner's jurisdiction is limited to review of any sanction the Commission may recommend based upon its determination that a school official has violated the Act.

Given the nature of the Commissioner's review and upon full consideration of the record in this matter, the Commissioner finds no cause to disturb the Commission's recommended sanction. The Commissioner so holds notwithstanding the error noted by respondents, since, regardless of whether it constitutes a "finding"

reviewable by the Commissioner, it has no relation to the violation found with respect to *N.J.S.A.* 18A:12-24.1(j), failure to report complaints to the administration prior to taking public action on them, and it is immaterial to the violation found with respect to *N.J.S.A.* 18A:12-24.1(f), surrendering one's independent judgment to a special interest group. In this latter regard, the Commissioner specifically notes that, notwithstanding any action taken by the Board as a whole to renew or not renew the disputed food service contract, respondents each admitted that *they* voted *not* to renew it. (Complaint at 6, paragraph 19; Response of John F. Kruschwitz, II at 3, paragraph 19; Response of Wendy Sturgeon at 6, paragraph 19) Additionally, on November 25, 2003, the Commission acted to issue an amended decision correcting its prior factual error while still retaining its analyses, determinations of violation and recommendation for penalty.[1]

Accordingly, for the reasons expressed in the decision of the School Ethics Commission, IT IS hereby ORDERED that John F. Kroschwitz, II and Wendy Sturgeon be censured as school officials found to have violated the School Ethics Act.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 12/19/03

Date of Mailing: 12/19/03

[1] The October 31, 2003 decision reads, at the last sentence of the "Facts" section ending on page 3, "The contract with Sodexho was not renewed." The November 25, 2003 decision reads, at the same place, "The contract with Sodexho was renewed." In all other respects, the decisions are identical.

[2] This decision may be appealed to the State Board of Education in accordance with *N.J.S.A.* 18A:6-27 *et seq.*, *N.J.S.A.* 18A:12-29(d) and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to the latter, Commissioner decisions are deemed filed three days after the date of mailing to the parties.

661-03

661-03SEC

IN THE MATTER OF ERIC CALLADO,	:	
PERTH AMBOY BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION, MIDDLESEX COUNTY.	:	DECISION
	:	

December 19, 2003

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	
	:	**Docket No.: D27-03**
ERIC CALLADO **PERTH AMBOY** **BOARD OF EDUCATION** **MIDDLESEX COUNTY**	:	**RESOLUTION FOR FAILING TO FILE DISCLOSURE STATEMENT**

WHEREAS, N.J.S.A. 18A:12-25 of the School Ethics Act requires each school official to file a personal/relative disclosure statement and N.J.S.A. 18A:12-26 requires each school official to file a financial disclosure statement for the School Ethics Commission; and

WHEREAS, Mr. Eric Callado is a member of the Perth Amboy Board of Education and thus a "school official" under N.J.S.A. 18A:12-23 of the Act and N.J.A.C. 6A:28-1.2 of the Code; and

WHEREAS, the deadline to file these disclosure statements was April 30, 2003 for school officials in office since January 30, 2003 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators; and

WHEREAS, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with his school district and the County Superintendent's office as required by the Act; and

WHEREAS, the Commission sent a reminder letter to him on September 5, 2003, indicating that if the completed statement was not filed by September 15, 2003, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

WHEREAS, the Commission issued an Order on September 24, 2003, directing this school official to Show Cause why the Commission should not find him in violation of the Act for failing to file the disclosure statements; and

WHEREAS, the school official failed to reply to the Order to Show Cause; and

WHEREAS, in its letter enclosing the Order, the Commission notified this school official that the Commission would discuss this matter at its October 28, 2003 meeting, that he had the right to attend, and he could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission finds that the failure to file a disclosure statement within the designated timeline constitutes a clear violation of N.J.S.A. 18A:12-25 and 26; and

WHEREAS, the Commission finds that this school official did not provide any reason why he failed to comply with the requirement under N.J.S.A. 18A:12-25 and 26; and

WHEREAS, the Commission finds that this school official was given ample opportunity to provide the complete disclosure statement; and

WHEREAS, the appropriate penalty for the violation is suspension from his Board, until he files the required form, but removal if he fails to file within 30 days from the date of the Commissioner's decision on penalty, especially in light of the failure to respond to the Commission's reminder letter before the September 15, 2003 deadline.

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Eric Callado violated N.J.S.A. 18A:12-25 and 26 of the School Ethics Act and recommends that the Commissioner of Education impose a sanction of suspension from his Board, but removal if he fails to file within 30 days from the effective date of the Commissioner's decision.

Paul C. Garbarini

Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: October 28, 2003

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to you, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

AGENCY DKT. NO. 409-11/03

IN THE MATTER OF ERIC CALLADO,	:	
PERTH AMBOY BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION, MIDDLESEX COUNTY.	:	DECISION
	:	

Whereas, the School Ethics Commission has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named school official for failure to file a personal/relative disclosure statement, pursuant to *N.J.S.A.* 18A:12-25 and/or an annual financial disclosure statement required by *N.J.S.A.* 18A:12-26;

Whereas, the deadline to file these disclosure statements was April 30, 2003 for school officials in office since January 30, 2003, or 30 days from swearing in or start of service for newly elected or appointed board members and administrators; and

Whereas, the School Ethics Commission, was advised by the County Superintendent that this school official did not file a disclosure statement with his school district and the County Superintendent's office, as required by the Act; and

Whereas, the Commission sent a reminder letter to the above-named school official on September 5, 2003, indicating that if the completed statement was not filed by September 15, 2003, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.5(j), the Commission issued an Order on September 24, 2003 directing this school official to Show Cause why the Commission should not find him in violation of the Act for failing to file the necessary statement(s), with a cover letter

indicating that the Commission would discuss the matter at its October 28, 2003 meeting, that the named official had the right to attend, and that the Commission could, at that meeting, find a violation of the School Ethics Act and recommend a penalty up to removal; and

Whereas, the above-named school official failed to reply to the Order to Show Cause and provided no reason for his failure to comply with the requirement under *N.J.S.A.* 18A:12-25 and 26; and

Whereas, the Commission found that failure to file a disclosure statement within the designated timeline, despite ample opportunity to do so, constitutes a clear violation of *N.J.S.A.* 18A:12-25 and 26; and

Whereas, the Commission voted on October 28, 2003 to recommend suspension of the above-named school official, and his automatic removal from the board of education if he failed to file within 30 days, memorializing such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, by letter dated November 7, 2003 from the School Ethics Commission, the above-named school official was afforded an opportunity to submit to the Commissioner a response to said resolution recommending removal; and

Whereas, no response was submitted to the Commissioner; and

Whereas, the Commissioner has carefully considered the record of this matter and the decision of the School Ethics Commission; and

Whereas, the Commissioner recognizes that, were the Commission's recommendation to be adopted without modification, school officials filing the requisite disclosure statement prior to the decision of the Commissioner, and hence, prior to imposition of the recommended suspension, would receive no penalty notwithstanding that the School Ethics

Act was violated and the Commission has recommended reprimands for school officials who failed to file until after issuance of the Order to Show Cause; now therefore

IT IS ORDERED that, as recommended by the School Ethics Commission, the above-named school official be suspended until he files the necessary disclosure statement, and automatically removed from the board of education if he fails to file within 30 days. IT IS additionally ORDERED that, even if the above-named school official shall have filed the necessary statement prior to the filing date of this decision, he shall nevertheless be reprimanded for his failure to abide by the requirements of the School Ethics Act despite many opportunities for compliance, thereby causing administrative and adjudicative time to be wasted by local, county and state education officials.*

COMMISSIONER OF EDUCATION

Date of Decision: 12/19/03

Date of Mailing: 12/19/03

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

#662-03SEC

IN THE MATTER OF FELIX ROIG,	:	
NEW HORIZONS CHARTER SCHOOL,	:	COMMISSIONER OF EDUCATION
ESSEX COUNTY.	:	DECISION

December 22, 2003

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	
	:	**Docket No.: D17-03**
FELIX ROIG **NEW HORIZON** **CHARTER SCHOOL** **ESSEX COUNTY**	:	**RESOLUTION FOR FAILING TO FILE DISCLOSURE STATEMENT**

WHEREAS, N.J.S.A. 18A:12-25 of the School Ethics Act requires each school official to file a personal/relative disclosure statement and N.J.S.A. 18A:12-26 requires each school official to file a financial disclosure statement for the School Ethics Commission; and

WHEREAS, Mr. Felix Roig is a member of the New Horizons Charter School Board of Trustees and thus a "school official" under N.J.S.A. 18A:12-23 of the Act and N.J.A.C. 6A:28-1.2 of the Code; and

WHEREAS, the deadline to file these disclosure statements was April 30, 2003 for school officials in office since January 30, 2003 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators; and

WHEREAS, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with his school district and the County Superintendent's office as required by the Act; and

WHEREAS, the Commission sent a reminder letter to Mr. Roig on September 5, 2003, indicating that if the completed statement was not filed by September 15, 2003, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

WHEREAS, the Commission issued an Order on September 24, 2003, directing this school official to Show Cause why the Commission should not find him in violation of the Act for failing to file the disclosure statements; and

WHEREAS, the school official failed to reply to the Order to Show Cause; and

WHEREAS, in its letter enclosing the Order, the Commission notified this school official that the Commission would discuss this matter at its October 28, 2003 meeting, that he had the right to attend, and he could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission finds that the failure to file a disclosure statement within the designated timeline constitutes a clear violation of N.J.S.A. 18A:12-25 and 26; and

WHEREAS, the Commission finds that this school official did not provide any reason why he failed to comply with the requirement under N.J.S.A. 18A:12-25 and 26; and

WHEREAS, the Commission finds that this school official was given ample opportunity to provide the complete disclosure statement; and

WHEREAS, the appropriate penalty for the violation is suspension from his Board, but removal if he does not file within 30 days of the date of the Commissioner's decision on penalty, especially in light of the failure to respond to the Commission's reminder letter before the September 15, 2003 deadline.

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Felix Roig violated N.J.S.A. 18A:12-25 and 26 of the School Ethics Act and recommends that the Commissioner of Education impose a sanction of suspension from his Board, but removal if he does not file within 30 days of the effective date of the Commissioner's decision.

Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: October 28, 2003

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to you, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

AGENCY DKT. NO. 419-11/03

IN THE MATTER OF FELIX ROIG, :

NEW HORIZONS CHARTER SCHOOL, : COMMISSIONER OF EDUCATION

ESSEX COUNTY. : DECISION

Whereas, the School Ethics Commission has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named school official for failure to file a personal/relative disclosure statement, pursuant to *N.J.S.A.* 18A:12-25 and/or an annual financial disclosure statement required by *N.J.S.A.* 18A:12-26;

Whereas, the deadline to file these disclosure statements was April 30, 2003 for school officials in office since January 30, 2003, or 30 days from swearing in or start of service for newly elected or appointed board members and administrators; and

Whereas, the School Ethics Commission, was advised by the County Superintendent that this school official did not file a disclosure statement with his school district and the County Superintendent's office, as required by the Act; and

Whereas, the Commission sent a reminder letter to the above-named school official on September 5, 2003, indicating that if the completed statement was not filed by September 15, 2003, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.5(j), the Commission issued an Order on September 24, 2003 directing this school official to Show Cause why the Commission should not find him in violation of the Act for failing to file the necessary statement(s), with a cover letter

indicating that the Commission would discuss the matter at its October 28, 2003 meeting, that the named official had the right to attend, and that the Commission could, at that meeting, find a violation of the School Ethics Act and recommend a penalty up to removal; and

Whereas, the above-named school official failed to reply to the Order to Show Cause and provided no reason for his failure to comply with the requirement under *N.J.S.A.* 18A:12-25 and 26; and

Whereas, the Commission found that failure to file a disclosure statement within the designated timeline, despite ample opportunity to do so, constitutes a clear violation of *N.J.S.A.* 18A:12-25 and 26; and

Whereas, the Commission voted on October 28, 2003 to recommend suspension of the above-named school official, and his automatic removal from the Board of Trustees if he failed to file within 30 days, memorializing such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, by letter dated November 7, 2003 from the School Ethics Commission, the above-named school official was afforded an opportunity to submit to the Commissioner a response to said resolution recommending removal; and

Whereas, no response was submitted to the Commissioner; and

Whereas, the Commissioner has carefully considered the record of this matter and the decision of the School Ethics Commission; and

Whereas, the Commissioner recognizes that, were the Commission's recommendation to be adopted without modification, school officials filing the requisite disclosure statement prior to the decision of the Commissioner, and hence, prior to imposition of the recommended suspension, would receive no penalty notwithstanding that the School Ethics

Act was violated and the Commission has recommended reprimands for school officials who failed to file until after issuance of the Order to Show Cause; now therefore

IT IS ORDERED that, as recommended by the School Ethics Commission, the above-named school official be suspended until he files the necessary disclosure statement, and automatically removed from the board of education if he fails to file within 30 days. IT IS additionally ORDERED that, even if the above-named school official shall have filed the necessary statement prior to the filing date of this decision, he shall nevertheless be reprimanded for his failure to abide by the requirements of the School Ethics Act despite many opportunities for compliance, thereby causing administrative and adjudicative time to be wasted by local, county and state education officials.*

COMMISSIONER OF EDUCATION

Date of Decision: 12/22/03

Date of Mailing: 12/23/03

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

665-02

#663-02SEC

IN THE MATTER OF MICHAEL TULLO,	:	
NEW HORIZONS CHARTER SCHOOL,	:	COMMISSIONER OF EDUCATION
ESSEX COUNTY.	:	DECISION

December 22, 2003

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	
	:	**Docket No.: D19-03**
MICHAEL TULLO NEW HORIZONS CHARTER SCHOOL ESSEX COUNTY	:	**RESOLUTION FOR FAILING TO FILE DISCLOSURE STATEMENT**

WHEREAS, N.J.S.A. 18A:12-25 of the School Ethics Act requires each school official to file a personal/relative disclosure statement and N.J.S.A. 18A:12-26 requires each school official to file a financial disclosure statement for the School Ethics Commission; and

WHEREAS, Mr. Michael Tullo is a member of the New Horizons Charter School Board of Trustees and thus a "school official" under N.J.S.A. 18A:12-23 of the Act and N.J.A.C. 6A:28-1.2 of the Code; and

WHEREAS, the deadline to file these disclosure statements was April 30, 2003 for school officials in office since January 30, 2003 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators; and

WHEREAS, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with his school district and the County Superintendent's office as required by the Act; and

WHEREAS, the Commission sent a reminder letter to him on September 5, 2003, indicating that if the completed statement was not filed by September 15, 2003, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

WHEREAS, the Commission issued an Order on September 24, 2003, directing this school official to Show Cause why the Commission should not find him in violation of the Act for failing to file the disclosure statements; and

WHEREAS, the school official failed to reply to the Order to Show Cause; and

WHEREAS, in its letter enclosing the Order, the Commission notified this school official that the Commission would discuss this matter at its October 28, 2003 meeting, that he had the right to attend, and he could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission finds that the failure to file a disclosure statement within the designated timeline constitutes a clear violation of N.J.S.A. 18A:12-25 and 26; and

WHEREAS, the Commission finds that this school official did not provide any reason why he failed to comply with the requirement under N.J.S.A. 18A:12-25 and 26; and

WHEREAS, the Commission finds that this school official was given ample opportunity to provide the complete disclosure statement; and

WHEREAS, the appropriate penalty for the violation is suspension from his Board, until he files the required form, but removal if he fails to file within 30 days from the date of the Commissioner's decision on penalty, especially in light of the failure to respond to the Commission's reminder letter before the September 15, 2003 deadline.

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Michael Tullo violated N.J.S.A. 18A:12-25 and 26 of the School Ethics Act and recommends that the Commissioner of Education impose a sanction of suspension from his Board, but removal if he fails to file within 30 days from the effective date of the Commissioner's decision.

Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: October 28, 2003

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to you, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

AGENCY DKT. NO. 417-11/03

IN THE MATTER OF MICHAEL TULLO, :

NEW HORIZONS CHARTER SCHOOL, : COMMISSIONER OF EDUCATION

ESSEX COUNTY : DECISION

Whereas, the School Ethics Commission has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named school official for failure to file a personal/relative disclosure statement, pursuant to *N.J.S.A.* 18A:12-25 and/or an annual financial disclosure statement required by *N.J.S.A.* 18A:12-26;

Whereas, the deadline to file these disclosure statements was April 30, 2003 for school officials in office since January 30, 2003, or 30 days from swearing in or start of service for newly elected or appointed board members and administrators; and

Whereas, the School Ethics Commission, was advised by the County Superintendent that this school official did not file a disclosure statement with his school district and the County Superintendent's office, as required by the Act; and

Whereas, the Commission sent a reminder letter to the above-named school official on September 5, 2003, indicating that if the completed statement was not filed by September 15, 2003, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.5(j), the Commission issued an Order on September 24, 2003 directing this school official to Show Cause why the Commission should not find him in violation of the Act for failing to file the necessary statement(s), with a cover letter

indicating that the Commission would discuss the matter at its October 28, 2003 meeting, that the named official had the right to attend, and that the Commission could, at that meeting, find a violation of the School Ethics Act and recommend a penalty up to removal; and

Whereas, the above-named school official failed to reply to the Order to Show Cause and provided no reason for his failure to comply with the requirement under *N.J.S.A.* 18A: 12-25 and 26; and

Whereas, the Commission found that failure to file a disclosure statement within the designated timeline, despite ample opportunity to do so, constitutes a clear violation of *N.J.S.A.* 18A:12-25 and 26; and

Whereas, the Commission voted on October 28, 2003 to recommend suspension of the above-named school official until he files the necessary disclosure statement, and his automatic removal from the Board of Trustees if he fails to file within 30 days, memorializing such decision through a resolution forwarded to the Commissioner pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, by letter dated November 7, 2003 from the School Ethics Commission, the above-named school official was afforded an opportunity to submit to the Commissioner a response to said resolution recommending removal; and

Whereas, no response was submitted to the Commissioner; and

Whereas, the Commissioner has carefully considered the record of this matter and the decision of the School Ethics Commission; and

Whereas, the Commissioner recognizes that, were the Commission's recommendation to be adopted without modification, school officials filing the requisite disclosure statement prior to the decision of the Commissioner, and hence, prior to imposition of

the recommended suspension, would receive no penalty notwithstanding that the School Ethics Act was violated and the Commission has recommended reprimands for school officials who failed to file until after issuance of the Order to Show Cause; now therefore

IT IS ORDERED that, as recommended by the School Ethics Commission, the above-named school official be suspended until he files the necessary disclosure statement, and automatically removed from the Board of Trustees if he fails to file within 30 days. IT IS additionally ORDERED that even if the above-named school official shall have filed the necessary statement prior to the filing date of this decision, he shall nevertheless be reprimanded for his failure to abide by the requirements of the School Ethics Act despite many opportunities for compliance, thereby causing administrative and adjudicative time to be wasted by local, county and state education officials.*

COMMISSIONER OF EDUCATION

Date of Decision: 12/22/03

Date of Mailing: 12/23/03

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

664-03

#664-03SEC

IN THE MATTER OF COLLEEN McCABE, CAPE MAY SPECIAL SERVICES BOARD OF EDUCATION, CAPE MAY COUNTY. :

COMMISSIONER OF EDUCATION

DECISION

December 22, 2003

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	
	:	**Docket No.: D08-03**
COLLEEN McCABE **CAPE MAY SPECIAL SERVICES BOARD OF EDUCATION** **CAPE MAY COUNTY**	:	**RESOLUTION FOR FAILING TO FILE DISCLOSURE STATEMENT**

WHEREAS, N.J.S.A. 18A:12-25 of the School Ethics Act requires each school official to file a personal/relative disclosure statement and N.J.S.A. 18A:12-26 requires each school official to file a financial disclosure statement for the School Ethics Commission; and

WHEREAS, Ms. Colleen McCabe is a member of the Special Services Board of Education and thus a "school official" under N.J.S.A. 18A:12-23 of the Act and N.J.A.C. 6A:28-1.2 of the Code; and

WHEREAS, the deadline to file these disclosure statements was April 30, 2003 for school officials in office since January 30, 2003 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators; and

WHEREAS, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with her school district and the County Superintendent's office as required by the Act; and

WHEREAS, the Commission sent a reminder letter to her on September 5, 2003, indicating that if the completed statement was not filed by September 15, 2003, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

WHEREAS, the Commission issued an Order on September 24, 2003, directing this school official to Show Cause why the Commission should not find her in violation of the Act for failing to file the disclosure statements; and

WHEREAS, the school official failed to reply to the Order to Show Cause; and

WHEREAS, in its letter enclosing the Order, the Commission notified this school official that the Commission would discuss this matter at its October 28, 2003 meeting, that she had the right to attend, and she could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission finds that the failure to file a disclosure statement within the designated timeline constitutes a clear violation of N.J.S.A. 18A:12-25 and 26; and

WHEREAS, the Commission finds that this school official did not provide any reason why she failed to comply with the requirement under N.J.S.A. 18A:12-25 and 26; and

WHEREAS, the Commission finds that this school official was given ample opportunity to provide the complete disclosure statement; and

WHEREAS, the appropriate penalty for the violation is a suspension from her Board, but removal if she does not file within 30 days of the date of the Commissioner's decision on penalty, especially in light of the failure to respond to the Commission's reminder letter before the September 15, 2003 deadline.

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Colleen McCabe violated N.J.S.A. 18A:12-25 and 26 of the School Ethics Act and recommends that the Commissioner of Education impose a sanction of suspension from her Board, but removal if she does not file within 30 days of the effective date of the Commissioner's decision.

Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: October 28, 2003

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to you, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

IN THE MATTER OF COLLEEN McCABE, CAPE MAY SPECIAL SERVICES BOARD OF EDUCATION, CAPE MAY COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

Whereas, the School Ethics Commission has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named school official for failure to file a personal/relative disclosure statement, pursuant to *N.J.S.A.* 18A:12-25 and/or an annual financial disclosure statement required by *N.J.S.A.* 18A:12-26;

Whereas, the deadline to file these disclosure statements was April 30, 2003 for school officials in office since January 30, 2003, or 30 days from swearing in or start of service for newly elected or appointed board members and administrators; and

Whereas, the School Ethics Commission, was advised by the County Superintendent that this school official did not file a disclosure statement with her school district and the County Superintendent's office, as required by the Act; and

Whereas, the Commission sent a reminder letter to the above-named school official on September 5, 2003, indicating that if the completed statement was not filed by September 15, 2003, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.5(j), the Commission issued an Order on September 24, 2003 directing this school official to Show Cause why the Commission should not find her in violation of the Act for failing to file the necessary statement(s); and

Whereas, the above-named school official failed to reply to the Order to Show Cause; and

Whereas, the Commission found that failure to file a disclosure statement within the designated timeline constitutes a clear violation of *N.J.S.A.* 18A:12-25 and 26; and

Whereas, the above-referenced school official did not provide any reason why she failed to comply with the requirement under *N.J.S.A.* 18A:12-25 and 26; and

Whereas, the Commission voted on October 28, 2003 to recommend suspension of the above-named school official until she files the necessary disclosure statement, and her automatic removal from the board if she fails to file within 30 days, memorializing such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, by letter dated November 7, 2003 from the School Ethics Commission, the above-named school official was afforded an opportunity to submit to the Commissioner a response to said resolution recommending removal; and

Whereas, neither the above-named school official nor anyone on her behalf submitted a response for the Commissioner's consideration; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission; and

Whereas, the Commissioner recognizes that, were the Commission's recommendation to be adopted without modification, school officials filing the requisite disclosure statement prior to the decision of the Commissioner, and hence, prior to imposition of

the recommended suspension, would receive no penalty notwithstanding that the School Ethics Act was violated and the Commission has recommended reprimands for school officials who failed to file until after issuance of the Order to Show Cause; now therefore

IT IS ORDERED that, as recommended by the School Ethics Commission, the above-named school official be suspended until she files the necessary disclosure statement, and automatically removed from the Board if she fails to file within 30 days. IT IS additionally ORDERED that even if the above-named school official shall have filed the necessary statement prior to the filing date of this decision, she shall nevertheless be reprimanded for her failure to abide by the requirements of the School Ethics Act despite many opportunities for compliance, thereby causing administrative and adjudicative time to be wasted by local, county and state education officials.*

COMMISSIONER OF EDUCATION

Date of Decision: 12/22/03

Date of Mailing: 12/23/03

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

665-03

IN THE MATTER OF VERNIE YOUNG,	:	
STATE-OPERATED SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE CITY OF NEWARK,	:	DECISION
ESSEX COUNTY.	:	

December 22, 2003

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	
	:	**Docket No.: D16-03**
VERNIE YOUNG NEWARK BOARD OF EDUC. ESSEX COUNTY	:	**RESOLUTION FOR FAILING TO FILE DISCLOSURE STATEMENT**

WHEREAS, N.J.S.A. 18A:12-25 of the School Ethics Act requires each school official to file a personal/relative disclosure statement and N.J.S.A. 18A:12-26 requires each school official to file a financial disclosure statement for the School Ethics Commission; and

WHEREAS, Ms. Vernie Young is a member of the Newark Board of Education and thus a "school official" under N.J.S.A. 18A:12-23 of the Act and N.J.A.C. 6A:28-1.2 of the Code; and

WHEREAS, the deadline to file these disclosure statements was April 30, 2003 for school officials in office since January 30, 2003 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators; and

WHEREAS, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with her school district and the County Superintendent's office as required by the Act; and

WHEREAS, the Commission sent a reminder letter to Ms. Young on September 5, 2003, indicating that if the completed statement was not filed by September 15, 2003, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

WHEREAS, the Commission issued an Order on September 24, 2003, directing this school official to Show Cause why the Commission should not find her in violation of the Act for failing to file the disclosure statements; and

WHEREAS, the school official filed the completed disclosure statement, but not until after the Commission issued the Order to Show Cause; and

WHEREAS, in its letter enclosing the Order, the Commission notified this school official that the Commission would discuss this matter at its October 28, 2003 meeting, that she had the right to attend, and she could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission finds that the failure to file a disclosure statement within the designated timeline constitutes a clear violation of N.J.S.A. 18A:12-25 and 26; and

WHEREAS, the Commission finds that this school official did not provide any reason why she failed to comply with the requirement under N.J.S.A. 18A:12-25 and 26; and

WHEREAS, the Commission finds that this school official was given ample opportunity to provide the complete disclosure statement; and

WHEREAS, the appropriate penalty for the violation is a reprimand, especially in light of the failure to respond to the Commission's reminder letter before the September 15, 2003 deadline.

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Vernie Young violated N.J.S.A. 18A:12-25 and 26 of the School Ethics Act and recommends that the Commissioner of Education impose a sanction of a reprimand.

Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: October 28, 2003

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to you, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

IN THE MATTER OF VERNIE YOUNG,	:	
STATE-OPERATED SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE CITY OF NEWARK,	:	DECISION
ESSEX COUNTY.	:	

Whereas, the School Ethics Commission has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend sanctioning of the above-named school official for failure to file a personal/relative disclosure statement, pursuant to *N.J.S.A.* 18A:12-25 and/or an annual financial disclosure statement required by *N.J.S.A.* 18A:12-26;

Whereas, the deadline to file these disclosure statements was April 30, 2003 for school officials in office since January 30, 2003, or 30 days from swearing in or start of service for newly elected or appointed board members and administrators; and

Whereas, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with her school district and the County Superintendent's office, as required by the Act; and

Whereas, the Commission sent a reminder letter to the above-named school official on September 5, 2003, indicating that if the completed statement was not filed by September 15, 2003, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.5(j), the Commission issued an Order on September 24, 2003 directing this school official to Show Cause why the Commission should not

find her in violation of the Act for failing to file *the* necessary statement(s), with a cover letter indicating that the Commission would discuss the matter at its October 28, 2003 meeting, that the named official had the right to attend, and that the Commission could, at that meeting, find a violation of the School Ethics Act and recommend a penalty up to removal; and

Whereas, the above-named school official filed the completed disclosure statement, but not until after the Commission had issued the Order to Show Cause; and

Whereas, the Commission found that failure to file a disclosure statement within the designated timeline despite ample opportunity to do so constitutes a clear violation of *N.J.S.A.* 18A:12-25 and 26; and

Whereas, the Commission voted on October 28, 2003 to recommend reprimand of the above-named school official for her delay in filing, particularly in light of her failure to respond to the Commission's reminder prior to the September 15, 2003 deadline, and memorialized such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, by letter dated November 7, 2003 from the School Ethics Commission, the above-named school official was afforded an opportunity to submit to the Commissioner a response to said resolution recommending reprimand; and

Whereas, no response was filed with the Commissioner; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission and concurs with and adopts as his own the recommendations of the Commission, and further admonishes the school official for her failure to file the requisite statement in a timely manner, in that such delay has caused

administrative and adjudicative time to be wasted by local, county and state education officials; now therefore

IT IS ORDERED that the above-named Board member be reprimanded as a school official found to have violated the School Ethics Act.*

COMMISSIONER OF EDUCATION

Date of Decision: 12/22/03

Date of Mailing: 12/23/03

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

666-03

ALBERT ZIEGLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

SYNOPSIS

Petitioner, former teacher of Employment Orientation, alleged the Board violated his tenure rights when it terminated his contract two months into the 1998-99 school year on the assertion that he was not certified for the new courses to which he was assigned following elimination of his previously assigned courses. The ALJ found that petitioner was entitled to be reemployed by the Board since his Employment Orientation endorsement permitted him to teach certain vocational courses which the Board was continuing to offer. The Commissioner, however, was not persuaded that the issue of petitioner's qualification to teach these courses could be summarily resolved, and he remanded the matter for further factfinding on the actual content of the courses at issue so as to determine the certification required to teach them.

On remand, the ALJ concluded that the courses to which petitioner claimed entitlement did, in fact, fall within the scope of petitioner's Employment Orientation endorsement, so that petitioner was entitled to be reemployed and assigned to them.

The Commissioner rejected the Initial Decision, finding that the classes at issue were subject area vocational courses requiring appropriate specialized certification, and were thus beyond the limited scope of the Employment Orientation endorsement. The petition was dismissed.

December 22, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO.: EDU 1526-00

AGENCY DKT. NO. 21-2/99

ON REMAND FROM

OAL DKT. NO. EDU 3339-99

ALBERT ZIEGLER,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY,

Respondent.

Gregory T. Syrek, Esq., for petitioner
(Bucceri & Pincus, attorneys)

Robert J. Merryman, Jr., Esq., for respondent
(Apruzzese, McDermott, Mastro & Murphy, attorneys)

Record Closed: February 21, 2003 Decided: August 8, 2003

BEFORE **JEFFREY A. GERSON**, ALJ:

PROCEDURAL HISTORY

Petitioner, Albert Ziegler, was terminated from his position as a Shop Teacher by the Board of Education of the City of Bayonne on November 23, 1998. Ziegler appealed contending that his tenure rights had been violated. Cross Motions for

Summary Judgment were filed and the undersigned concluded that Ziegler was entitled to tenure and that he should be reinstated.

The Commissioner of Education agreed that Ziegler had earned tenure but was not convinced that reinstatement was an issue that could be resolved in a summary fashion. The Commissioner in his decision stated the following:

> However, in order to determine whether the Board improperly terminated petitioner on November 23, 1998 and whether petitioner is entitled to reinstatement to his tenured position of employment it is also necessary to examine what skills are required to be taught, and are actually taught, by a teacher of Shop 9, Shop 10, Maintenance and Repair and Industrial Technology.

The Commissioner goes on to say:

> This matter, therefore, is remanded to the OAL for further fact finding as necessary to determine (1) The actual duties of and skills taught by a teacher of Shop 9, Shop 10, Maintenance and Repair and Industrial Technology within the Board's Industrial Arts Program; (2) Whether petitioner's endorsement as a teacher of employment orientation permits him to teach any or all of the courses; and (3) If petitioner is entitled to teach any or all of these courses, what back pay and emoluments are now due as a result of his improper termination.

Although Ziegler does not have a Bachelor's Degree, he does have a Skilled Trade Certificate, which allows him to teach Employment Orientation.

Ziegler does not dispute the fact that he is not certified in Industrial Arts which the Board's contends encompasses Shop 9, Shop 10, Maintenance/Repair and Industrial Technology. Ziegler contends that the subject matter actually taught in these classes are in essence what he has been teaching for years and that he should not be terminated because the verbiage of his certification does not equal the verbiage of the certification requirements for Industrial Arts.

TESTIMONY

The Board's first witness was Alfred Pissciotti. He has been a teacher for 37 years and is certified as an Industrial Arts teacher and has a vocational certification for automotive technology. Mr. Pissciotti, who has taught Shop 9, described it as a course in which students would spend one marking period in different trade areas. Mr. Pissciotti focused on basic wood working for his semester. The course was not designed specifically for Special Education or Special Needs students but was in fact, from Pissciotti's testimony, taught on a very basic level. According to Pissciotti, the course was designed to reinforce other basic skills taught to students like math and science. It was not a required course, but was a prerequisite to Industrial Technology II, which was a more advanced woodworking course.

The next witness to testify was Dedicacon DeJesus was also certified to teach Industrial Arts and had been teaching at the time of the hearing for two years.

Mr. DeJesus taught Shop 9 in his first year on a rotated basis. In his second year, the rotating basis had been abandoned and Mr. DeJesus taught Shop 9 for Special Education Students. Mr. DeJesus indicated that the course focused on the basic tools for woodworking and the basic skills necessary to handle those tools. Mr. DeJesus did try to incorporate other subject matter into the course for example, basic electricity and drafting, but his flexibility was limited by the nature and capacity of his students.

Richard Roberts, who also had been employed in the district for two years at the time of the hearing, held an endorsement for Industrial Arts and Teacher of the Handicapped and had been assigned to teach Shop 9 during his tenure. In his first year, like Mr. DeJesus before him, he was involved with the rotation system and taught drafting. In his second year, he taught drafting and woodshop in the Shop 9 course. According to Roberts, the course labeled Shop 9 exposed the students to basic tools used in woodworking and drafting. In combining the drafting and woodworking, Roberts had the students plan a project and then produce it as part of the woodworking component.

Only Dedicacon DeJesus testified that he taught Shop 10. Shop 10 was a progression from Shop 9. The Shop 10 class that Mr. DeJesus was teaching in his

second year at the time of the hearing was mostly Special Ed., although not exclusively. The course was project based and students would learn how to use power tools and other machinery. Woodworking was definitely the emphasis.

Both Alfred Pissciotti and Dedicacon DeJesus taught maintenance and repair classes. The course was designed to give basic instruction in the areas of plumbing, masonry, electrical, carpentry, fluid movement and painting and decorating. It is designed to give special need students exposure to simple repairs to items that might be the subject of janitorial or general maintenance work.

Industrial Technology taught by Mr. Pissciotti and Mr. Roberts was similar in content to Shop 9 but in more detail. It ranges from the use of simple tools to the construction of basic wood joints and other more sophisticated wood skills.

In addition to the teachers delineated above, Doctor Michael Wanko, the Principle of Bayonne High School also testified.

He filled in some background by indicating that Mr. Ziegler had been assigned to Bayonne High School in 1994. Prior to that, Mr. Ziegler had been teaching at the alternative school which was a program for 6th, 7th and 8th graders who although high school age were experiencing academic difficulties. The alternative program was phased out at about the time Mr. Ziegler was transferred to Bayonne High School. According to Dr. Wanko, the alternative school had a program known as Employment Orientation, which was designed to assess students' vocational abilities. The Singer System, which was a series of carrels, utilizing filmstrips and cassette tapes to acquaint the students with various trades was used only by Ziegler.

The next witness to testify was Tom Jacobson, Supervisor for Industrial Arts in Bayonne who prepares the evaluations of all Industrial Arts and Vocational teachers. Jacobson confirmed that, at the time he made his observation of Mr. Ziegler in Shop 9 during 1998, the course was a project based wood shop in which the students, after receiving basic instruction would work on their own wood projects. Mr. Ziegler's testimony was challenged on cross-examination, which was very effectively conducted by Mr. Merryman. Mr. Ziegler's credibility was undoubtedly put into question by what

appeared to be an attempt to answer for the unanswerable. For example, Ziegler indicated that after being transferred from the alternative school to Bayonne High School, he continued to teach a vast array of subject matters, which would have given the students exposure to many more areas than are actually reflected in his observations by his supervisors. Two of his observations from 1995 and 1996 and from 1998 to 1999 indicate that his students were working on individual wood projects. However, Ziegler's credibility is simply not dispositive of the issues before the court. What is at issue was delineated by the Commissioner of Education in that it was to be determined by further fact-finding concerning what the duties of and skills taught by the teachers of Shop 9, Shop 10, Maintenance/Repair and Industrial Technology encompass and whether Ziegler's endorsement permits him to teach any of the courses.

THE LAW

Ziegler has a certificate as a Teacher of Skilled Trades. *N.J.A.C.* 6:11-6.2(a)(27) states

> Teacher of Skilled Trades: This endorsement authorizes the holder to teach skilled trade courses in the area of his or her State Approved Occupational Experience in all public schools. Presently, a list of skilled trades is incorporated into the code.

Ziegler received his Employment Orientation Endorsement in March of 1981. Apparently, this endorsement, which is no longer issued, was last issued in 1982, shortly after Ziegler received his. At the time he received his endorsement, it did not contain a list of authorize skilled trades, but there was a "fact sheet" which described employment orientation as follows:

> Employment Orientation is a significant and integral component of the school's career development sequence for special needs, handicap or disadvantage students. It is designed to assist special needs students to develop sound work habits and attitudes and basic vocational and interpersonal skills through the use of vocational evaluation, simulated work in basic vocational instruction. Because

> employment orientation offers in-school, hands-on vocational experiences, it is the major link between career, exploratory and awareness activities and specific vocational training for special needs students.

The endorsement for Industrial Arts at *N.J.A.C.* 6:11-6.2(a)(13) states as follows:

> This endorsement authorizes the holder to teach Industrial Arts in all public schools. Industrial Arts normally includes: graphic arts, drafting, woodworking, metalworking, arts and power mechanics.

As pointed out by petitioner, the regulations define the scope of Industrial Arts by the nature of its subject matter.

Petitioner argues that characterization by the Board of the courses in questions as "Industrial Arts" does not necessarily lead to the conclusion that those who teach the course must be certified as Teachers of Industrial Arts. The characterization of the course must be supported by an analysis of the duties performed. *Lipencot v. Board of Educ. Of Wachung Hills Reg. High School Dist.* 94 *N.J.A.R.2d* (EDU) 311 *aff'd St. Bd. Of Educ.* 94 *N.J.A.R.2d* (EDU) 430, *aff'd App. Div.* 95 *N.J.A.R.2d* (EDU) 304.

DISCUSSION

Skilled Trades-Employment Orientation reflected a program, which envisioned an evaluation process, a teaching and basic skill phase and an actual hands-on practice of skills.

As originally conceived, Special Needs students would be given a more broad based exposure to various skilled trades then what is presently occurring at Bayonne High School. However, petitioner argues that the "slimmed down" nature of the exposure does not preclude Ziegler under his certification from teaching the basics of woodworking and carpentry. The testimony of the teachers in this matter, confirmed that those courses, which primarily encompass Special Needs Students (that are now

all Special Needs students) taught only rudimentary skills accompanied by rather simple individual projects. The description of Employment Orientation in the fact-sheet indicates "Employment Orientation is designed to develop sound work habits and attitudes in basic vocational and interpersonal skills through the use of vocational evaluation and simulated work in basic vocational instruction."

Ziegler's endorsement as a Teacher of Employment Orientation having been discontinued in 1982 or 1983 indirectly creates the debate involved herein. The absence of the certification leads to an absence of updated requirements. Thus, in the twenty years that Ziegler has had the certification, no attention has been paid to its standards and requirements of its possession. The present duties of teachers of Shop 9, Shop 10, Maintenance and Repair and Industrial Technology are far less demanding when applied exclusively to Special Education students and come just as close to the student anticipated in the course of employment orientation in that employment orientation was in fact designed for Special Education and Special Needs students. The description by the teachers presently teaching the four courses confirms that their duties do not extend much past the rudimentary introduction to skilled trades with an emphasis on woodworking.

I **FIND** as a matter of **FACT** that the actual duties of and skills taught by the teachers of Shop 9, Shop 10, Maintenance Repair and Industrial Technology are, as presently constituted, no different than the skills Ziegler has acquired by virtue of his Employment Orientation Certification and actually teaching the courses. The skills required by an Employment Orientation Certification as issued twenty years ago encompassed the skills presently be exhibited by the teachers at Bayonne High School in that the various areas of basic skills has been narrowed but those areas still being taught at the high school are all encompassed in a Employment Orientation Certificate.

CONCLUSION

Albert Ziegler is entitled to reinstatement as a teacher with back pay. The amount of the back pay is undecided in that there was not enough evidence of salary or mitigation, if any, to allow an exact figure to be determined. It is further **ORDERED** that

no prejudgment interest will attach to the back pay since a showing of "bad faith" by a preponderance of the evidence was not sustained.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

8/08/03
DATE

JEFFREY A. GERSON, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

August 8, 2003
DATE

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

AUG 11 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

sej

APPENDIX

Joint Exhibits:

A Certificate from Department of Education re: Albert Ziegler, Teacher of Skilled Trades (Employment Orientation) issued 3/81 expires 7/81.

B Certificate from Department of Education re: Albert Ziegler, Teacher of Employment Orientation dated 7/82.

C Certificate from Department of Education re: Albert Ziegler, Teacher Coordinator of Cooperative Industrial Education dated 11/97.

D Letter and Contract from James H. Murphy, Superintendent, Bayonne Public Schools to Albert Ziegler re: Assignment for School Year 1984-1985 dated August 30, 1984.

E Evaluation Report re: Albert Ziegler School Year 1984/85 dated April 18, 1984

F Employment Contract re: Albert Ziegler dated April 26, 1985

G Annual Staff Evaluation re: Albert Ziegler, School Year 1985/86 dated March 26, 1986

H Employment Contract re: Albert Ziegler, dated April 1986

I Annual Staff Evaluation, School Year 1986/87, dated March 27, 1986

J Employment Contract re: Albert Ziegler, dated April 28, 1987

K Annual Staff Evaluation, School Year 1987/88, dated February 25, 1987

L. Annual Staff Evaluation, School Year 1989/90, dated March 12, 1990

M Annual Staff Evaluation, School Year 1990/91, dated June 17, 1990

N Termination Letter from James H. Murphy, Superintendent of Schools to Albert Ziegler dated April 30, 1991

O Reassignment letter from James H. Murphy, Superintendent of Schools to Albert Ziegler, dated August 28, 1991

P Annual Staff Evaluation, School Year 1991-92 re: Albert Ziegler dated March 29, 1992

Q Memo from Lois McGuire, Ed. D. , Asst. Superintendent to Albert Ziegler dated January 31, 1992

R Annual Staff Evaluation, School Year 1992/93, re: Albert Ziegler dated June 18, 1993

S Professional Improvement Plan, School Year 1993-94 re: Albert Ziegler dated March 29, 1993

T Memo to Karla McQuilla, Justine Wanko and Albert Ziegler from Joseph A. Luppino, Principal, Special Programs dated October 19, 1994

U Annual Staff Evaluation, School Year 1994-95 re: Albert Ziegler dated March 16, 1995

V Professional Observation Report, School Year 1995/96 re: Albert Ziegler dated March 7, 1996

W Employment Contract dated May 1, 1996, re: Albert Ziegler

X Letter dated June 24, 1997 to Albert Ziegler from John D. Foley, Secretary re: Meeting scheduled for June 23, 1997

Y Memo from Michael A. Wanko, re: Shop 9 and IVT Rotations dated September 10, 1997

Z Letter dated January 27, 1998 to Albert Ziegler from Clifford G. Doll, Acting Secretary

AA Annual Staff Evaluation, School Year 1997-98 re: Albert Ziegler dated March 27, 1998

BB Letter to Richard J. Malanowski, Superintendent from Robert Osak, County Superintendent dated September 29, 1998

CC Letter to Albert Ziegler from Richard J. Malanowski, Superintendent of Schools dated October 16, 1998

DD Letter to Richard J. Malanowski, Superintendent of Schools from Margaret Smith, Coordinator, Licensing Programs, Office of Licensing and Credentials dated November 9, 1998

EE Letter to Albert Ziegler from Richard J. Malanowski, Superintendent dated November 9, 1998

FF Letter to Albert Ziegler from Richard J. Malanowski, Superintendent dated November 19, 1998.

GG Letter to Albert Zeigler from Richard J. Malanowski, Superintendent dated November 24, 1998

HH Letter to Richard Malanowski, Superintendent from Robert Osak, Hudson County Superintendent of Schools dated December 3, 1998

II Letter to Richard J. Malanowski, Superintendent from Robert Osak, County Superintendent dated December 22, 1998

JJ Letter to Ida B. Graham, Director, Licensing Department of Education from Gregory T. Syrek, Esq., re: Instructional Certificate Endorsement dated January 26, 1999

KK Letter to Gregory T. Syrek, Esq. from Ida B. Graham, Licensing Department re: Albert Ziegler dated February 4, 1999

LL Letter to Ida Graham, Director of Licensing and Credentials from Richard J. Malanowski re: Description of qualifications for Teacher of Employment Orientation. Dated May 17, 1999

MM Letter to Richard J. Malanowski from Ida B. Graham dated June 2, 1999

NN Picture of Bayonne Public Schools Alternative Education building

OO Employment Orientation Program, prepared by John R. Bobner, Consultant

PP Curriculum Employment Orientation I

QQ Price List - Vocational Evaluations Systems

RR Work Activity Rating Form Engine Service

SS Employment Orientation

TT Employment Orientation Exam

UU Course Requirements Maintenance and Repair, Industrial Arts Class

VV Career Stations Worked On

WW Memo from Tim Mercier, House 5 Principal to Pre-Vocational Staff dated March 5, 1998 re: CAT and EWT Test Administration

XX Employment Orientation

YY Employment Orientation Programs for Students with Special Needs in Grades 8-10

ZZ Professional Observation Report, School Year 1997-98 dated March 13, 1998.

ALBERT ZIEGLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

The record of this matter and the Office of Administrative Law's Initial Decision on Remand have been reviewed. Pursuant to *N.J.A.C.* 1:1-18.4, the respondent Board of Education (Board) filed timely exceptions, to which petitioner duly replied.

In its exceptions, the Board argues that the Administrative Law Judge (ALJ) failed to take account of the full spectrum of evidence in assessing the courses at issue, leading to their mischaracterization as rudimentary introductions to skilled trades and to the erroneous conclusion that petitioner's Skilled Trades certificate, along with the classroom experience he has gained over the years, authorizes him to teach them. The Board contends that these courses are not introductions to skilled trades, as found by the ALJ, but rather genuine Industrial Arts offerings, clearly distinguishable from Employment Orientation courses and requiring teachers with Industrial Arts certification. By concluding that petitioner may teach them, the Board opines, the ALJ has effectively converted the limited Skilled Trades certificate into a regular instructional certificate encompassing all the industrial arts. (Board's Exceptions at 2-7, 8-14, 16-18) The Board

additionally rejects the ALJ's "conclusion" that special education students do not require a fully certified teacher (*Id.* at 7-8); his reliance, notwithstanding concerns about petitioner's credibility as raised in the Initial Decision at 4-5, on petitioner's testimony to the effect that the courses at issue are merely "slimmed down" versions of prior Employment Orientation courses (*Id.* at 15-16); his ordering of petitioner's reemployment without any consideration of whether courses within the scope of petitioner's certification and seniority rights are presently being taught in the District (*Id.* at 20); and his ordering of back pay despite insufficient information on record about petitioner's attempts (or lack thereof) to mitigate damages. (*Ibid.*)[1]

In reply, petitioner counters that the Board persists in its error of equating what is stated in curriculum guides or course descriptions with what is actually being taught in the classroom, as described by the staff members doing the teaching. In petitioner's view, Shop 9, whether the special or the non-special education section, is "a very basic, introductory level class designed to give students some information and instruction regarding tools and their uses," with "a great deal of flexibility in how the course is taught and a level of instruction somewhat less sophisticated [than] the [specified course] proficiencies appear." (Petitioner's Reply at 2) Shop 10 is "a progression from Shop 9," continuing the subject matter with "somewhat more advanced instruction," and consisting of mostly or all special education students. (*Id.* at 5-6) Maintenance and Repair is limited to special education students and provides basic instruction in the areas of plumbing, masonry, electrical, carpentry, fluid movement, and

[1] The Board also notes the Initial Decision's error in indicating that the record of this matter was closed on February 21, 2003 rather than February 25, 2002, and asks that, if the Initial Decision is otherwise adopted, back pay not be awarded for the period from April 2002 to the present, since petitioner should not receive a windfall at the expense of the Board on account of the ALJ's 16-month delay in issuing a decision. (*Id.* at 19)

painting and decorating, at a level suitable to household repair, janitorial or maintenance work. (*Id.* at 6-7) Industrial Technology covers the same subjects and skills as Shop 9, but in greater depth and with an eye toward their use in society and industry, resulting in a course that is project-based, employs hand and power tools, is taught to both special and non-special education students, and focuses primarily on woodworking with other areas covered if they happened to arise. (*Id.* at 7-8)[2]

Petitioner reiterates that his Teacher of Employment Orientation endorsement authorizes him to teach these "introductory or rudimentary Skilled Trades" courses, and that he, in fact, did so for years before the Board erroneously determined to characterize them as Industrial Arts courses. Petitioner compares the scope of the Industrial Arts endorsement, which includes graphic arts, drafting, woodworking, metal working, arts and power mechanics, with that of the Teacher of Skilled Trades endorsement, which, although in its present form does not include a specified list of trades, over the years has included aircraft mechanics, appliance repair, auto mechanics, brick and masonry, cabinet making, carpentry, custodial training, drafting, electrical construction trades, painting and decorating. According to petitioner, "each of these skilled trades is, in theory or practice, part of the courses in review in this case," a significant fact because the Employment Orientation endorsement, which petitioner holds and under which he taught basic introductory skills for years, is a subcategory of the Teacher of Skilled Trades endorsement. (Petitioner's Reply at 9-13, quotation at 11)

[2] Petitioner also rejects as baseless the Board's allegation that the Initial Decision somehow views special education/special needs students as less deserving of fully certified teachers, observing that the ALJ reached no such conclusion but merely analyzed what was actually taking place in the classroom in order to determine the certification required to teach the courses at issue. (*Id.* at 9)

Petitioner further contends that his career in the Board's District has been consistent with the scope of Employment Orientation as described in the Department of Education's 1985 Fact Sheet (Attachment to Stipulation of Facts) that remains valid as shown by its parallel to current regulation:

> Employment Orientation is a significant and integral component of the schools' career development sequence for special needs, handicapped or disadvantaged students. It is designed to assist special needs students to develop sound work habits and attitudes and basic vocational and interpersonal skills through the use of vocational evaluation, simulated work and basic vocational instruction. Because Employment Orientation offers in-school, hands-on vocational experiences, it is the major link between career exploratory and awareness activities and specific vocational training for special needs students. (*Cf., N.J.A.C.* 6A:19-1.2 and 6A:19-6.3)

Petitioner contends that throughout his employ, just as contemplated by this description, he taught basic introductory skills, either at the alternative school or the high school, to primarily special education, special needs, and disadvantaged students, in order to provide them with a variety of in-school, hands-on vocational experiences that might interest them in careers or more advanced coursework in masonry, carpentry, plumbing, home repair, welding, electrical work and the like. According to petitioner, there is "very little difference" between the instruction provided by him and that offered in the courses at issue herein; it is "simply a matter of degrees," since petitioner covered a dozen or more skills through use of the Singer work-station system, while the present classes cover fewer skills but retain the same basic instructional level and purpose. It makes no sense, petitioner reasons, to hold that he is qualified to teach a program that covers "far more vocational experiences and career opportunities" and yet is not qualified to teach "fewer skills in the current courses." (Petitioner's Reply at 13-15, quotations at 13-14)

Petitioner reiterates that, since he is qualified to teach the courses at issue and these were assigned to nontenured teachers in sufficient number to have provided him with a full-time schedule, his tenure rights were violated by his termination and he is entitled to all the relief he seeks, including reinstatement, back pay less mitigation, pre-judgment and post-judgment interest, seniority credit, pension credit and contributions, reimbursement for medical insurance and expenses, restoration of any benefits or emoluments received by comparable teaching staff members since the time of his termination, and "[r]eferral of this matter to the County Superintendent's office for oversight to ensure that the Board complies with its obligations under N.J.S.A. 18A:28-5 in the future." (Petitioner's Reply at 16-20, quotation at 20)

Upon review, however, the Commissioner cannot agree with petitioner and the ALJ that petitioner holds appropriate certification to teach the classes to which he herein claims entitlement. Even accepting, *arguendo*, petitioner's contention that the nature of these courses must be determined by teachers' testimony about what is actually taught in them rather than by paper syllabi, the Commissioner finds the courses to be beyond the scope of the limited certificate held by petitioner.

Petitioner is certified as a Teacher of Employment Orientation. As he himself notes, at a time when the Employment Orientation endorsement was more commonly in use, the Department of Education described Employment Orientation as

> ***a significant and integral component of the schools' career development sequence for special needs, handicapped or disadvantaged students***[,] designed to assist special needs students to develop sound work habits and attitudes and basic vocational and interpersonal skills through the use of vocational evaluation, simulated work and basic vocational instruction***[, and offering] in-school, hands-on vocational experiences***[so as to serve as] the major link between career

> exploratory and awareness activities and specific vocational training for special needs students. (Joint Stipulation, attached "Fact Sheet")

Consistent with this view, the Department stated that the program objectives of Employment Orientation were:

> To identify students' vocational interests, abilities, aptitudes, and employability characteristics, and develop an individualized vocational profile for each student;
>
> To modify and/or develop and reinforce appropriate work habits and attitudes in line with the world-of-work and the specific needs of the students; and
>
> To provide basic vocational training which will prepare students for entry into a vocational education program. (Joint Exhibit XX)

Elaborating on this three-prong purpose, the Department presented Employment Orientation as a pre-vocational program with three distinct phases: the vocational evaluation phase, the simulated work experience phase, and the initial vocational training and exploration phase. The evaluation phase is designed "to identify and assess each student's work habits and attitudes, as well as his or her vocational interests, abilities, and aptitudes and to establish an individual student's profile of vocational potential." Where necessary, students then participate in simulated work experience, designed to "[modify, develop and/or reinforce] desirable work habits and attitudes;" when ready, they advance to the initial vocational training/exploration phase, where each student is provided "with actual experiences that reinforce his or her potential and capabilities, and to prepare him or her for future employment or vocational training." This is most commonly accomplished through a de-centralized approach, using a shop or lab where various learning centers are set up, with each addressing one occupational area and designed as a self-contained, self-instructional unit. Successful completion of

Employment Orientation will ideally lead to a student's placement in a regular or cooperative vocational education program. (Joint Exhibit YY at 5-15)

The Department's description of Employment Orientation is entirely consistent with Bayonne's former program as taught by petitioner (Joint Exhibits I, K, L, M, P, R, S, U, V) and described by Principal Wanko, who noted in particular petitioner's use of the Singer system, "a series of carrels, utilizing filmstrips and cassette tapes to acquaint the students with various trades***." (Initial Decision at 4)

The courses petitioner now seeks to teach, however, do not differ from his former Employment Orientation classes merely in degree, as he claims, but in *kind*. Shop 9, Shop 10, Maintenance & Repair and Industrial Technology as they are presently taught at Bayonne High School may well be at the lower end of the vocational education spectrum in content level and student capacity, and may share overlapping elements with the third and culminating phase of Employment Orientation as described above. But that does not alter their fundamental nature as specific subject-area courses requiring appropriate subject-area certification,[3] rather than as broad-based introductions to the world of work covered by a generalist endorsement expressly limited in its authorization to exploring the aptitudes and interests of special needs students, enhancing their overall work-readiness, and providing them with introductory exposure to a variety of trades so as to prepare them for entry into actual vocational education programs.

[3] Shop 9, despite its rotational structure and occasional limited introduction of other elements, is taught almost entirely as a woodworking and drafting course (Initial Decision at 3, 4-5; Exceptions at 4-5); Shop 10 likewise focuses on woodworking (Initial Decision at 3-4; Exceptions at 6); Maintenance and Repair, although it covers a number of areas, is taught specifically as preparation for custodial and general maintenance work (Initial Decision at 4; Exceptions at 6); and Industrial Technology centers on woodworking at a higher level (Initial Decision at 4; Exceptions at 8).

The record in this matter is clear that, as claimed by the Board, Employment Orientation is no longer offered as a discrete program in the Bayonne School District; rather, the District has incorporated elements of Employment Orientation into its regular vocational class structure.[4] But petitioner's qualification to teach Employment Orientation does not concomitantly qualify him to teach the classes into which it has been subsumed. While petitioner may, indeed, as found by the ALJ, have acquired, "by virtue of his Employment Orientation Certification and actually teaching the courses[,]***the skills presently***exhibited by the teachers at Bayonne High School" in teaching certain of the school's vocational classes "as presently constituted" (Initial Decision at 7), the fact remains that he does not hold the subject area certifications that would authorize him to do so. As noted by the ALJ in *Deborah Ulrich v. Board of Education of the Monmouth County Vocational School District, Monmouth County,* 96 *N.J.A.R.*2d(EDU) 290, the "relevant inquiry regarding certification is not what a person *can* teach, but what a person *may* teach." (*emphasis supplied*) (at 293) Nor can the Board be compelled to restructure its program by once again segregating Employment Orientation elements, so as to accommodate petitioner's tenure rights.

Accordingly, for the reasons expressed herein, the Commissioner finds that petitioner is not appropriately certified for the assignments to which he lays claim, so that the Board did not violate his tenure rights by terminating his employment. Thus, the Initial Decision of the Office of Administrative Law is rejected and the Petition of Appeal dismissed with respect to the relief sought. However, in view of his tenure status,

[4] Such incorporation is fully consistent with the Department's discontinuance of Employment Orientation as a separate endorsement.

petitioner is to be placed on a preferred eligibility list for reemployment if and when an assignment within the scope of his certification becomes available in the District.[5]

IT IS SO ORDERED.[6]

COMMISSIONER OF EDUCATION

Date of Decision: 12/22/03
Date of Mailing: 12/23/03

[5] In light of the decision herein, the Commissioner does not reach the ALJ's conclusions or the parties' arguments with respect to mitigation and other issues pertaining to relief.

[6] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

668-03

668-03SEC

IN THE MATTER OF FIELDS HOWARD, :

NEWARK BOARD OF EDUCATION, :

ESSEX COUNTY. :

:

COMMISSIONER OF EDUCATION

DECISION

December 22, 2003

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	
	:	**Docket No.: D13-03**
FIELDS HOWARD **NEWARK BOARD OF EDUC.** **ESSEX COUNTY**	:	**RESOLUTION FOR FAILING TO FILE DISCLOSURE STATEMENT**

WHEREAS, N.J.S.A. 18A:12-25 of the School Ethics Act requires each school official to file a personal/relative disclosure statement and N.J.S.A. 18A:12-26 requires each school official to file a financial disclosure statement for the School Ethics Commission; and

WHEREAS, Mr. Howard is a member of the Newark Board of Education and thus a "school official" under N.J.S.A. 18A:12-23 of the Act and N.J.A.C. 6A:28-1.2 of the Code; and

WHEREAS, the deadline to file these disclosure statements was April 30, 2003 for school officials in office since January 30, 2003 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators; and

WHEREAS, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with his school district and the County Superintendent's office as required by the Act; and

WHEREAS, the Commission sent a reminder letter to Mr. Howard on September 5, 2003, indicating that if the completed statement was not filed by September 15, 2003, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

WHEREAS, the Commission issued an Order on September 24, 2003, directing this school official to Show Cause why the Commission should not find him in violation of the Act for failing to file the disclosure statements; and

WHEREAS, the school official failed to reply to the Order to Show Cause; and

WHEREAS, in its letter enclosing the Order, the Commission notified this school official that the Commission would discuss this matter at its October 28, 2003 meeting, that he had the right to attend, and he could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission finds that the failure to file a disclosure statement within the designated timeline constitutes a clear violation of N.J.S.A. 18A:12-25 and 26; and

WHEREAS, the Commission finds that this school official did not provide any reason why he failed to comply with the requirement under N.J.S.A. 18A:12-25 and 26; and

WHEREAS, the Commission finds that this school official was given ample opportunity to provide the complete disclosure statement; and

WHEREAS, the appropriate penalty for the violation is suspension from his Board, but removal if he does not file with the County office within 30 days of the effective date of the Commissioner's decision on penalty, especially in light of the failure to respond to the Commission's reminder letter before the September 15, 2003 deadline.

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Fields Howard violated N.J.S.A. 18A:12-25 and 26 of the School Ethics Act and recommends that the Commissioner of Education impose a sanction of suspension, but removal if he does not file within 30 days of the effective date of the Commissioner's decision.

Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: October 28, 2003

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to you, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

AGENCY DKT. NO. 405-11/03

IN THE MATTER OF FIELDS HOWARD, :
NEWARK BOARD OF EDUCATION, :
ESSEX COUNTY. :
:

COMMISSIONER OF EDUCATION

DECISION

Whereas, the School Ethics Commission has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named school official for failure to file a personal/relative disclosure statement, pursuant to *N.J.S.A.* 18A:12-25 and/or an annual financial disclosure statement required by *N.J.S.A.* 18A:12-26;

Whereas, the deadline to file these disclosure statements was April 30, 2003 for school officials in office since January 30, 2003, or 30 days from swearing in or start of service for newly elected or appointed board members and administrators; and

Whereas, the School Ethics Commission, upon being advised by the County Superintendent that this school official did not file a disclosure statement with his school district and the County Superintendent's office, as required by the Act; and

Whereas, the Commission sent a reminder letter to the above-named school official on September 5, 2003, indicating that if the completed statement was not filed by September 15, 2003, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

Whereas, pursuant to *N.J.A.C.* 6:3-9.3(i), the Commission issued an Order on September 24, 2003, directing this school official Show Cause why the Commission should not find him in violation of the Act for failing to file the necessary statement(s); and

Whereas, the above-named school official failed to reply to the Order to Show Cause; and

Whereas, the Commission found that failure to file a disclosure statement within the designated timeline constitutes a clear violation of *N.J.S.A.* 18A:12-25 and 26; and

Whereas, the above-referenced school official did not provide any reason why he failed to comply with the requirement under *N.J.S.A.* 18A:12-25 and 26; and

Whereas, the Commission voted on October 28, 2003 to recommend suspension of the above-named school official until he files the necessary disclosure statement, and his automatic removal from the board if he fails to file within 30 days, memorializing such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, by letter dated November 7, 2003 from the School Ethics Commission, the above-named school official was afforded an opportunity to submit to the Commissioner a response to said resolution recommending removal; and

Whereas, neither the above-named school official nor anyone on his behalf submitted a response for the Commissioner's consideration; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission; and

Whereas, the Commissioner recognizes that, were the Commission's recommendation to be adopted without modification, school officials filing the requisite disclosure statement prior to the decision of the Commissioner, and hence, prior to imposition of the recommended suspension, would receive no penalty notwithstanding that the School Ethics Act was violated and the Commission has recommended reprimands for school officials who failed to file until after issuance of the Order to Show Cause; now therefore

IT IS ORDERED that, as recommended by the School Ethics Commission, the above-named school official be suspended until he files the necessary disclosure statement, and automatically removed from the Board if he fails to file within 30 days. IT IS additionally ORDERED that even if the above-named school official shall have filed the necessary statement prior to the filing date of this decision, he shall nevertheless be reprimanded for his failure to abide by the requirements of the School Ethics Act despite many opportunities for compliance, thereby causing administrative and adjudicative time to be wasted by local, county and state education officials.*

COMMISSIONER OF EDUCATION

Date of Decision: 12/22/03

Date of Mailing: 12/24/03

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

670-03SEC

6 10-05

IN THE MATTER OF RICHARD ZAPPY, :

GREATER EGG HARBOR :

BOARD OF EDUCATION, :

ATLANTIC COUNTY. :

COMMISSIONER OF EDUCATION

DECISION

December 22, 2003

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	
	:	**Docket No.: D02-03**
RICHARD ZAPPY GREATER EGG HARBOR BOARD OF EDUCATION ATLANTIC COUNTY	:	**RESOLUTION FOR FAILING TO FILE DISCLOSURE STATEMENT**

WHEREAS, N.J.S.A. 18A:12-25 of the School Ethics Act requires each school official to file a personal/relative disclosure statement and N.J.S.A. 18A:12-26 requires each school official to file a financial disclosure statement for the School Ethics Commission; and

WHEREAS, Mr. Zappy is a member of the Greater Egg Harbor Board of Education and thus a "school official" under N.J.S.A. 18A:12-23 of the Act and N.J.A.C. 6A:28-1.2 of the Code; and

WHEREAS, the deadline to file these disclosure statements was April 30, 2003 for school officials in office since January 30, 2003 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators; and

WHEREAS, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with his school district and the County Superintendent's office as required by the Act; and

WHEREAS, the Commission sent a reminder letter to him on September 5, 2003, indicating that if the completed statement was not filed by September 15, 2003, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

WHEREAS, the Commission issued an Order on September 24, 2003, directing this school official to Show Cause why the Commission should not find him in violation of the Act for failing to file the disclosure statements; and

WHEREAS, the school official failed to reply to the Order to Show Cause; and

WHEREAS, in its letter enclosing the Order, the Commission notified this school official that the Commission would discuss this matter at its October 28, 2003 meeting, that he had the right to attend, and he could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission finds that the failure to file a disclosure statement within the designated timeline constitutes a clear violation of N.J.S.A. 18A:12-25 and 26; and

WHEREAS, the Commission finds that this school official did not provide any reason why he failed to comply with the requirement under N.J.S.A. 18A:12-25 and 26; and

WHEREAS, the Commission finds that this school official was given ample opportunity to provide the complete disclosure statement; and

WHEREAS, the appropriate penalty for the violation is suspension from his Board, but removal if he does not file within 30 days of the date of the Commissioner's decision on penalty, especially in light of his failure to respond to the Commission's reminder letter before the September 15, 2003 deadline.

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Richard Zappy violated N.J.S.A. 18A:12-25 and 26 of the School Ethics Act and recommends that the Commissioner of Education impose a sanction of suspension, but removal if he does not file within 30 days of the effective date of the Commissioner's decision.

Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: October 28, 2003

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to you, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

IN THE MATTER OF RICHARD ZAPPY, :	COMMISSIONER OF EDUCATION
GREATER EGG HARBOR :	
BOARD OF EDUCATION, :	DECISION
ATLANTIC COUNTY. :	

Whereas, the School Ethics Commission has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named school official for failure to file a personal/relative disclosure statement, pursuant to *N.J.S.A.* 18A:12-25 and/or an annual financial disclosure statement required by *N.J.S.A.* 18A:12-26;

Whereas, the deadline to file these disclosure statements was April 30, 2003 for school officials in office since January 30, 2003, or 30 days from swearing in or start of service for newly elected or appointed board members and administrators; and

Whereas, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with his school district and the County Superintendent's office, as required by the Act; and

Whereas, the Commission sent a reminder letter to the above-named school official on September 5, 2003, indicating that if the completed statement was not filed by September 15, 2003, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.5(j), the Commission issued an Order on September 24, 2003 directing this school official to Show Cause why the Commission should not find him in violation of the Act for failing to file the necessary statement(s); and

Whereas, the above-named school official failed to reply to the Order to Show Cause; and

Whereas, the Commission found that failure to file a disclosure statement within the designated timeline constitutes a clear violation of *N.J.S.A.* 18A:12-25 and 26; and

Whereas, the above-referenced school official did not provide any reason why he failed to comply with the requirement under *N.J.S.A.* 18A:12-25 and 26; and

Whereas, the Commission voted on October 28, 2003 to recommend suspension of the above-named school official until he files the necessary disclosure statement, and his automatic removal from the board if he fails to file within 30 days, memorializing such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, by letter dated November 7, 2003 from the School Ethics Commission, the above-named school official was afforded an opportunity to submit to the Commissioner a response to said resolution recommending removal; and

Whereas, neither the above-named school official nor anyone on his behalf submitted a response for the Commissioner's consideration; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission; and

Whereas, the Commissioner recognizes that, were the Commission's recommendation to be adopted without modification, school officials filing the requisite disclosure statement prior to the decision of the Commissioner, and hence, prior to imposition of

the recommended suspension, would receive no penalty notwithstanding that the School Ethics Act was violated and the Commission has recommended reprimands for school officials who failed to file until after issuance of the Order to Show Cause; now therefore

IT IS ORDERED that, as recommended by the School Ethics Commission, the above-named school official be suspended until he files the necessary disclosure statement, and automatically removed from the Board if he fails to file within 30 days. IT IS additionally ORDERED that even if the above-named school official shall have filed the necessary statement prior to the filing date of this decision, he shall nevertheless be reprimanded for his failure to abide by the requirements of the School Ethics Act despite many opportunities for compliance, thereby causing administrative and adjudicative time to be wasted by local, county and state education officials.*

COMMISSIONER OF EDUCATION

Date of Decision: 12/22/03

Date of Mailing: 12/24/03

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

671-03

IN THE MATTER OF PANIAGUA	:	
SANTIAGO, NEW HORIZONS	:	COMMISSIONER OF EDUCATION
CHARTER SCHOOL, ESSEX COUNTY.	:	DECISION
_____	:	

December 22, 2003

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	
	:	**Docket No.: D18-03**
PANIAGUA SANTIAGO NEW HORIZONS CHARTER SCHOOL ESSEX COUNTY	:	**RESOLUTION FOR FAILING TO FILE DISCLOSURE STATEMENT**

WHEREAS, N.J.S.A. 18A:12-25 of the School Ethics Act requires each school official to file a personal/relative disclosure statement and N.J.S.A. 18A:12-26 requires each school official to file a financial disclosure statement for the School Ethics Commission; and

WHEREAS, Ms. Paniagua Santiago is a member of New Horizons Charter School Board of Trustees and thus a "school official" under N.J.S.A. 18A:12-23 of the Act and N.J.A.C. 6A:28-1.2 of the Code; and

WHEREAS, the deadline to file these disclosure statements was April 30, 2003 for school officials in office since January 30, 2003 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators; and

WHEREAS, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with her school district and the County Superintendent's office as required by the Act; and

WHEREAS, the Commission sent a reminder letter to her on September 5, 2003, indicating that if the completed statement was not filed by September 15, 2003, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

WHEREAS, the Commission issued an Order on September 24, 2003, directing this school official to Show Cause why the Commission should not find her in violation of the Act for failing to file the disclosure statements; and

WHEREAS, the school official failed to reply to the Order to Show Cause; and

WHEREAS, in its letter enclosing the Order, the Commission notified this school official that the Commission would discuss this matter at its October 28, 2003 meeting, that she had the right to attend, and she could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission finds that the failure to file a disclosure statement within the designated timeline constitutes a clear violation of N.J.S.A. 18A:12-25 and 26; and

WHEREAS, the Commission finds that this school official did not provide any reason why she failed to comply with the requirement under N.J.S.A. 18A:12-25 and 26; and

WHEREAS, the Commission finds that this school official was given ample opportunity to provide the complete disclosure statement; and

WHEREAS, the appropriate penalty for the violation is suspension from her Board, until she files the required form, but removal if she fails to file within 30 days from the date of the Commissioners' decision on penalty, especially in light of the failure to respond to the Commission's reminder letter before the September 15, 2003 deadline.

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Paniagua Santiago violated N.J.S.A. 18A:12-25 and 26 of the School Ethics Act and recommends that the Commissioner of Education impose a sanction of suspension from his Board, but removal if she does not file within 30 days from the effective date of the Commissioner's decision.

Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: October 28, 2003

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to you, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

AGENCY DKT. NO. 418-11/03

IN THE MATTER OF PANIAGUA	:	
SANTIAGO, NEW HORIZONS	:	COMMISSIONER OF EDUCATION
CHARTER SCHOOL, ESSEX COUNTY.	:	DECISION
	:	

Whereas, the School Ethics Commission has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named school official for failure to file a personal/relative disclosure statement, pursuant to *N.J.S.A.* 18A:12-25 and/or an annual financial disclosure statement required by *N.J.S.A.* 18A:12-26;

Whereas, the deadline to file these disclosure statements was April 30, 2003 for school officials in office since January 30, 2003, or 30 days from swearing in or start of service for newly elected or appointed board members and administrators; and

Whereas, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with her school district and the County Superintendent's office, as required by the Act; and

Whereas, the Commission sent a reminder letter to the above-named school official on September 5, 2003, indicating that if the completed statement was not filed by September 15, 2003, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.5(j), the Commission issued an Order on September 24, 2003 directing this school official to Show Cause why the Commission should not find her in violation of the Act for failing to file the necessary statement(s), with a cover letter

indicating that the Commission would discuss the matter at its October 28, 2003 meeting, that the named official had the right to attend, and that the Commission could, at that meeting, find a violation of the School Ethics Act and recommend a penalty up to removal; and

Whereas, the above-named school official failed to reply to the Order to Show Cause and provided no reason for her failure to comply with the requirement under *N.J.S.A.* 18A:12-25 and 26; and

Whereas, the Commission found that failure to file a disclosure statement within the designated timeline despite ample opportunity to do so constitutes a clear violation of *N.J.S.A.* 18A:12-25 and 26; and

Whereas, the Commission voted on October 28, 2003 to recommend suspension of the above-named school official until she files the necessary disclosure statement, and her automatic removal from the Board of Trustees if she fails to file within 30 days, memorializing such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, by letter dated November 7, 2003 from the School Ethics Commission, the above-named school official was afforded an opportunity to submit to the Commissioner a response to said resolution recommending removal; and

Whereas, no response was submitted to the Commissioner; and

Whereas, the Commissioner has carefully considered the record of this matter and the decision of the School Ethics Commission; and

Whereas, the Commissioner recognizes that, were the Commission's recommendation to be adopted without modification, school officials filing the requisite disclosure statement prior to the decision of the Commissioner, and hence, prior to imposition of

the recommended suspension, would receive no penalty notwithstanding that the School Ethics Act was violated and the Commission has recommended reprimands for school officials who failed to file until after issuance of the Order to Show Cause; now therefore

IT IS ORDERED that, as recommended by the School Ethics Commission, the above-named school official be suspended until she files the necessary disclosure statement, and automatically removed from the Board of Trustees if she fails to file within 30 days. IT IS additionally ORDERED that even if the above-named school official shall have filed the necessary statement prior to the filing date of this decision, she shall nevertheless be reprimanded for her failure to abide by the requirements of the School Ethics Act despite many opportunities for compliance, thereby causing administrative and adjudicative time to be wasted by local, county and state education officials.*

COMMISSIONER OF EDUCATION

Date of Decision: 12/22/03

Date of Mailing: 12/24/03

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

672-03

672-03SEC

IN THE MATTER OF LORETTA	:	
WILLIAMS, NEW HORIZONS	:	COMMISSIONER OF EDUCATION
CHARTER SCHOOL, ESSEX COUNTY.	:	DECISION
_____	:	

December 22, 2003

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	
	:	**Docket No.: D20-03**
LORETTA WILLIAMS NEW HORIZONS CHARTER SCHOOL ESSEX COUNTY	:	**RESOLUTION FOR FAILING TO FILE DISCLOSURE STATEMENT**

WHEREAS, N.J.S.A. 18A:12-25 of the School Ethics Act requires each school official to file a personal/relative disclosure statement and N.J.S.A. 18A:12-26 requires each school official to file a financial disclosure statement for the School Ethics Commission; and

WHEREAS, Ms. Loretta Williams is a member of the New Horizons Charter School Board of Trustees and thus a "school official" under N.J.S.A. 18A:12-23 of the Act and N.J.A.C. 6A:28-1.2 of the Code; and

WHEREAS, the deadline to file these disclosure statements was April 30, 2003 for school officials in office since January 30, 2003 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators; and

WHEREAS, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with her school district and the County Superintendent's office as required by the Act; and

WHEREAS, the Commission sent a reminder letter to her on September 5, 2003, indicating that if the completed statement was not filed by September 15, 2003, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

WHEREAS, the Commission issued an Order on September 24, 2003, directing this school official to Show Cause why the Commission should not find her in violation of the Act for failing to file the disclosure statements; and

WHEREAS, the school official failed to reply to the Order to Show Cause; and

WHEREAS, in its letter enclosing the Order, the Commission notified this school official that the Commission would discuss this matter at its October 28, 2003 meeting, that she had the right to attend, and she could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission finds that the failure to file a disclosure statement within the designated timeline constitutes a clear violation of N.J.S.A. 18A:12-25 and 26; and

WHEREAS, the Commission finds that this school official did not provide any reason why she failed to comply with the requirement under N.J.S.A. 18A:12-25 and 26; and

WHEREAS, the Commission finds that this school official was given ample opportunity to provide the complete disclosure statement; and

WHEREAS, the appropriate penalty for the violation is suspension from her Board, until she files the required form, but removal if she fails to file within 30 days from the date of the Commissioner's decision on penalty, especially in light of the failure to respond to the Commission's reminder letter before the September 15, 2003 deadline.

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Loretta Williams violated N.J.S.A. 18A:12-25 and 26 of the School Ethics Act and recommends that the Commissioner of Education impose a sanction of suspension from her Board, but removal if she fails to file within 30 days from the effective date of the Commissioner's decision.

Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: October 28, 2003

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to you, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

AGENCY DKT. NO. 406-11/03

IN THE MATTER OF LORETTA	:	
WILLIAMS, NEW HORIZONS	:	COMMISSIONER OF EDUCATION
CHARTER SCHOOL, ESSEX COUNTY.	:	DECISION
	:	

Whereas, the School Ethics Commission has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named school official for failure to file a personal/relative disclosure statement, pursuant to *N.J.S.A.* 18A:12-25 and/or an annual financial disclosure statement required by *N.J.S.A.* 18A:12-26;

Whereas, the deadline to file these disclosure statements was April 30, 2003 for school officials in office since January 30, 2003, or 30 days from swearing in or start of service for newly elected or appointed board members and administrators; and

Whereas, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with her school district and the County Superintendent's office, as required by the Act; and

Whereas, the Commission sent a reminder letter to the above-named school official on September 5, 2003, indicating that if the completed statement was not filed by September 15, 2003, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.5(j), the Commission issued an Order on September 24, 2003 directing this school official to Show Cause why the Commission should not find her in violation of the Act for failing to file the necessary statement(s), with a cover letter

indicating that the Commission would discuss the matter at its October 28, 2003 meeting, that the named official had the right to attend, and that the Commission could, at that meeting, find a violation of the School Ethics Act and recommend a penalty up to removal; and

Whereas, the above-named school official failed to reply to the Order to Show Cause and provided no reason for her failure to comply with the requirement under *N.J.S.A.* 18A:12-25 and 26; and

Whereas, the Commission found that failure to file a disclosure statement within the designated timeline despite ample opportunity to do so constitutes a clear violation of *N.J.S.A.* 18A:12-25 and 26; and

Whereas, the Commission voted on October 28, 2003 to recommend suspension of the above-named school official until she files the necessary disclosure statement, and her automatic removal from the Board of Trustees if she fails to file within 30 days, memorializing such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, by letter dated November 7, 2003 from the School Ethics Commission, the above-named school official was afforded an opportunity to submit to the Commissioner a response to said resolution recommending removal; and

Whereas, no response was submitted to the Commissioner; and

Whereas, the Commissioner has carefully considered the record of this matter and the decision of the School Ethics Commission; and

Whereas, the Commissioner recognizes that, were the Commission's recommendation to be adopted without modification, school officials filing the requisite disclosure statement prior to the decision of the Commissioner, and hence, prior to imposition of

the recommended suspension, would receive no penalty notwithstanding that the School Ethics Act was violated and the Commission has recommended reprimands for school officials who failed to file until after issuance of the Order to Show Cause; now therefore

IT IS ORDERED that, as recommended by the School Ethics Commission, the above-named school official be suspended until she files the necessary disclosure statement, and automatically removed from the Board of Trustees if she fails to file within 30 days. IT IS additionally ORDERED that even if the above-named school official shall have filed the necessary statement prior to the filing date of this decision, she shall nevertheless be reprimanded for her failure to abide by the requirements of the School Ethics Act despite many opportunities for compliance, thereby causing administrative and adjudicative time to be wasted by local, county and state education officials.*

COMMISSIONER OF EDUCATION

Date of Decision: 12/22/03

Date of Mailing: 12/24/03

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

673-03

B.W., on behalf of minor child, D.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner challenged the Board's determination that her child was not domiciled in the District and its demand for tuition from petitioner, claiming that she never changed her domicile, but became homeless.

The ALJ determined that petitioner and her child had not been domiciled or resided in the South Orange-Maplewood School District since October 2001, but, in fact, had been and continue to be domiciled in Union, New Jersey. The ALJ ordered payment of tuition to the Board at a per diem rate of $50.29 for the dates of D.P.'s ineligible attendance during the 2002-03 school year.

The Commissioner adopted the decision of the ALJ finding that D.P. was not domiciled in the South Orange-Maplewood School District so as to be entitled to a free public education in respondent's District, but modified the tuition calculation, ordering petitioner to pay the District tuition in the amount of $9,345.00 for the 2002-03 school year and $50.29 for each day of D.P.'s ineligible attendance in the 2003-04 school year. The Commissioner denied the Board's claim for pre and post-judgment interest and legal fees.

December 29, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 01837-03

AGENCY DKT. NO. 364 -11/02

B.W., ON BEHALF OF MINOR CHILD, D.P.,

Petitioner,

v.

BOAD OF EDUCATION OF THE SCHOOL DISTRICT OF SOUTH ORANGE-MAPLEWOOD, ESSEX COUNTY,

Respondent.

Beverly Williams, Petitioner, *pro se*

Joanne Butler, Esq., for Respondent (Schenck, Price, Smith and King, LLP)

Record Closed: October 20, 2003 **Decided:** November 21, 2003

BEFORE **SANDRA ANN ROBINSON**, ALJ:

STATEMENT OF THE CASE

Pursuant to *N.J.S.A.* 18A:38-1, the Board of Education of the School District South Orange Maplewood (BOE/Respondent), held a hearing and determined that D.P., the child of B.W. (Petitioner/B.W.), was not domiciled within the BOE's school district, although she continued to attend a school within the district. Consequently, the BOE decided that the child should be removed from the school and that B.W. should pay a per diem rate on the $9,345.00 tuition for 2002-2003 attendance in Respondent's district.

According to the papers filed, B.W. alleges that she and her child, D.P., remained domiciled within Respondent's district, since she never changed her domicile, but became homeless. Thus, B.W. claims that the BOE was and is required to provide her child with a free public education. The BOE submits that B.W. has not met her burden of proof and counterclaims for an order requiring B.W. to pay tuition.

PROCEDURAL HISTORY

On October 8, 2002, the BOE informed B.W. that she was required to withdraw D.P. as a student from the South Orange Maplewood School District and enroll her in the Union School District, where B.W was domiciled. On November 1, 2002, B.W. filed a residency appeal with the Commissioner of Education. On November 13, 2002, the Director of the Bureau of Controversies and Disputes, forwarded correspondence to B.W. to advise that the matter would proceed as a residency appeal. On February 3, 2003 the BOE filed an answer to the aforesaid appeal and included a counterclaim for tuition. *N.J.S.A.* 18A:6-9, *N.J.S.A.* 18A:38-1. The Department of Education transmitted the matter to the Office of Administrative Law (OAL) on March 4, 2003, where it was received and filed as a contested case pursuant to *N.J.S.A.* 52:14B-2(b). A hearing was scheduled for September 11, 2003, testimony was completed and exhibits were marked and entered on the record. As Ordered, the record was closed on October 20, 2003 upon receipt of post hearing briefs.

ISSUE

Was Petitioner domiciled in South Orange Maplewood during all or any part of the 2002-2003 school year?

TESTIMONY

Tiffani Barnes (T.B.) – has been the Registrar for the South Orange Maplewood Board of Education (BOE) since April 2002. The Registrar's duties include: registration of all new and returning students, residence checks, residency verifications, parent

letters, student withdrawals and preparation for and testimony at residency hearings before the BOE and other tribunals as required.

T.B. has known student D.P. since April 2002 and is familiar with her chronological student school history. **(Exhibit R-1).** In September 2001 T.B. commenced an inquiry of D.P.'s residency with a letter mailed to B.W. (D.P.'s mother); a copy of the letter was also hand delivered by D.P. Two weeks elapsed and B.W. did not respond to the letter, so an Officer of Residency Verification was dispatched to B.W. and D.P.'s home on Boyden Street in Maplewood. The Officer was unable to determine if the family still resided on Boyden Street. On October 8, 2001 D.P. was picked-up by the Maplewood Police because she had been standing on a corner near the Boyden Street residence for two hours, waiting for her mother. The Officer of Residency Verification was given D.P.'s File Summary Form Of Student Information to review and was again dispatched to the Maplewood residence. **(Exhibit R-2).** The Officer spoke with the first floor tenant who informed him that the family had moved from Boyden Street one week ago. The BOE mailed a letter to B.W. which required that D.P. be removed from the school district. **(Exhibit R-3).** On or about October 24, 2001 B.W. submitted a letter to the BOE which provided notice of a new address on Valley Street in Maplewood. On November 4, 2001 she submitted a "Landlord Affidavit" which noted her new address; the Affidavit was not acceptable because it did not bear a notarized signature. **(Exhibit R-4).** A note disclaiming the "Landlord Affidavit" was recorded in the school files on November 29, 2001. **(Exhibit R-5).**

In December 2001 B.W. disclosed her homelessness to the BOE. She was referred to a Help Counselor and asked to submit verification from an agency of her homelessness. When B.W. did not submit verification by January 18, 2002, a hearing on residency and education entitlement in Respondent's school district was set for February 7, 2002. A Case Summary Narrative and an Activity List was submitted to the BOE members to prepare for the hearing. **(Exhibits R-1, R-6).** After the meeting, the Superintendent mailed B.W. a summary letter with instructions for submission of additional information which was required from B.W. **(Exhibit R-7).** The Superintendent's letter was hand delivered to B.W. by her children, since a current

address had not been provided to the BOE. On February 15, 2002, B.W. submitted to the BOE a copy of a Verification Application for Work First New Jersey Temporary Assistance To Needy Families (WFNJ/TANF) AFDC/Food Stamps **(Exhibit R-8).** After B.W.'s February 15, 2002 submission was reviewed, the Superintendent of the South Orange Maplewood BOE had another letter hand delivered to B.W. which outlined the remaining outstanding items she needed to present. **(Exhibit R-9).** B.W. did not submit the additional information within the requested ten-day response period. On April 15, 2002, the BOE passed Resolution 1492 which ordered the transfer or removal B.W.'s children for Respondent's school district. **(Exhibit R-10).** A letter dated April 16, 2002 was hand delivered to B.W. to advise her of the Resolution and that she had twenty-one days to appeal the notice. **(Exhibit R-11).**

On March 7, 2002 B.W. received her denial letter for Family Care and Food Stamps addressed to her at 1867 Manor Drive in Union. **(Exhibit R-12).** There was no mention of her homelessness in the denial letters. B.W. again visited Respondent's offices and explained that admission of her children in the Union School District was denied because of inappropriate documentation. T.B said that B.W. told her that she did not want her children in the Union School District because there were too many Black People there. Donald Wright B.W.'s boyfriend, the alleged sole owner/renter of 1867 Manor Drive in Union, prepared a letter of explanation regarding B.W.'s homelessness and her temporary residence. **(Exhibit R-13).** T.B. showed Donald Wright's letter to her Superintendent and two Board Members, and based on the letter and the fact that it was late in the year, Respondent School District allowed the children to stay in the school District only for the purpose of completing the 2001-2002 school year. **(Exhibit R-14).** Resolution No. 1512 to rescind the Transfer and Removal Resolution 1492 was presented at Respondent School District's BOE meeting on May 13, 2002. **(Exhibit R-15).**

In May 2002 B.W.'s application for WFNJ/TANF benefits was denied and B.W. wrote to Governor McGreevey and Senator Corzine regarding the denial decision; both replied. **(Exhibits R-16, R-17, R-18).** By Action Letter dated November 11, 2002 B.W.

was notified that cash and food stamps benefits were granted retroactive to October 1, 2002. **(Exhibit R-33).**

Based on a July 25, 2002 residency check by the Officer of Residency Verification, B.W. was living with her boyfriend D. Wright at 1867 Manor Drive in Union, New Jersey. The Officer saw B.W. and her children's names on the mailbox and spoke with a representative in the complex management office and learned that B.W.'s children also live there and their names are listed on the Lease Agreement **(Exhibit R-19).** One month later, on or about August 22, 2002 B.W. came to T.B.'s and informed a Registrar's Agent S. Sommer, of her continued homelessness. **(Exhibit R-20).** On August 28, 2002 the BOE personnel mailed to B.W.'s Union address (regular and certified mail) a request for verification of five items. **(Exhibit R-21).** B.W. returned to Respondent's office on September 2, 2002 with documents from the Unemployment Offices which had been mailed to her at 1867 Manor Drive in Union. **(Exhibit R-22).**

On September 5, 2002 the Officer of Residency Verification submitted a note to T.B. regarding his recent observance at 1867 Manor Drive in Union and a copy of the "Mill Run Application For Residency". **(Exhibits R-23, R-24).** Copies of documentation related to B.W.'s challenge to residency was given to the Superintendent of the South Orange Maplewood School District. **(Exhibits R-24, 26).** On October 1, 2002 Respondent's Superintendent mailed a letter to B.W. requiring removal of D.P. from the South Orange Maplewood School District by October 11, 2002. **(Exhibit R-25).** On October 8, 2002, the Superintendent mailed a letter to B.W. to inform her that pursuant to *N.J.A.C.* 6A:17-2.8(a) her daughter should not be considered homeless and she should be immediately enrolled in the Union School District. **(Exhibit R-27).** On October 15, 2002 B.W. visited Respondent's office twice for the purpose of discussing her homelessness; notes were taken. **(Exhibit R-28).**

On October 18, 2002 T.B. received a copy of the entire Mill Run Residency Application. She learned that the Lease would expire on September 30, 2003 and that rent checks were signed by Petitioner and paid from her Personal Checking account. **(Exhibit R-29).** On October 30, 2002 the South Orange Maplewood District

Superintendent sent a letter to the Superintendent of the Union School District regarding D.P.'s permanent residency in Union. **(Exhibit R-30).** The Union Superintendent did not respond. The South Orange Maplewood District Superintendent also sent B.W. a letter dated October 30, 2002 to inform that D.P. is ineligible to continue school in Respondent's District. **(Exhibit R-31).**

On October 31, 2002 T.B. telephoned the Commissioner of Education to determine if an appeal had been filed; it had not. On November 1, 2002 B.W. brought her appeal documents to the BOE offices to be faxed to Trenton. On November 4, 2002 B.W. visited the BOE offices again to request that the appeal be faxed a second time. The BOE personnel declined to complete a second fax and told B.W. that the first fax was done as a courtesy and that it was strictly her responsibility to complete the transmittal of her appeal to Trenton. On November 13, 2002 the Commissioner of Education confirmed receipt of B.W.'s appeal. **(Exhibit R-32).**

The South Orange Maplewood School District established the following tuition rates:

Resolution No 11721 dated February 28, 2000 for 2000-01
Rates **(Exhibit R-34);**

Resolution No 1345C dated April 16, 2001 for 2001-02
Rates **(Exhibit R-35);**

Resolution No 1495J dated April 15, 2002 for 2002-03
Rates **(Exhibit R-36);**

Resolution No 1667L dated May 19, 2003 for 2003-04
Rates **(Exhibits R-37, R-38);**

PETITIONER'S TESTIMONY

Petitioner (B.W.) explained to the BOE that she had lost her job in August 2001 and lost her apartment in September 2001 and was homeless. She became depressed and needed medical attention and housing assistance. B.W. said she was placed on the Essex County "wait list" for housing assistance and needed to use an Essex County address for contacting purposes. She stayed with several friends in Newark until the end of 2001, but did not have letters to verify her temporary residence with them. B.W.'s boyfriend's letter regarding her residency with him in Union was submitted. **(Exhibit R-13).** B.W. said her name and her children's names had to be listed on the Mill Run Lease Agreement because the agreement required disclosure on all persons who would reside in the unit. B.W. explained to T.B. that all of her mail was received in Union, and that was the reason her name had to appear on the mailbox. In regard to the lack of reference to homelessness in the assistance applications, B.W. said that social workers told her that she could not be considered homeless if she had a roof over her head. In regard to the rent payments, B.W. said she was a Manager of Mid Range Systems for two years at Summit/Fleet Bank and still had privileges of free checks and money orders, so her checks were used and her boyfriend gave her the money. B.W. confirmed that her boyfriend stays at the Union apartment off and on. In regard to the bus stop incident, B.W. said she was still living on Boyden Street in Maplewood and there was no DYFS involvement since the landlord had called the police.

On cross-examination, B.W. confirmed that she no longer lives in Maplewood or South Orange. She said she never presented her eviction papers to the BOE because no one ever asked for them. B.W. acknowledged that her name appears on the September 10, 2001 Mill Run Application under the heading of "permanent resident"; and that her name and her children's names appear on the Lease Agreement dated October 1, 2002.

FINDINGS OF FACT

Based on the facts, applicable law, legal discussion, credible testimony and evidence, **I FIND:**

1. Petitioner was provided with many opportunities to present proofs in meetings and at a hearing to show by a preponderance of the evidence that D.P. was eligible for a free education based on domicile within Respondent School District;

2. Petitioner failed to meet the burden of production of evidence to substantiate that her residency and that of her daughter was maintained in Respondent's school district between October 2001 and the present date;

3. As per *N.J.S.A.* 18A:38-1(b)(2) the Superintendent of Respondent School District correctly determined that D.P. was attending a District School while not domiciled within the district;

4. The Superintendent, pursuant to *N.J.S.A.* 18A:38-1(b)(2) correctly assessed D.P.'s prorated tuition on a per diem basis.

5. The following is credible evidence favoring a finding of Petitioner's permanent domicile and residency in Union, New Jersey from October 2001 through the present:

    (1). Absence from the Boyden Street Maplewood, New Jersey address;
    (2). Inability to provide proof of residency for another address in Maplewood, New Jersey;
    (3). Family Name and Union, New Jersey address on all mail after October 2001 (including the Governor's letter,

Senator's letter, Unemployment, Work First New Jersey, Food Stamp, Respondent school district and other correspondence);

(4). Family name and children's names on the Application Agreement and Lease Agreement for the Union, New Jersey address;

(5). Family name and children's name on the mailbox for the Union, New Jersey address;

(6). Payment of rent at the Union, New Jersey address, using personal checking account and signing personal checks;

4. As per *N.J.S.A.* 18A:38-1(b)(2) the Superintendent of Respondent School District correctly determined that D.P. was attending a District School while not domiciled within the district;

5. The Superintendent, pursuant to *N.J.S.A.* 18A:38-1(b)(2) correctly assessed D.P.'s prorated tuition on a per diem basis.

6. Petitioner is not domiciled in the South Orange Maplewood School District.

LEGAL ANALYSIS

DOMICILE:

Domicile may be acquired in one of three ways: (1) through birth or place of origin; (2) through choice by a person legally capable of choosing his domicile; and (3) through operation of law in the case of a person who lacks capacity to acquire a new domicile by choice. *In re Gillmore's Estate*, 101 *N.J. Super.* 77, 87 (App. Div. 1968), *cert. den.*, 52 *N.J.* 175 (1968).

Domicile is the place of a person's abode where he or she, if absent, intends to return. *Mercadante v. City of Paterson*, 111 *N.J. Super.* 35, 39 (Ch. Div. 1970), *aff'd* 58

N.J. 112 (1971). A person may have multiple residences, but may only have one true domicile at a time. Therefore, residence may coincide with domicile, but does not alone determine domicile. *State v. Benny*, 20 *N.J.* 238, 151 (1955). Intent is the decisive factor in establishing domicile. It is the manifestation of a person's intent that converts residence from a mere place in which a person lives to a domicile. *State v. Benny,* 20 *N.J.* at 251. As the New Jersey Supreme Court held in *Lyon v. Glaser*, 60 *N.J.* 259, 264 (1972), domicile requires proof of physical presence and the intention to remain there indefinitely. Domicile is acquired upon the "concurrence, even for a moment, of physical presence at a dwelling place with the intention of making it a permanent abode." 60 *N.J* at 264.

Traditionally, the domicile or resident of children, for school purposes under Title 18A is the domicile of the parent. *I.P. v. Board of Education of the Borough of Leonia*, 93 *N.J.A.R.* 2d. (EDU) 128, 132 (1993). *See also, V.R. on Behalf of A.R. v. Hamburg Board of Education*, *N.J.A.R.* 283, 286 (EDU 1980), *aff'd* St. Bd. 1981 *SLD* 1553, *rev'd* on other grounds, *Rabinowitz v. New Jersey State Board of Education*, 550 *F. Supp.* 481 (D.N.J. 1982).

HOMELESSNESS:

The statute defines a homeless parent with a school-aged child as "an individual who temporarily lacks a fixed, regular and adequate residence." *N.J.S.A.* 18A:7B-12c. The State regulations regarding homelessness state very specific criteria supporting a determination of homelessness. *N.J.A.C.* 6A:17-1.1, *et seq. See also, Board of Education of the Borough of Woodlynne v. Board of Education of the Borough of Lindenwold,* OAL Dkt. No. EDU 8609-97 (May 4, 1999), C.D. 196-99 (June 21, 1999), in which the Commissioner of Education affirmed the Administrative Law Judge's finding that because petitioner lived in a single school district from April 1996 until June 1997, petitioner's child was not the child of a homeless family.

N.J.S.A. 18A:38-1(b)(2) states that when the superintendent of a school district determines that a person is attending a district school but is not domiciled within the

district, the parent may present proofs at a hearing to show by a preponderance of the evidence that the child is eligible for a free education based on domicile within the district. If the parent or guardian does not meet that burden, then they may be assessed for the child's tuition prorated on a *per diem* basis. Based on the unrefuted testimony at the hearing it is clear that in spite of the letters of explanation and affidavits which were submitted, B.W. and D.P. have not been domiciled or resided in the School District of South Orange-Maplewood since October 2001, but, in fact, were and continue to be domiciled and residing in Union, New Jersey at 1867 Manor Drive, a location not within the district of the BOE. The Respondent has made an application pursuant to that statue for tuition reimbursement, of which there is entitlement, pursuant to *N.J.S.A.* 18A:38-1(b)(2). The allowable tuition for reimbursement purposes shall be at the fixed per diem rate for the 2002-2003 school year.

ORDERS

Based on the above, and for good cause shown, I **ORDER** that the appeal in this matter be and is hereby **DISMISSED.** I further **ORDER** that the BOE's counterclaim for tuition is **GRANTED** and I **ORDER** B.W. to pay a $50.29 per diem rate for the dates of attendance during the 2002-2003 school year in Respondent's School District. I further **ORDER** that because D.P. is not domiciled within the district, she may be removed from the educational program offered by the BOE.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 21, 2003
DATE

Sandra Ann Robinson
SANDRA ANN ROBINSON, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

NOV 21 2003
DATE

Mailed to Parties:

NOV 25 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cml/al

APPENDIX

PETITIONER'S WITNESSES

Beverly Williams, Petitioner, *pro se*

RESPONDENT'S WITNESS

Tiffany Barnes, Registrar, South Orange Maplewood School District

EXHIBITS

Petitioner

None.

Respondent

R-1 Activity List

R-2 South Orange Maplewood File Summary Form, Student Information

R-3 Residency Verification letter October 24, 2001

R-4 Landlord's Affidavit November 4, 2001

R-5 Landlord's Affidavit with notes November 11,2001

R-6 Quick Summary Narrative

R-7 Letter from Superintendent to Petitioner February 11,2002

R-8 Verification and Application AFDC/FS February 2, 2002 and February 15, 2002

R-9 Letter from Superintendent to Petitioner March 5, 2002

R-10 Resolution 1492 dated April 15, 202

R-11 Letter from Superintendent to Petitioner April 16, 2002

R-12 Notice to Deny Your Food Stamp Application May 7, 2002

R-13 Letter from Donald Wright (friend of Petitioner) May 7, 2002

R-14 Letter from Director Planning & Assessment to Petitioner, May 8, 2002

R-15 Resolution 1512, May 13, 2002

R-16 Letter from Senator Corzine to Petitioner May 21, 2002

R-17 Letter from Commissioner Harris to Petitioner June 5, 2002

R-18 Letter from Union County Division of Social Services to Petitioner June 7, 2002

Appendix Continued

Page 2

R-19 File Summary Form Student Information July 18, 2002

R-20 Notes by Susan Sommer to Registrar August 22, 2002

R-21 Letter from Director of Planning and Assessment to Petitioner August 28, 2002

R-22 Unemployment Documentation from Petitioner September 2, 2002

R-23 Notes of Residency Officer

R-24 Millrun Application for Residency September 10, 2001

R-25 Letter from Superintendent to Petitioner October 1, 2002

R-26 BOE Package to Superintendent

R-27 Superintendent letter to Petitioner October 8, 2002

R-28 Notes by Registrar's personnel October 15, 2002

R-29 Mill Run Apartments Lease July 23, 2002

R-30 Letter from So. Orange/Maplewood Superintendent to Superintendent of Union Public School District, October 30, 2002

R-31 Letter from Superintendent to Petitioner October 30, 2002

R-32 Letter from Director, Bureau of Controversies and Disputes to Petitioner and BOE Secretary November 13, 2002

R-33 WFNJ Action Letter to Plaintiff November 21, 2002

R-34 Resolution 1172I Feb. 28, 2000

R-35 Resolution 1345C April 16, 2001

R-36 Resolution 1495J April 15, 2002

R-37 Resolution 1667L May 19, 2003

R-38 Per Diem Tuition Rates 2003-2004 September 10, 2003

B.W., on behalf of minor child, D.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions.

Upon careful and independent review of the record in this matter, the Commissioner concurs with the Administrative Law Judge's (ALJ) finding that B.W. and D.P. are neither homeless nor domiciled in the South Orange-Maplewood School District so as to entitle D.P. to a free public education in respondent's district, but, in fact, are, and continue to be, domiciled in Union, New Jersey.

With respect to the Board's counterclaim for tuition, the Commissioner finds that the ALJ's conclusion in the Initial Decision that petitioner is to pay a $50.29 per diem rate to the Board solely for the dates of D.P.'s ineligible attendance during the 2002-03 school year is not supported in the record. (Initial Decision at 11) Initially, it is noted that the $50.29 per diem rate provided by the Board refers to the daily tuition rate for the *2003-04 school year*, rather than the *2002-03 school year.* (Exhibit R-38, in evidence) Moreover, in reviewing the Board's counterclaim for tuition, the Board seeks the award of tuition "for the period of ineligible attendance, as well as attorneys['] fees, pre and post-judgment interest, and costs of suit, and such further relief as deemed appropriate by the Commissioner." (Answer and Counterclaim at 5) The Board's counterclaim for tuition, therefore, is not limited to the 2002-03 school year. Accordingly, petitioner is directed to reimburse the Board $9,345.00 for the period of D.P.'s

ineligible attendance in the District's schools for the 2002-03 school year (*Id.* at 5, Number 11 and Exhibit R-36, in evidence), and $50.29 for each day of D.P.'s ineligible attendance in the 2003-04 school year (Exhibit R-38, in evidence).

With respect to the other remedies sought in the Board's counterclaim, the Commissioner finds that the record does not support a finding that petitioner's actions were taken in bad faith or in deliberate violation of the law. *N.J.A.C.* 6A:3-1.17(c)1. The Commissioner further notes that the Board's claim for post-judgment interest is not properly before him at this time, since the requisite time period has not passed pursuant to *N.J.A.C.* 6A:3-1.17(c)2.

Finally, turning to the Board's claim for counsel fees, in the absence of express statutory authority to award counsel fees, I may not direct that the Board be compensated for legal fees in this matter. *See Hinfey v. Matawan Regional Board of Education,* 77 *N.J.* 514, 525 (1978)*; B.B., on behalf of her son, L.C. v. Board of Education of the Union County Regional High School District No.1. and Donald Merachnik, Superintendent of Schools, Union County,* 1987 *S.L.D.* 323*; Balsley v. North Hunterdon Bd. of Educ,.* 117 *N.J.* 434 (1990)*; and State, Dept. of Environ. Protect. v. Ventron Corp.,* 94 *N.J.* 473 (1983).

Accordingly, the Commissioner adopts the Initial Decision, as modified above, as the final decision in this matter for the reasons stated therein.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 12/29/03

Date of Mailing: 12/29/03

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

674-03SEC

IN THE MATTER OF ARTHUR WILSON,	:	
NEW HORIZONS CHARTER SCHOOL,	:	COMMISSIONER OF EDUCATION
ESSEX COUNTY.	:	DECISION
	:	

December 22, 2003

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	
	:	**Docket No.: D21-03**
ARTHUR WILSON NEW HORIZONS CHARTER SCHOOL ESSEX COUNTY	:	**RESOLUTION FOR FAILING TO FILE DISCLOSURE STATEMENT**

WHEREAS, N.J.S.A. 18A:12-25 of the School Ethics Act requires each school official to file a personal/relative disclosure statement and N.J.S.A. 18A:12-26 requires each school official to file a financial disclosure statement for the School Ethics Commission; and

WHEREAS, Mr. Arthur Wilson is a member of the New Horizons Charter School Board of Trustees and thus a "school official" under N.J.S.A. 18A:12-23 of the Act and N.J.A.C. 6A:28-1.2 of the Code; and

WHEREAS, the deadline to file these disclosure statements was April 30, 2003 for school officials in office since January 30, 2003 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators; and

WHEREAS, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with his school district and the County Superintendent's office as required by the Act; and

WHEREAS, the Commission sent a reminder letter to him on September 5, 2003, indicating that if the completed statement was not filed by September 15, 2003, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

WHEREAS, the Commission issued an Order on September 24, 2003, directing this school official to Show Cause why the Commission should not find him in violation of the Act for failing to file the disclosure statements; and

WHEREAS, the school official failed to reply to the Order to Show Cause; and

WHEREAS, in its letter enclosing the Order, the Commission notified this school official that the Commission would discuss this matter at is October 28, 2003 meeting, that he had the right to attend, and he could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission finds that the failure to file a disclosure statement within the designated timeline constitutes a clear violation of N.J.S.A. 18A:12-25 and 26; and

WHEREAS, the Commission finds that this school official did not provide any reason why he failed to comply with the requirement under N.J.S.A. 18A:12-25 and 26; and

WHEREAS, the Commission finds that this school official was given ample opportunity to provide the complete disclosure statement; and

WHEREAS, the appropriate penalty for the violation is suspension from her Board, until he files the required form, but removal if he fails to file within 30 days from the date of the Commissioner's decision on penalty, especially in light of the failure to respond to the Commission's reminder letter before the September 15, 2003 deadline.

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Arthur Wilson violated N.J.S.A. 18A:12-25 and 26 of the School Ethics Act and recommends that the Commissioner of Education impose a sanction of suspension from his Board, but removal if he fails to file within 30 days from the effective date of the Commissioner's decision.

Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: October 28, 2003

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to you, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

IN THE MATTER OF ARTHUR WILSON,	:	
NEW HORIZONS CHARTER SCHOOL,	:	COMMISSIONER OF EDUCATION
ESSEX COUNTY.	:	DECISION
	:	

Whereas, the School Ethics Commission has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named school official for failure to file a personal/relative disclosure statement, pursuant to *N.J.S.A.* 18A:12-25 and/or an annual financial disclosure statement required by *N.J.S.A.* 18A:12-26;

Whereas, the deadline to file these disclosure statements was April 30, 2003 for school officials in office since January 30, 2003, or 30 days from swearing in or start of service for newly elected or appointed board members and administrators; and

Whereas, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with his school district and the County Superintendent's office, as required by the Act; and

Whereas, the Commission sent a reminder letter to the above-named school official on September 5, 2003, indicating that if the completed statement was not filed by September 15, 2003, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.5(j), the Commission issued an Order on September 24, 2003 directing this school official to Show Cause why the Commission should not find him in violation of the Act for failing to file the necessary statement(s); and

Whereas, the above-named school official failed to reply to the Order to Show Cause; and

Whereas, the Commission found that failure to file a disclosure statement within the designated timeline constitutes a clear violation of *N.J.S.A.* 18A:12-25 and 26; and

Whereas, the above-referenced school official did not provide any reason why he failed to comply with the requirement under *N.J.S.A.* 18A:12-25 and 26; and

Whereas, the Commission voted on October 28, 2003 to recommend suspension of the above-named school official until he files the necessary disclosure statement, and his automatic removal from the board if he fails to file within 30 days, memorializing such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, by letter dated November 7, 2003 from the School Ethics Commission, the above-named school official was afforded an opportunity to submit to the Commissioner a response to said resolution recommending removal; and

Whereas, no comments were received from the above-named school official; and

Whereas, the Commissioner recognizes that, were the Commission's recommendation to be adopted without modification, school officials filing the requisite disclosure statement prior to the decision of the Commissioner, and hence, prior to imposition of the recommended suspension, would receive no penalty notwithstanding that the School Ethics Act was violated and the Commission has recommended reprimands for school officials who failed to file until after issuance of the Order to Show Cause; now therefore

IT IS ORDERED that, as recommended by the School Ethics Commission, the above-named school official be suspended until he files the necessary disclosure statement, and automatically removed from the Board if he fails to file within 30 days. IT IS additionally

ORDERED that even if the above-named school official shall have filed the necessary statement prior to the filing date of this decision, he shall nevertheless be reprimanded for his failure to abide by the requirements of the School Ethics Act despite many opportunities for compliance, thereby causing administrative and adjudicative time to be wasted by local, county and state education officials.*

COMMISSIONER OF EDUCATION

Date of Decision: 12/22/03

Date of Mailing: 12/29/03

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

675-03

675-03SEC

IN THE MATTER OF GAIL SIMMONS,	:	
GATEWAY CHARTER SCHOOL, HUDSON	:	COMMISSIONER OF EDUCATION
COUNTY.	:	DECISION
	:	

December 22, 2003

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	
	:	**Docket No.: D25-03**
GAIL SIMMONS GATEWAY CHARTER SCHOOL HUDSON COUNTY	:	**RESOLUTION FOR FAILING TO FILE DISCLOSURE STATEMENT**

WHEREAS, N.J.S.A. 18A:12-25 of the School Ethics Act requires each school official to file a personal/relative disclosure statement and N.J.S.A. 18A:12-26 requires each school official to file a financial disclosure statement for the School Ethics Commission; and

WHEREAS, Ms. Gail Simmons is a member of the Gateway Charter School Board of Trustees and thus a "school official" under N.J.S.A. 18A:12-23 of the Act and N.J.A.C. 6A:28-1.2 of the Code; and

WHEREAS, the deadline to file these disclosure statements was April 30, 2003 for school officials in office since January 30, 2003 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators; and

WHEREAS, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with her school district and the County Superintendent's office as required by the Act; and

WHEREAS, the Commission sent a reminder letter to her on September 5, 2003, indicating that if the completed statement was not filed by September 15, 2003, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

WHEREAS, the Commission issued an Order on September 24, 2003, directing this school official to Show Cause why the Commission should not find her in violation of the Act for failing to file the disclosure statements; and

WHEREAS, the school official filed the completed disclosure statement, but not until after the Commission issued the Order to Show Cause; and

WHEREAS, in its letter enclosing the Order, the Commission notified this school official that the Commission would discuss this matter at its October 28, 2003 meeting, that she had the right to attend, and she could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission finds that the failure to file a disclosure statement within the designated timeline constitutes a clear violation of N.J.S.A. 18A:12-25 and 26; and

WHEREAS, the Commission finds that this school official did not provide any reason why she failed to comply with the requirement under N.J.S.A. 18A:12-25 and 26; and

WHEREAS, the Commission finds that this school official was given ample opportunity to provide the complete disclosure statement; and

WHEREAS, the appropriate penalty for the violation is a reprimand, especially in light of the failure to respond to the Commission's reminder letter before the September 15, 2003 deadline.

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Gail Simmons violated N.J.S.A. 18A:12-25 and 26 of the School Ethics Act and recommends that the Commissioner of Education impose a sanction of a reprimand.

Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: October 28, 2003

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to you, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

IN THE MATTER OF GAIL SIMMONS,	:	
GATEWAY CHARTER SCHOOL, HUDSON	:	COMMISSIONER OF EDUCATION
COUNTY.	:	DECISION
	:	

Whereas, the School Ethics Commission has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named school official for failure to file a personal/relative disclosure statement, pursuant to *N.J.S.A.* 18A:12-25 and/or an annual financial disclosure statement required by *N.J.S.A.* 18A:12-26;

Whereas, the deadline to file these disclosure statements was April 30, 2003 for school officials in office since January 30, 2003, or 30 days from swearing in or start of service for newly elected or appointed board members and administrators; and

Whereas, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with her school district and the County Superintendent's office, as required by the Act; and

Whereas, the Commission sent a reminder letter to the above-named school official on September 5, 2003, indicating that if the completed statement was not filed by September 15, 2003, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.5(j), the Commission issued an Order on September 24, 2003 directing this school official to Show Cause why the Commission should not find her in violation of the Act for failing to file the necessary statement(s); and

Whereas, the above-named school official filed the completed disclosure statement thereafter; and

Whereas, the Commission found that failure to file a disclosure statement within the designated timeline constitutes a clear violation of *N.J.S.A.* 18A:12-25 and 26; and

Whereas, the above-referenced school official did not provide any reason why she failed to comply with the requirement under *N.J.S.A.* 18A:12-25 and 26; and

Whereas, the Commission voted on October 28, 2003 to recommend reprimand of the above-named school official in light of her failure to respond to the Commission's reminder letter before the September 15, 2003 deadline, memorializing such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, by letter dated November 7, 2003 from the School Ethics Commission, the above-named school official was afforded an opportunity to submit to the Commissioner a response to said resolution recommending reprimand; and

Whereas, no comments were received from the above-named school official; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission and concurs with and adopts as his own the recommendations of the Commission, and further admonishes the school official for her failure to timely file the requisite statement, in that such delay has caused administrative and adjudicative time to be wasted by local, county and state education officials; now therefore

IT IS ORDERED that the above-named Board member be reprimanded as a school official found to have violated the School Ethics Act.*

COMMISSIONER OF EDUCATION

Date of Decision: 12/22/03

Date of Mailing: 12/29/03

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

676-03

676-03SEC

IN THE MATTER OF LYNEL DUNKINS,	:	
GATEWAY CHARTER SCHOOL, HUDSON	:	COMMISSIONER OF EDUCATION
COUNTY.	:	DECISION
	:	

December 22, 2003

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	
	:	**Docket No.: D26-03**
LYNEL DUNKINS GATEWAY CHARTER SCHOOL HUDSON COUNTY	:	**RESOLUTION FOR FAILING TO FILE DISCLOSURE STATEMENT**

WHEREAS, N.J.S.A. 18A:12-25 of the School Ethics Act requires each school official to file a personal/relative disclosure statement and N.J.S.A. 18A:12-26 requires each school official to file a financial disclosure statement for the School Ethics Commission; and

WHEREAS, the above-referenced respondent is a member of the Gateway Charter School Board of Trustees and thus a "school official" under N.J.S.A. 18A:12-23 of the Act and N.J.A.C. 6A:28-1.2 of the Code; and

WHEREAS, the deadline to file these disclosure statements was April 30, 2003 for school officials in office since January 30, 2003 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators; and

WHEREAS, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with the County Superintendent's office as required by the Act; and

WHEREAS, the Commission sent a reminder letter to this school official on September 5, 2003, indicating that if the completed statement was not filed by September 15, 2003, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

WHEREAS, the Commission issued an Order on September 24, 2003, directing this school official to Show Cause why the Commission should not find a violation of the Act for failing to file the disclosure statements; and

WHEREAS, the school official failed to reply to the Order to Show Cause; and

WHEREAS, in its letter enclosing the Order, the Commission notified this school official that the Commission would discuss this matter at is October 28, 2003 meeting, that the school official had the right to attend, and could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission finds that the failure to file a disclosure statement within the designated timeline constitutes a clear violation of N.J.S.A. 18A:12-25 and 26; and

WHEREAS, the Commission finds that this school official did not provide any reason why the form was not filed in compliance with the requirement under N.J.S.A. 18A:12-25 and 26; and

WHEREAS, the Commission finds that this school official was given ample opportunity to provide the complete disclosure statement; and

WHEREAS, the appropriate penalty for the violation is suspension from his Board, until the school official files the required form, but removal if the school official fails to file within 30 days from the date of the Commissioner's decision on penalty, especially in light of the failure to respond to the Commission's reminder letter before the September 15, 2003 deadline.

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Lynel Dunkins violated N.J.S.A. 18A:12-25 and 26 of the School Ethics Act and recommends that the Commissioner of Education impose a sanction of suspension from his Board, but removal if the school official fails to file within 30 days from the date of this resolution.

Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: October 28, 2003

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to you, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

IN THE MATTER OF LYNEL DUNKINS, :

GATEWAY CHARTER SCHOOL, HUDSON : COMMISSIONER OF EDUCATION

COUNTY. : DECISION

:

Whereas, the School Ethics Commission has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named school official for failure to file a personal/relative disclosure statement, pursuant to *N.J.S.A.* 18A:12-25 and/or an annual financial disclosure statement required by *N.J.S.A.* 18A:12-26;

Whereas, the deadline to file these disclosure statements was April 30, 2003 for school officials in office since January 30, 2003, or 30 days from swearing in or start of service for newly elected or appointed board members and administrators; and

Whereas, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with his school district and the County Superintendent's office, as required by the Act; and

Whereas, the Commission sent a reminder letter to the above-named school official on September 5, 2003, indicating that if the completed statement was not filed by September 15, 2003, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.5(j), the Commission issued an Order on September 24, 2003 directing this school official to Show Cause why the Commission should not find him in violation of the Act for failing to file the necessary statement(s); and

Whereas, the above-named school official failed to reply to the Order to Show Cause; and

Whereas, the Commission found that failure to file a disclosure statement within the designated timeline constitutes a clear violation of *N.J.S.A.* 18A:12-25 and 26; and

Whereas, the above-referenced school official did not provide any reason why he failed to comply with the requirement under *N.J.S.A.* 18A:12-25 and 26; and

Whereas, the Commission voted on October 28, 2003 to recommend suspension of the above-named school official until he files the necessary disclosure statement, and his automatic removal from the board if he fails to file within 30 days, memorializing such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, by letter dated November 7, 2003 from the School Ethics Commission, the above-named school official was afforded an opportunity to submit to the Commissioner a response to said resolution recommending removal; and

Whereas, no comments were received from the above-named school official; and

Whereas, the Commissioner recognizes that, were the Commission's recommendation to be adopted without modification, school officials filing the requisite disclosure statement prior to the decision of the Commissioner, and hence, prior to imposition of the recommended suspension, would receive no penalty notwithstanding that the School Ethics Act was violated and the Commission has recommended reprimands for school officials who failed to file until after issuance of the Order to Show Cause; now therefore

IT IS ORDERED that, as recommended by the School Ethics Commission, the above-named school official be suspended until he files the necessary disclosure statement, and automatically removed from the Board if he fails to file within 30 days. IT IS additionally

ORDERED that even if the above-named school official shall have filed the necessary statement prior to the filing date of this decision, he shall nevertheless be reprimanded for his failure to abide by the requirements of the School Ethics Act despite many opportunities for compliance, thereby causing administrative and adjudicative time to be wasted by local, county and state education officials.*

COMMISSIONER OF EDUCATION

Date of Decision: 12/22/03

Date of Mailing: 12/29/03

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

677-03

IN THE MATTER OF CHAWN CHARLTON,	:	
GATEWAY CHARTER SCHOOL, HUDSON	:	COMMISSIONER OF EDUCATION
COUNTY.	:	DECISION

December 22, 2003

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	
	:	**Docket No.: D23-03**
CHAWN CHARLTON GATEWAY CHARTER SCHOOL HUDSON COUNTY	:	**RESOLUTION FOR FAILING TO FILE DISCLOSURE STATEMENT**

WHEREAS, N.J.S.A. 18A:12-25 of the School Ethics Act requires each school official to file a personal/relative disclosure statement and N.J.S.A. 18A:12-26 requires each school official to file a financial disclosure statement for the School Ethics Commission; and

WHEREAS, Ms. Charlton is a member of the Gateway Charter School Board of Trustees and thus a "school official" under N.J.S.A. 18A:12-23 of the Act; and N.J.A.C. 6A:28-1.2 of the Code; and

WHEREAS, the deadline to file these disclosure statements was April 30, 2003 for school officials in office since January 30, 2003 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators; and

WHEREAS, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with her school district and the County Superintendent's office as required by the Act; and

WHEREAS, the Commission sent a reminder letter to her on September 5, 2003, indicating that if the completed statement was not filed by September 15, 2003, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

WHEREAS, the Commission issued an Order on September 24, 2003, directing this school official to Show Cause why the Commission should not find her in violation of the Act for failing to file the disclosure statements; and

WHEREAS, the school official filed the completed disclosure statement, but not until after the Commission issued the Order to Show Cause; and

WHEREAS, in its letter enclosing the Order, the Commission notified this school official that the Commission would discuss this matter at its October 28, 2003 meeting, that she had the right to attend, and she could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission finds that the failure to file a disclosure statement within the designated timeline constitutes a clear violation of N.J.S.A. 18A:12-25 and 26; and

WHEREAS, the Commission finds that this school official did not provide any reason why she failed to comply with the requirement under N.J.S.A. 18A:12-25 and 26; and

WHEREAS, the Commission finds that this school official was given ample opportunity to provide the complete disclosure statement; and

WHEREAS, the appropriate penalty for the violation is a reprimand, especially in light of the failure to respond to the Commission's reminder letter before the September 15, 2003 deadline.

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Chawn Charlton violated N.J.S.A. 18A:12-25 and 26 of the School Ethics Act and recommends that the Commissioner of Education impose a sanction of a reprimand.

Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: October 28, 2003

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to you, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

IN THE MATTER OF CHAWN CHARLTON, :

GATEWAY CHARTER SCHOOL, HUDSON : COMMISSIONER OF EDUCATION

COUNTY. : DECISION

Whereas, the School Ethics Commission has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named school official for failure to file a personal/relative disclosure statement, pursuant to *N.J.S.A.* 18A:12-25 and/or an annual financial disclosure statement required by *N.J.S.A.* 18A:12-26;

Whereas, the deadline to file these disclosure statements was April 30, 2003 for school officials in office since January 30, 2003, or 30 days from swearing in or start of service for newly elected or appointed board members and administrators; and

Whereas, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with her school district and the County Superintendent's office, as required by the Act; and

Whereas, the Commission sent a reminder letter to the above-named school official on September 5, 2003, indicating that if the completed statement was not filed by September 15, 2003, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.5(j), the Commission issued an Order on September 24, 2003 directing this school official to Show Cause why the Commission should not find her in violation of the Act for failing to file the necessary statement(s); and

Whereas, the above-named school official filed the completed disclosure statement thereafter; and

Whereas, the Commission found that failure to file a disclosure statement within the designated timeline constitutes a clear violation of *N.J.S.A.* 18A:12-25 and 26; and

Whereas, the above-referenced school official did not provide any reason why she failed to comply with the requirement under *N.J.S.A.* 18A:12-25 and 26; and

Whereas, the Commission voted on October 28, 2003 to recommend reprimand of the above-named school official in light of her failure to respond to the Commission's reminder letter before the September 15, 2003 deadline, memorializing such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, by letter dated November 7, 2003 from the School Ethics Commission, the above-named school official was afforded an opportunity to submit to the Commissioner a response to said resolution recommending reprimand; and

Whereas, no comments were received from the above-named school official; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission and concurs with and adopts as his own the recommendations of the Commission, and further admonishes the school official for her failure to timely file the requisite statement, in that such delay has caused administrative and adjudicative time to be wasted by local, county and state education officials; now therefore

IT IS ORDERED that the above-named Board member be reprimanded as a school official found to have violated the School Ethics Act.*

COMMISSIONER OF EDUCATION

Date of Decision: 12/22/03

Date of Mailing: 12/29/03

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

678-03

678-03SEC

IN THE MATTER OF JOSEPHINE CUPO,	:	
GATEWAY CHARTER SCHOOL,	:	COMMISSIONER OF EDUCATION
HUDSON COUNTY.	:	DECISION
	:	

December 22, 2003

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	
	:	**Docket No.: D22-03**
JOSEPHINE CUPO **GATEWAY CHARTER SCHOOL** **HUDSON COUNTY**	:	**RESOLUTION FOR FAILING TO FILE DISCLOSURE STATEMENT**

WHEREAS, N.J.S.A. 18A:12-25 of the School Ethics Act requires each school official to file a personal/relative disclosure statement and N.J.S.A. 18A:12-26 requires each school official to file a financial disclosure statement for the School Ethics Commission; and

WHEREAS, Josephine Cupo is a member of the Gateway Charter School Board of Trustees and thus a "school official" under N.J.S.A. 18A:12-23 of the Act and N.J.A.C. 6A:28-1.2 of the Code; and

WHEREAS, the deadline to file these disclosure statements was April 30, 2003 for school officials in office since January 30, 2003 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators; and

WHEREAS, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with her school district and the County Superintendent's office as required by the Act; and

WHEREAS, the Commission sent a reminder letter to her on September 5, 2003, indicating that if the completed statement was not filed by September 15, 2003, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

WHEREAS, the Commission issued an Order on September 24, 2003, directing this school official to Show Cause why the Commission should not find her in violation of the Act for failing to file the disclosure statements; and

WHEREAS, the school official filed the completed disclosure statement, but not until after the Commission issued the Order to Show Cause; and

WHEREAS, in its letter enclosing the Order, the Commission notified this school official that the Commission would discuss this matter at its October 28, 2003 meeting, that she had the right to attend, and she could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission finds that the failure to file a disclosure statement within the designated timeline constitutes a clear violation of N.J.S.A. 18A:12-25 and 26; and

WHEREAS, the Commission finds that this school official did not provide any reason why she failed to comply with the requirement under N.J.S.A. 18A:12-25 and 26; and

WHEREAS, the Commission finds that this school official was given ample opportunity to provide the complete disclosure statement; and

WHEREAS, the appropriate penalty for the violation is a reprimand, especially in light of the failure to respond to the Commission's reminder letter before the September 15, 2003 deadline.

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Josephine Cupo violated N.J.S.A. 18A:12-25 and 26 of the School Ethics Act and recommends that the Commissioner of Education impose a sanction of a reprimand.

Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: October 28, 2003

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to you, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

IN THE MATTER OF JOSEPHINE CUPO, :

GATEWAY CHARTER SCHOOL, : COMMISSIONER OF EDUCATION

HUDSON COUNTY. : DECISION

Whereas, the School Ethics Commission has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named school official for failure to file a personal/relative disclosure statement, pursuant to *N.J.S.A.* 18A:12-25 and/or an annual financial disclosure statement required by *N.J.S.A.* 18A:12-26;

Whereas, the deadline to file these disclosure statements was April 30, 2003 for school officials in office since January 30, 2003, or 30 days from swearing in or start of service for newly elected or appointed board members and administrators; and

Whereas, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with her school district and the County Superintendent's office, as required by the Act; and

Whereas, the Commission sent a reminder letter to the above-named school official on September 5, 2003, indicating that if the completed statement was not filed by September 15, 2003, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.5(j), the Commission issued an Order on September 24, 2003 directing this school official to Show Cause why the Commission should not find her in violation of the Act for failing to file the necessary statement(s); and

Whereas, the above-named school official filed the completed disclosure statement thereafter; and

Whereas, the Commission found that failure to file a disclosure statement within the designated timeline constitutes a clear violation of *N.J.S.A.* 18A:12-25 and 26; and

Whereas, the above-referenced school official did not provide any reason why she failed to comply with the requirement under *N.J.S.A.* 18A:12-25 and 26; and

Whereas, the Commission voted on October 28, 2003 to recommend reprimand of the above-named school official in light of her failure to respond to the Commission's reminder letter before the September 15, 2003 deadline, memorializing such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, by letter dated November 7, 2003 from the School Ethics Commission, the above-named school official was afforded an opportunity to submit to the Commissioner a response to said resolution recommending reprimand; and

Whereas, no comments were received from the above-named school official; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission and concurs with and adopts as his own the recommendations of the Commission, and further admonishes the school official for her failure to timely file the requisite statement, in that such delay has caused administrative and adjudicative time to be wasted by local, county and state education officials; now therefore

IT IS ORDERED that the above-named Board member be reprimanded as a school official found to have violated the School Ethics Act.*

COMMISSIONER OF EDUCATION

Date of Decision: 12/22/03

Date of Mailing: 12/29/03

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

679-03

679-03SEC

IN THE MATTER OF PATRICIA HUNTER, :

LEARNING CENTER CHARTER SCHOOL :

BOARD OF TRUSTEES, ATLANTIC :

COUNTY. :

:

COMMISSIONER OF EDUCATION

DECISION

December 22, 2003

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	
	:	**RESOLUTION**
PATRICIA HUNTER	:	
Learning Center Charter School	:	**SEC Docket No.: T38-03**
Board of Trustees	:	
Atlantic County	:	
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-33 requires new board members to attend training within one year of election or appointment to the board to gain the skills and knowledge necessary to serve as a school board member; and

WHEREAS, Patricia Hunter was appointed to the Learning Center Charter School in August 2001; and

WHEREAS, the New Jersey School Boards Association (NJSBA) advises prospective board members of the training requirement in the "candidate kit"; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on January 3, 2003 and February 19, 2003; and

WHEREAS, the NJSBA conducted eight training sessions between August 2001 and April 2003 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes;* and

WHEREAS, the last training session to fulfill the requirement was held in March 2003; and

WHEREAS, the Commission issued an Order against Ms. Hunter on June 9, 2003, via regular and certified mail, directing her to Show Cause why she had not attended training up until that time; and

WHEREAS, the Commission granted an extension for similarly situated board members to attend one of the October training sessions; and

WHEREAS, Respondent provided no response to the Order, and

WHEREAS, the Commission notified her by letter dated June 12, 2003, that the Commission would discuss this matter at its October 28, 2003 meeting, and if she did not attend training by that time, she could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission finds that this failure to attend board member training from August 2001 to April 2003, well beyond the one year required by law, constitutes a violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission considers suspension to be the appropriate penalty until Ms. Hunter attends training in January, 2004; and

WHEREAS, the Commission finds that if Ms. Hunter fails to attend by the end of **January 2004**, it would be appropriate for her to be removed from the board;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Ms. Hunter violated N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education remove her from the board if she fails to attend one of the January 2004 training sessions.

Dated: October 28, 2003

Paul C. Garbarini, Chairperson

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed, the board member may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 River View Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on October 28, 2003.

Lisa James-Beavers, Executive Director

(psc/ljb/m: ethics/trainingresT38-03.doc)

AGENCY DKT. NO. 433-11/03

IN THE MATTER OF PATRICIA HUNTER, :
LEARNING CENTER CHARTER SCHOOL :
BOARD OF TRUSTEES, ATLANTIC :
COUNTY. :
:

COMMISSIONER OF EDUCATION

DECISION

Whereas, the School Ethics Commission (Commission) has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named Board member from office for failure to attend the Board member training sessions required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-1.6; and

Whereas, *N.J.S.A.* 18A:12-33 requires new school board members to attend training within one year of election or appointment to the board to gain skills and knowledge necessary to serve as a school board member; and

Whereas, the above-named Board member was appointed to the Learning Center Charter School in August 2001; and

Whereas, the above-named Board member was duly apprised of the training requirement via the New Jersey School Boards Association's (NJSBA) "candidate kit," together with correspondence to her dated January 3, 2003 and February 19, 2003; and

Whereas, the NJSBA conducted eight training sessions between August 2001 and April 2003 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

Whereas, the last training session to fulfill her requirement was held in March 2003; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.6(e), on June 9, 2003, the Commission issued an Order to Show Cause why she had not attended a training up until that time; and

Whereas, the Commission granted an extension for similarly situated board members to attend one of the October 2003 training sessions; and

Whereas, the above-named Board member provided no response to the Order; and

Whereas, the Commission notified her by letter dated June 12, 2003 that it would discuss this matter at its October 28, 2003 meeting and, if she did not attend training by that time, she could be found in violation of the School Ethics Act and receive a penalty up to removal; and

Whereas, the above-named Board member failed to attend the October 2003 training session; and

Whereas, the Commission finds that this failure to attend board member training from August 2001 until April 2003 constitutes a violation of *N.J.S.A.* 18A:12-33; and

Whereas, at its meeting on October 28, 2003, the Commission recommended that the above-named Board member be suspended from the Board until she attends the January 2004 session and removed if she fails to attend the January 2004 session, and memorialized such decision through a resolution forwarded to the Commissioner of Education, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, on November 12, 2003, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to said resolution; and

Whereas, no comments were received from the above-named Board member; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the Commission and concurs with and adopts as his own the recommendations of the Commission; now therefore

IT IS ORDERED that the above-named Board member is suspended from office as of the filing of this decision and shall remain suspended pending completion of the requisite training, and, in the event she fails to complete the training session in January 2004, the above-named Board member shall be summarily removed from office as of that date.*

COMMISSIONER OF EDUCATION

Date of Decision: 12/22/03

Date of Mailing: 12/30/03

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

680-03SEC

680-03

IN THE MATTER OF JOHN FROHLING, :

LEARNING COMMUNITY CHARTER :

SCHOOL BOARD OF TRUSTEES, :

HUDSON COUNTY. :

:

COMMISSIONER OF EDUCATION

DECISION

December 22, 2003

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	
	:	**RESOLUTION**
JOHN B.M. FROHLING	:	
Learning Community Charter School	:	**SEC Docket No.: T39-03**
Board of Trustees	:	
Hudson County	:	
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-33 requires new board members to attend training within one year of election or appointment to the board to gain the skills and knowledge necessary to serve as a school board member; and

WHEREAS, John Frohling was appointed to the Learning Community Charter School in September 2001; and

WHEREAS, the New Jersey School Boards Association (NJSBA) advises prospective board members of the training requirement in the "candidate kit"; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on January 3, 2003 and February 19, 2003; and

WHEREAS, the NJSBA conducted eight training sessions between September 2001 and April 2003 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes;* and

WHEREAS, the last training session to fulfill the requirement was held in March 2003; and

WHEREAS, the Commission issued an Order against Mr. Frohling June 9, 2003, via regular and certified mail, directing him to Show Cause why he had not attended training up until that time; and

WHEREAS, the Commission granted an extension for similarly situated board members to attend one of the October training sessions; and

WHEREAS, Respondent responded to the Order by certified letter stating that he agreed to attend the next NJSBA training session, and noted as the only attorney serving on the charter school board, he has assisted, and is willing to continue to assist, in many of its legal matters without compensation; and

WHEREAS, Mr. Frohling did not attend the training in October 2003; and

WHEREAS, the Commission notified him by letter dated June 12, 2003, that the Commission would discuss this matter at its October 28, 2003 meeting, and if he did not attend training by that time, he could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission finds that this failure to attend board member training from September 2001 to April 2003, well beyond the one year allowable by law, constitutes a violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds suspension to be the appropriate penalty for failure to attend through October, 2003; and

WHEREAS, the Commission finds that if Mr. Frohling fails to attend training by the end of **January 2004**, it would be appropriate to have him removed from the board;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Mr. Frohling violated N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education suspend him until he attends in January, 2004, but remove him from the board of trustees without further proceedings if he fails to attend one of the January 2004 training sessions.

Dated: October 29, 2003

Paul C. Garbarini

Paul C. Garbarini, Chairperson

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed, the board member may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 River View Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on October 28, 2003.

Lisa James-Beavers

Lisa James-Beavers, Executive Director

(psc/ljb/m: ethics/trainingresT39-03.doc)

AGENCY DKT. NO. 435-11/03

IN THE MATTER OF JOHN FROHLING, :
LEARNING COMMUNITY CHARTER :
SCHOOL BOARD OF TRUSTEES, :
HUDSON COUNTY. :
:

COMMISSIONER OF EDUCATION

DECISION

Whereas, the School Ethics Commission (Commission) has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named Board member from office for failure to attend the Board member training sessions required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-1.6; and

Whereas, *N.J.S.A.* 18A:12-33 requires new school board members to attend training within one year of election or appointment to the board to gain skills and knowledge necessary to serve as a school board member; and

Whereas, the above-named Board member was appointed to the Learning Community Charter School in September 2001; and

Whereas, the above-named Board member was duly apprised of the training requirement via the New Jersey School Boards Association's (NJSBA) "candidate kit," together with correspondence to him dated January 3, 2003 and February 19, 2003; and

Whereas, the NJSBA conducted eight training sessions between September 2001 and April 2003 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

Whereas, the last training session to fulfill his requirement was held in March, 2003; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.6(e), on June 9, 2003, the Commission issued an Order to Show Cause why he had not attended a training up until that time; and

Whereas, the Commission granted an extension for similarly situated board members to attend one of the October 2003 training sessions; and

Whereas, the above-named Board member responded to the order by letter stating that he had agreed to attend the next NJSBA training session; and

Whereas, the above-named Board member did not attend the training in October 2003; and

Whereas, the Commission notified him by letter dated June 12, 2003 that it would discuss this matter at its October 28, 2003 meeting and, if he did not attend training by that time, he could be found in violation of the School Ethics Act and receive a penalty up to removal; and

Whereas, the Commission finds that this failure to attend board member training from September 2001 through April 2003 constitutes a violation of *N.J.S.A.* 18A:12-33; and

Whereas, at its meeting on October 28, 2003, the Commission recommended that the above-named Board member be suspended from the Board until he attends the January 2004 session and removed if he fails to attend the January 2004 session, and memorialized such decision through a resolution forwarded to the Commissioner of Education, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, on November 12, 2003, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to said resolution; and

Whereas, no comments were received from the above-named Board member; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the Commission and concurs with and adopts as his own the recommendations of the Commission; now therefore

IT IS ORDERED that the above-named Board member is suspended from office as of the filing of this decision and shall remain suspended pending completion of the requisite training, and, in the event he fails to complete the training session in January 2004, the above-named Board member shall be summarily removed from office as of that date.*

COMMISSIONER OF EDUCATION

Date of Decision: 12/22/03

Date of Mailing: 12/30/03

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

681-03SEC

681-03

IN THE MATTER OF VERONICA	:	
SUTTON, JERSEY CITY COMMUNITY	:	COMMISSIONER OF EDUCATION
CHARTER SCHOOL BOARD OF TRUSTEES,	:	DECISION
HUDSON COUNTY.	:	
_____	:	

December 22, 2003

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	
	:	**RESOLUTION**
VERONICA SUTTON	:	
Jersey City Community Charter School Board of Trustees	:	**SEC Docket No.: T37-03**
Hudson County	:	
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-33 requires new board members to attend training within one year of election or appointment to the board to gain the skills and knowledge necessary to serve as a school board member; and

WHEREAS, Veronica Sutton was appointed to the Jersey City Community Charter School in October 2000; and

WHEREAS, the New Jersey School Boards Association (NJSBA) advises prospective board members of the training requirement in the "candidate kit"; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on January 3, 2003 and February 19, 2003; and

WHEREAS, the NJSBA conducted ten training sessions between October 2000 and April 2003 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes;* and

WHEREAS, the last training session to fulfill the requirement was held in March 2003; and

WHEREAS, the Commission issued an Order against Ms. Sutton on June 9, 2003, via regular and certified mail, directing her to Show Cause why she had not attended training up until that time; and

WHEREAS, the Commission granted an extension for similarly situated board members to attend one of the October training sessions; and

WHEREAS, Respondent provided no response to the Order; and

WHEREAS, the Commission notified her by letter dated June 12, 2003, that the Commission would discuss this matter at its October 28, 2003 meeting, and if she did not attend training by that time, she could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission finds that this failure to attend board member training from October 2000 to April 2003, well beyond the one year required by law, constitutes a violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds suspension to be the appropriate penalty for failure to attend through October; and

WHEREAS, the Commission finds that if Ms. Sutton fails to attend by the end of **January 2004**, the Commission finds that it would be appropriate to have her removed from the board;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Ms. Sutton violated N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education suspend her until she attends, but remove her from the board if she fails to attend one of the January 2004 training sessions.

Dated: October 29, 2003

Paul C. Garbarini, Chairperson

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed, the board member may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 River View Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on October 28, 2003.

Lisa James-Beavers, Executive Director

(psc/ljb/m: ethics/trainingresT37-03.doc)

AGENCY DKT. NO. 434-11/03

IN THE MATTER OF VERONICA	:	
SUTTON, JERSEY CITY COMMUNITY	:	COMMISSIONER OF EDUCATION
CHARTER SCHOOL BOARD OF TRUSTEES,	:	DECISION
HUDSON COUNTY.	:	
	:	

Whereas, the School Ethics Commission (Commission) has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named Board member from office for failure to attend the Board member training sessions required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-1.6; and

Whereas, *N.J.S.A.* 18A:12-33 requires new school board members to attend training within one year of election or appointment to the board to gain skills and knowledge necessary to serve as a school board member; and

Whereas, the above-named Board member was appointed to the Jersey City Community Charter School in October 2000; and

Whereas, the above-named Board member was duly apprised of the training requirement via the New Jersey School Boards Association's (NJSBA) "candidate kit," together with correspondence to her dated January 3, 2003 and February 19, 2003; and

Whereas, the NJSBA conducted ten training sessions between October 2000 and April 2003 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

Whereas, the last training session to fulfill her requirement was held in March, 2003; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.6(e), on June 9, 2003, the Commission issued an Order to Show Cause why she had not attended a training up until that time; and

Whereas, the Commission granted an extension for similarly situated board members to attend one of the October 2003 training sessions; and

Whereas, the above-named Board member provided no response to the Order; and

Whereas, the Commission notified her by letter dated June 12, 2003 that it would discuss this matter at its October 28, 2003 meeting and, if she did not attend training by that time, she could be found in violation of the School Ethics Act and receive a penalty up to removal; and

Whereas, the above-named Board member failed to attend the October 2003 training session; and

Whereas, the Commission finds that this failure to attend board member training from October 2000 until April 2003 constitutes a violation of *N.J.S.A.* 18A:12-33; and

Whereas, at its meeting on October 28, 2003, the Commission recommended that the above-named Board member be suspended from the Board until she attends the January 2004 session and removed if she fails to attend the January 2004 session, and memorialized such decision through a resolution forwarded to the Commissioner of Education, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, on November 12, 2003, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to said resolution; and

Whereas, no comments were received from the above-named Board member; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the Commission and concurs with and adopts as his own the recommendations of the Commission; now therefore

IT IS ORDERED that the above-named Board member is suspended from office as of the filing of this decision and shall remain suspended pending completion of the requisite training, and, in the event she fails to complete the training session in January 2004, the above-named Board member shall be summarily removed from office as of that date.*

COMMISSIONER OF EDUCATION

Date of Decision: 12/22/03

Date of Mailing: 12/30/03

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

6.82-03

BOARD OF EDUCATION OF THE TOWN OF BOONTON, MORRIS COUNTY,	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION
V.	:	
BOARD OF EDUCATION OF THE BOROUGH OF LINCOLN PARK, MORRIS COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning receiving district sought severance of its relationship with the respondent sending district, contending that no substantial negative impact would result from such severance. Respondent moved for dismissal of the petition on contractual grounds, but later withdrew its opposition and entered into a settlement with petitioner, agreeing to sever their relationship under the terms and conditions specified.

The ALJ recommended approval of the parties' Consent Order effectuating severance.

The Commissioner rejected the proposed order, holding that the record was insufficient for him to determine whether the criteria of *N.J.S.A.* 18A:38-13 had been met and that the parties could not, in any event, compel Commissioner-directed issuance of bonds if referenda to construct a new high school failed in the respondent district. The Commissioner declined to permit severance at this time, instead ordering further proceedings in accordance with *N.J.A.C.* 6A:3-6.1 so that the parties' now-mutual application could be properly assessed under the standard prescribed by law.

December 23, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 9211-02
AGENCY DKT. NO. 251-8/02

BOARD OF EDUCATION OF THE TOWN OF BOONTON, MORRIS COUNTY,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF LINCOLN PARK, MORRIS COUNTY,

Respondent.

Dennis A. Collins, Esq., appearing for petitioner

Nathanya Simon, Esq., for respondent
(Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record Closed: November 5, 2003 Decided: November 6, 2003

BEFORE **STEPHEN G. WEISS,** ALJ:

In August 2002, the petitioner Board of Education of the Town of Boonton filed an appeal with the Commissioner of Education in which it sought to sever a longstanding sending-receiving relationship with respondent Board of Education of the Borough of Lincoln Park. See *N.J.S.A.* 18A:38-13. Thereafter, respondent moved to dismiss the petition in lieu of filing an

answer. See *N.J.A.C.* 6A:3-1.5(g). As a result, the matter was transmitted to the Office of Administrative Law in October 2002 and the undersigned Administrative Law Judge was designated to handle the matter.

Thereafter, as the result of discussions between counsel and the undersigned, together with consultations counsel had with their respective clients, the parties were able to agree on the terms and conditions of an amicable resolution of the dispute. Attached hereto is a Joint Stipulation of Facts setting forth the agreement reached between the parties signed by their Presidents and Board Secretaries. Also attached is a Consent Order signed by counsel with respect to the severance.

I have also attached a letter dated November 5, 2003, from counsel for the Lincoln Park Board of Education in which she clarifies certain matters contained in the Consent Order and Stipulation. Specifically, the letter sets forth that all issues relating to the severance question have been resolved by this Consent Order and Stipulation, except for one matter pending before the undersigned and scheduled for hearing in January 2004 (EDU 3066-03) concerning a paving expenditure. In addition, counsel's letter clarifies that the settlement does not effect or limit in any legal way the rights of the respondent to continue to challenge any financial decisions and expenditures which occur after the entry of this Order (and, of course, its approval by the Commissioner). Finally, the letter explains that respondent retains its right to audit the tuition rate charged to it by Boonton during the period that any Lincoln Park student continues to attend Boonton High School.

I have reviewed the file and the terms of the Consent Order and Stipulation effects and **FIND** that:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

November 6, 2003
DATE

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

November 10, 2003
DATE

M. Kathleen Duncan (ta)
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 12 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cml

SCHWARTZ SIMON EDELSTEIN
CELSO & KESSLER LLP
Ten James Street
Florham Park, New Jersey 07932
(973) 301-0001
Attorneys for Respondent
Lincoln Park Board of Education

BOARD OF EDUCATION OF THE TOWN OF BOONTON, MORRIS COUNTY Petitioner, vs. BOARD OF EDUCATION OF THE BOROUGH OF LINCOLN PARK, MORRIS COUNTY Respondent.	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW Agency Dkt. No. 251-8/02 OAL Dkt. No. EDU 9211-02 ADMINISTRATIVE ACTION **CONSENT ORDER REGARDING THE SEVERANCE OF THE PARTIES' SENDING RECEIVING RELATIONSHIP**

THIS MATTER having been opened to the Court by the Law Offices of Dennis A. Collins, Esq., attorney for the Petitioner, with the consent of Schwartz Simon Edelstein Celso & Kessler, LLP, attorneys for Respondent; and

WHEREAS, Respondent Town of Boonton Board of Education (hereinafter "Boonton") is a body corporate of the State of New Jersey organized pursuant to N.J.S.A. 18A:13-1 *et seq.* and

WHEREAS, Boonton operates a K-12 school district in Morris County; and

WHEREAS, Respondent Board of Education of the Borough of Lincoln Park (hereinafter "Lincoln Park") is a body corporate of the State of New Jersey organized pursuant to N.J.S.A. 18A:13-1 *et seq.*; and

WHEREAS, Lincoln Park operates a K-8 school district in Morris County; and

WHEREAS, Boonton and Lincoln Park have been engaged in a long-standing sending receiving relationship, pursuant to N.J.S.A. 18A:38-8 *et seq.*, whereby Lincoln Park sends its pupils in grades 9 through 12 to Boonton High School, since Lincoln Park does not have its own high school; and

WHEREAS, on or about April 14, 1999, the parties memorialized their sending-receiving relationship into a formal written agreement (hereinafter the "Agreement") which was negotiated, executed and approved by both Boards for a period of seven (7) years commencing with the 1999-00 school year and running through 2005-06 school year, with an option to be exercised by Lincoln Park for an additional five (5) years; and

WHEREAS, Boonton filed a Petition of Appeal with the Commissioner of Education on or about August 9, 2002 seeking to sever the relationship and the subject Agreement, pursuant to N.J.S.A. 18A:38-13; and

WHEREAS, Lincoln Park moved to dismiss the Petition in lieu of filing an Answer, pursuant to N.J.A.C. 6A:3-1.5(g); and

WHEREAS, the matter was assigned by the Commissioner of Education to the Honorable Stephen Weiss, A.L.J., and

WHEREAS, on or about May 12, 2003, with the Consent of the Court, Lincoln Park withdrew, without prejudice, its pending Motion to Dismiss, so that the parties could explore the voluntary severance of the sending-receiving relationship; and

WHEREAS, Lincoln Park created an Ad Hoc Exploratory High School Committee to explore severance of the sending-receiving relationship; and

WHEREAS, the Committee has fully explored the issues surrounding severance and has met with representatives of the Boonton Board to discuss same; and

WHEREAS, Lincoln Park, in consultation with the Committee, has deemed the creation of a grade kindergarten through twelve school district and the construction of its own high school to be in the best interest of the community; and

WHEREAS, the parties, wishing to amicably resolve the issue of severance hereby agree to the terms and conditions set forth herein, upon approval by the Court and the Commissioner; and

WHEREAS, and the parties having consented to the relief set forth in this Consent Order; and good cause having been shown;

It is on this 6th day of November, 2003,

ORDERED that the parties' sending-receiving relationship and Agreement, under which Lincoln Park sends its high school students to Boonton High School and pays tuition for these students to Boonton pursuant to N.J.S.A. 18A:38-8 *et seq*, shall hereafter be severed in accordance with the terms of this Agreement as follows:

1. Lincoln Park shall provide Boonton with one (1) calendar year's advance notice of the date for the actual severance and that it intends to transition its students from Boonton High School back to Lincoln Park School District; and

2. There shall be a transition period designated exclusively by Lincoln Park, for a time period not to exceed two (2) school year(s), during which time Lincoln Park's students attending Boonton's High School shall be returned to Lincoln Park. For those students remaining at Boonton after severance, Lincoln Park shall pay tuition at a rate consistent with the State formula, with Lincoln Park retaining its right to audit any tuition rate established per the procedures established in the Agreement.

3. Neither party waives its rights to continue this or any other pending legal action or to commence future litigation in order to resolve disputes between the parties concerning any and all

financial or contractual aspects of the sending/receiving relationship, this severance, or any other financial or sending/receiving dispute.

4. Providing that all necessary approvals are obtained and the property on which the prospective Lincoln Park High School identified and established, Lincoln Park shall proceed with presenting a bond referendum for the construction of its own high school to its citizenry in March of 2004 , or as soon thereafter as legally and reasonably possible. In the event this referendum fails, Lincoln Park shall proceed with presenting a second bond referendum as soon thereafter as legally and reasonably possible; and

5. In the event that the second referendum fails, the Commissioner of Education will authorize the issuance of school bonds to fund the local share to build the Lincoln Park High School providing there is no decrease in State Aid eligibility for the project. See N.J.S.A. 18A:7G-12. The Lincoln Park Board of Education expressly reserves all of its rights with regard to any other assignment of its students, as well as to maintain the right to continue in the sending-receiving relationship with Boonton, subject to the acknowledgment that the terms of the Sending/Receiving Agreement dated April 19, 1999 shall expire on June 30, 2006.

Stephen G. Weiss, A.L.J.

The undersigned consent to the form and entry of the within Order:

Nathanya G. Simon, Esq.
Schwartz, Simon, Edelstein,
Celso & Kessler, LLP
Attorneys for Respondent

Dated: 10/13/03.

Dennis A. Collins, Esq.
Attorney for Petitioner

Dated: 10/10/03

SCHWARTZ SIMON EDELSTEIN CELSO & KESSLER LLP

Reply to Florham Park

November 5, 2003

VIA FACSIMILE (973) 648-6124
& REGULAR MAIL
Honorable Stephen Weiss, A.L.J.
Office of Administrative Law
33 Washington Street
Newark, New Jersey 07102-3011

Re: Board of Education of the Town of Boonton v.
Board of Education of the Borough of Lincoln Park
OAL Docket No. EDU 9211-02
Severance of the Sending/Receiving Relationship

Dear Judge Weiss:

I am pleased to advise that the parties have clarified the respective positions of their clients such that the proposed submitted Consent Order and Stipulation of Facts resolves all issues relating to the severance other than the related pending matter involving the paving dispute. Additionally, it has been clarified that this settlement does not affect or limit in any legal way whatsoever Lincoln Park's ability to continue to challenge financial decisions and expenditures which occur after the entry of the Consent Order. Additionally, it is clear that for the time period during which any Lincoln Park student continues to attend Boonton High School, Lincoln Park retains its right to audit the tuition rate.

Attached hereto please find a copy of correspondence issued to me from Dennis Collins which clarifies the position of Boonton to be consistent with that submitted herein on behalf of Lincoln Park. Accordingly, we would request that the Court issue its Initial Decision in this matter as soon as possible.

Ten James Street, Florham Park, New Jersey 07932 {00169305; 1}
Tel: 973 . 301 . 0001 Fax: 973 . 301 . 0203 Email: info@sseck.com Web-site: www.sseck.com

If you have any further questions which require a response prior to issuance of the Initial Decision, please do not hesitate to contact the parties' representatives.

Thank you for your ongoing consideration in this matter.

Respectfully submitted,

Nathanya G. Simon

NGS/lp
Enclosure
cc: Dennis Collins, Esq.
James Tevis, School Business Administrator
Members of the Lincoln Park Board of Education

The Law Office of
Dennis A. Collins, Esquire
2517 Highway 35
Building E, Suite 201
Manasquan, New Jersey 08736

Phone: (732) 292-1246
Facsimile: (732) 292-1247

E-Mail: DACESQ@aol.com
Member N.J. Bar

October 28, 2003

Nathanya Simon, Esquire
Schwartz, Simon, Edelstein
Ten James Street
Florham Park, NJ 07932

VIA FAX #973-301-0203

Re: Boonton Board of Education ads. Lincoln Park Board of Education (Severance File)

Dear Ms. Simon:

As a follow-up to our recent conference with Judge Weiss, I would clarify that the position of Boonton is that the Consent Order and Stipulation of facts resolves all issues, including financial, related to the severance other than pending matters including the parking lot dispute. This should not be construed as limiting Lincoln Park's ability to challenge financial decisions on expenditures which occur after the entry of the order.

I trust this clarifies this position. If you have any further questions, please do not hesitate to contact me.

Very truly yours,

DENNIS A. COLLINS

DAC/ao
Cc: Richard Kaplan, Superintendent

SCHWARTZ SIMON EDELSTEIN CELSO & KESSLER LLP
Ten James Street, Florham Park, New Jersey 07932
Tel: 973 . 301 . 0001 Fax: 973 . 301. 0203

FAX TRANSMITTAL

DATE: November 5, 2003

TO: Honorable Stephen Weiss, A.L.J. Fax: (973) 648-6124

Cc: Dennis Collins, Esq. Fax: (732) 292-1247
James Tevis, Business Administrator Fax: (973) 696-9273
Members of the Lincoln Park Board of Education

FROM: Nathanya G. Simon, Esq.

RE: BOE of the Town of Boonton v. BOE of the Borough of Lincoln Park
OAL Docket No. EDU 9211-02
Severance of the Sending/Receiving Relationship

NUMBER OF PAGES TRANSMITTED: (INCLUDING THIS COVERSHEET) 4

MESSAGE:

Please see attached.

Our File No. LP030

LAW OFFICE OF DENNIS A. COLLINS
2517 HIGHWAY 35
BUILDING 3 SUITE 201
MANASQUAN, NEW JERSEY 08736
ATTORNEY FOR PETITIONER,
BOARD OF EDUCATION OF THE TOWN OF BOONTON

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

2003 OCT 20 P 5:27

Board of Education of the Town of Boonton,	:	**BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY**
Petitioner,	:	**DOCKET NO:**
v.	:	
Lincoln Park Board of Education,	:	**STIPULATION OF FACTS**
Respondent.	:	

The parties hereby stipulate to the facts and the conclusions of law in the above-referenced matter as follows:

1. The Town of Boonton Board of Education is a body corporate of the State of New Jersey organized pursuant to N.J.S.A.18A:13-1et seq.
2. The Board of Education of the Borough of Lincoln Park is a body corporate of the State of New Jersey organized pursuant to N.J.S.A.18A:13-1et seq.
3. Boonton operates K-12 school district in Morris County New Jersey.
4. Lincoln Park operates a K-8 school district in Morris County New Jersey.
5. Boonton and Lincoln Park have been engaged in a long standing sending/receiving relationship pursuant to N.J.S.A. 18A:38-8 et seq, whereby Lincoln Park sends it's pupils in grades 9-12 to the Boonton High School.
6. Lincoln Park does not have its own High School.
7. By agreement dated April 14, 1999, Boonton and Lincoln Park

entered into a formal written agreement which was executed and approved by both Boards of Education. That agreement was for a term of 7 years beginning with the 1999-00 school year and running through the 2005-2006 school year.

8. On August 9, 2002 Boonton filed a Petition of Appeal with the Commissioner of Education seeking to sever the send/receive relationship pursuant to N.J.S.A.18A:38-13.
9. Pursuant to the requirements of the statute, appended to the Petition of Appeal was a "Feasibility Study to determine the impact of terminating the sending/receiving relationship between Boonton and Lincoln Park School District" prepared by Harry A. Galinsky, Ed.D. dated March 15, 2003. (A true and accurate of the report of Dr. Galinsky is attached hereto as Exhibit A.)
10. Lincoln Park moved to dismiss the petition in lieu of filing an answer.
11. On May 12, 2003, with the consent of the Court, Lincoln Park withdrew without prejudice that motion to dismiss.
12. The Lincoln Park Board of Education has deemed the creation of a kindergarten through twelfth grade school district and the construction of its own high school to be in the best interest of the community.
13. The format and structure of the feasibility study attached as Exhibit "A" conforms to the requirements of the May 25, 1998 New Jersey Department of Education Memo which outlines the process to be filed in a formal feasibility study of terminating sending/receiving relationship.
14. The Town of Boonton Board of Education maintains four schools. They are noted as the "School Street School" which is pre-k to grade three, the "John Hill School which is grade four through grade six, the Boonton Middle School" which is grades seven through eight and the "Boonton High School" which is grades nine

through twelve.

15. The functional capacity at Boonton High School is 605 students.
16. A full listing of the 135 general courses and 14 special education courses offered by the Boonton High School is attached to Exhibit A as table II-4.
17. The average class size fluctuates between 15.2 students and 22.13 students and accordance with table II-6 of Exhibit A.
18. The parties hereto accept the conclusion of Dr. Galinsky as to the impact on course sections and staff in major subject areas as contained in table II-16 of Exhibit A.
19. The parties agree that there will be modification in courses and staff at Boonton High School but the district will still be able to offer all programs contained in its current curriculum.
20. There will be no reduction in the quality of education at Boonton High School at the time of severance of the relationship.
21. The Boonton School District Organizational Structure provides a built in mechanism to mitigate the affect of the withdrawal of Lincoln Park students.
22. The fact that Boonton's Middle School program is part of Boonton High School creates a favorable condition for dealing with any staffing or programmatic difficulties that otherwise might a merge if the grade 9-12 population stood alone.
23. The parties accept the conclusions of Dr. Galinsky that when taking into account that sufficient time is available for good planning, staffing changes will not affect the quality of education and program offerings, that the Academy For Visual and Performing Arts is projected to grow in the next 5 years to 120 students, and that the physical location of the middle school within Boonton High School results in little consequence to Boonton High School.
24. There is no substantial negative impact on the quality of education

in the Boonton High School if a severance between Boonton and Lincoln Park occurs.

25. Lincoln Park School District operates two schools, "Lincoln Park Elementary School" which houses grades K-4 and the "Lincoln Park Middle School" which contains grades 5-8. The Borough of Lincoln Park provides a quality education on all grade levels.
26. The Lincoln Park Board of Education has determined that it is in the best interest of the community to seek voter approval for the construction of a new high school.
27. The present Lincoln Park school board and the teaching staff that exist can adequately prepare for the implementation of all appropriate high school programs of study to ensure the continuity of a quality education in a future Lincoln Park High School.
28. The modification of enrollment of students in the Boonton High School will not adversely affect the quality of education.
29. Under the current arrangements the present population of Boonton High School exceeds the functional capacity calculated in the districts long range facility plans.
30. The parties accept the enrollment projections of Dr. Galinsky and note that the termination of current sending/receiving relationship with Lincoln Park would permit the town of Boonton Board of Education to accomplish district educational goals without new construction.
31. The racial composition of the school district is noted in tables V-1 through V-7 of Exhibit A.
32. The two districts are similar racially.
33. It is projected by Dr. Galinsky that Lincoln Park's withdrawal will result in Boonton High School without Lincoln Park students to be 35.74% minorities in contrast to 23.43% if the Lincoln Park Students remained.
34. The removal of Lincoln Park students from Boonton High School

will not result in a substantial negative racial impact to either district.

35. The parties agree that there will be no substantial negative impact to the quality of education or the tax burden on local taxpayers or the racial composition of each respective school district as a result of the termination of the sending/receiving relationship, provided that the voters of Lincoln Park approve a bond referendum for the construction of its own high school, or, the Commissioner of Education orders the construction and authorizes the issuance of school bonds for the local share of the project with no decrease in the state aid eligibility for the project.(See N.J.S.A. 18A:7G-12)
36. The parties hereto stipulate to the facts and conclusions as contained herein and agree to the execution of the proposed form of Consent Order severing the parties sending/receiving relationship in accordance with the terms set forth therein.

TOWN OF BOONTON BOARD OF ED.

ATTEST

BOARD SECRETARY

PRESIDENT

LINCOLN PARK BOARD OF ED.

ATTEST

BOARD SECRETARY

PRESIDENT

OAL DKT. NO. EDU 9211-02
AGENCY DKT. NO. 251-8/02

BOARD OF EDUCATION OF THE TOWN OF BOONTON, MORRIS COUNTY,	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION
V.	:	
BOARD OF EDUCATION OF THE BOROUGH OF LINCOLN PARK, MORRIS COUNTY,	:	
RESPONDENT.	:	

The record of this matter, the Consent Order Regarding the Severance of the Parties' Sending-Receiving Relationship, the Stipulation of Facts, and the Initial Decision of the Office of Administrative Law (OAL) recommending approval of the parties' settlement effectuating severance, have been reviewed pursuant to *N.J.A.C.* 1:1-19.1(a) and (b).

Upon review, the Commissioner cannot agree with the OAL's recommended approval of the proposed Consent Order, nor can he, on the present record, approve the parties' proposed severance as consistent with *N.J.S.A.* 18A:38-13.

This matter was commenced as a contested case by the Boonton Board of Education (Boonton), through a petition seeking to sever its sending-receiving relationship with the Lincoln Park Board of Education (Lincoln Park), alleging, among other things, that no negative impact in any area of consideration prescribed by *N.J.S.A.* 18A:38-13 would result. In lieu of an answer, Lincoln Park filed, as permitted by

N.J.A.C. 6A:3-1.5(g), a Motion to Dismiss the petition, contending that Boonton could not presently seek to sever the relationship because it had entered in 1999 into a binding seven-year contract with Lincoln Park with no provision for severance prior to the contract's expiration. Subsequent to transmittal of the matter to the OAL but prior to adjudication of this motion, to which Boonton had by then duly replied, Lincoln Park withdrew its demand for dismissal because the parties had determined to engage in settlement discussions. These discussions ultimately led to the agreement herein proposed.

Because the Motion to Dismiss in Lieu of Answer was withdrawn and the parties proceeded directly to settlement, no answer to Boonton's petition was ever filed; instead, the request for severance became mutual and the parties, in their Consent Order and Joint Stipulation of Facts, attested to their agreement that no negative impact would result from severance. In effect, then, notwithstanding its initial posture and transmittal to the OAL as a contested case, Boonton's application for severance became uncontested before any record could be developed beyond Boonton's initial feasibility study and the parties' later settlement documents.[1]

As the State Board of Education has recognized in a prior matter involving the same parties, notwithstanding that member districts may agree to sever their sending-receiving relationship, pursuant to *N.J.S.A.* 18A:38-13, it is "the *Commissioner's* ultimate determination whether to grant severance" after "consideration of all relevant circumstances" so as to ensure that "no substantial negative impact will result therefrom." *Board of Education of the Borough of Lincoln Park, Morris County, v. Board of*

[1] In this regard, the Commissioner notes that Lincoln Park's Motion to Dismiss and the ensuing responsive papers were centered on contractual principles, and the Commissioner's jurisdiction over them, rather than on the criteria of *N.J.S.A.* 18A:38-13.

Education of the Town of Boonton, Morris County, decided April 5, 1995, slip opinion at 3, emphasis in text.[2] The State Board further recognized that the Commissioner could not make such determinations absent a sufficient record, and, understanding the potential for insufficiency in this regard where a request for severance is uncontested, the Board in December 1999 proposed rules, later promulgated as *N.J.A.C.* 6A:3-6.1,[3] 32 *N.J.R.* 1177,

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[2] In the referenced matter, Lincoln Park sought to enjoin Boonton from incorporating its 7th and 8th grades into the high school facility, and, as part of a proposed settlement, Boonton agreed not to oppose any request for severance filed within two years of the agreement. The State Board rejected that provision and remanded the settlement to the Commissioner, who had also rejected it, for deletion of the inappropriate provision or proceedings on the merits if the parties did not agree to such deletion. Following transmittal to the OAL on remand, the matter was withdrawn.

[3] These rules provide as follows:

6A:3-6.1 Application for termination or change in allocation or apportionment

(a) An application for change of designation of a high school (termination or severance of relationship) or of allocation or apportionment of students pursuant to N.J.S.A. 18A:38-13 shall be made by petition of appeal, accompanied by the required feasibility study, and shall proceed in accordance with the provisions of this chapter except as set forth below.

(b) Where an application for change is unanswered within the requisite filing period, or is answered by a filing or filings indicating that each respondent does not oppose the application, the Commissioner shall so notify the petitioning district board of education and each respondent district board of education. At the next public meeting of each district board of education following notice from the Commissioner, each district board shall announce that the record before the Commissioner shall remain open for a period of 20 days from the date of the announcement in order that interested persons or entities may submit written comments to the Commissioner. Such announcement shall indicate the manner in which, and the address to which, comments may be submitted to the Commissioner as set forth in N.J.A.C. 6A:3-1.2 and 6A:3-1.3 above, and shall further indicate the nature and purpose of such comments as set forth in (c) below.

1. Each district board of education shall, within 10 days of the date of the announcement, submit to the Commissioner a certification indicating the date the announcement was made and the content of the announcement.

(c) Comments submitted pursuant to (b) above shall not exceed 10 pages in length, shall be served on all parties to the case, shall include proof of such service when filed with the Commissioner, and shall specifically address the following statutory standard for the Commissioner's review of applications for change in designation, allocation or apportionment:

1. Comments shall address the question of whether the proposed change in designation, allocation or apportionment will result in a substantial negative impact in any of the affected districts in one or more of the following areas: educational and financial implications; quality of education received by students; and racial composition of the student populations.

(d) Each party to the application for change shall have 20 days to reply to any comments at the close of the designated comment period.

(e) If the Commissioner determines, upon review of the record at the close of the period established for submission of comments and replies, that further inquiry, fact-finding or exploration of legal argument is required in order to determine the matter consistent with the standard of statute, the Commissioner shall direct such further proceedings as the Commissioner deems necessary.

specifically addressing the need for

> ***development of a record where a district board of education has applied for severance or alteration of a sending-receiving relationship and the application is unopposed by the responding parties. In these situations, there are no adversarial proceedings through which to develop a record beyond the feasibility study required by law upon submission of an application to the Commissioner. The proposed rules offer a mechanism by which public comment may be brought to the record, and by which the Commissioner may direct further inquiry as needed, prior to the Commissioner's making a decision on whether the standard of N.J.S.A. 18A:38-13 for granting of a severance or alteration has been met. (31 *N.J.R.* 4173(a), Summary of Proposed Readoption and Recodification with Amendments: *N.J.A.C.* 6:24 as 6A:3, quotation at 4174)

In the present matter, not only has there been no opportunity for presentation of opposing perspectives, but the Commissioner is also not satisfied, based on the feasibility study alone, that the criteria of *N.J.S.A.* 18A:38-13 have been met. By way of example, in the area of educational impact, it is unclear how "sufficient planning" and "incremental changes" over the three-year withdrawal period posited by the feasibility study can ensure that there will be "little consequence" to the quality of education in Boonton High School; according to the study, its 9-12 student body will eventually be reduced by nearly half, from approximately 650 to 360, there will be a significant drop in the number of class sections, *e.g.*, from 32 to 21 in language arts, 31 to 20 in math, 32 to 21 in science, and 29 to 19 in social studies, and teaching staff will be reduced by a third, typically by 2 positions out of 6 in each major discipline. (Feasibility Study at 29-32, 72, 80-81, 100) The Commissioner's concern is heightened by the fact that the proposed Consent Order calls for the actual withdrawal of Lincoln Park students to occur over a period *not exceeding two years*, making the study's "three-year incremental" argument even less persuasive notwithstanding the agreement's one-year notice provision. (Consent Order at 3)

Additionally, in the area of racial impact, the feasibility study concludes that data in tables based on Fall Reports "indicate that Lincoln Park and Boonton are similar racially," with "student populations that are predominantly white with small percentages of minority students," so that "there would be no substantial negative racial impact as a result of the withdrawal of the Lincoln Park students from Boonton High School." (Feasibility Study at 82-87, 100; quotation at 83) However, the referenced tables show that Boonton's student population is 66% white as compared to Lincoln Park's 85%, and that withdrawal of Lincoln Park students will result in 12.31% decrease in white students attending Boonton High School. The Commissioner finds that the referenced statistics may not necessarily support the bare assertions drawn from them, and he notes with particular concern that, notwithstanding Boonton's feasibility study having been based in part on a review of "recent legal cases involving the terminating of sending-receiving relationships" (*Id.* at 5), the record includes no mention whatsoever of the cases reviewed or how the proposed severance is consistent with them.

Another area of concern is that the Commissioner cannot meaningfully assess the fiscal impact of severance on Lincoln Park, since the feasibility study focuses on comparative tuition rates based on sending Lincoln Park students to other districts in the area, while the proposed settlement agreement clearly contemplates the district's building of its own school. There is no discussion on record of the impact of this option, except insofar as the feasibility study notes its existence and concludes that, should it be chosen, the referendum process will include information on cost so the decision to build can be made by local citizens. (Feasibility Study at 98-99, 100) Moreover, in the proposed Consent Order, the parties have agreed that, should these same citizens twice

fail to approve building referenda, issuance of bonds will be ordered by the Commissioner pursuant to *N.J.S.A.* 18A:7G-12, with no decrease in State Aid eligibility. (Consent Order at 4) With or without a discussion of fiscal impact, this provision cannot stand, since the parties cannot compel the Commissioner to require issuance of bonds, nor can Lincoln Park make application for such issuance, or receive State Aid, except through the processes and at the levels prescribed by law. *In the Matter of the Application of the Board of Education of the Township of Clark, Union County, for an Order Directing Issuance of Bonds pursuant to N.J.S.A. 18A:7G-12*, decided by the Commissioner June 2, 2003.

In sum, while the Commissioner does not preclude the possibility of permitting Boonton and Lincoln Park to sever their long-standing sending-receiving relationship, the parties have not complied with the procedure for consideration of uncontested severance applications, and the areas discussed above are indicative of need for the fuller record contemplated by that procedure in order for the Commissioner to carry out his obligation under *N.J.S.A.* 18A:38-13. That this matter is not a simple one is demonstrated by the parties' own prior disagreement, as reported in the feasibility study, on whether an application for severance was even viable; indeed, as part of its historical introduction, the study notes that Boonton took the step of initiating the present application because Lincoln Park has long "supported a legal position that it is unable to terminate the send-relationship in light of the Commissioner's previous decisions." (Feasibility Study at 5)

Accordingly, the Commissioner rejects the Initial Decision of the Office of Administrative Law recommending approval of the settlement agreement, and, instead,

consistent with the process established by law for uncontested severance applications, the Commissioner directs that at the next public meetings of the Boonton and Lincoln Park Boards of Education, each Board shall announce that the record before the Commissioner in this matter shall remain open for a period of 20 days from the date of the announcement in order that interested persons or entities may submit written comments to the Commissioner addressing the question of whether the proposed severance will result in a substantial negative impact on either district. Such announcement, and its certification to the Commissioner, shall comply with the provisions of *N.J.A.C.* 6A:3-6.1(b) and (c), and, pursuant to *N.J.A.C.* 6A:3-6.1(d), at the close of the designated comment period, each district shall have 20 days to reply to any comments filed. If, upon review of the record at the close of the period established for submission of comments and replies, the Commissioner determines that additional inquiry, factfinding or legal argument is required in order to determine whether to grant severance consistent with the standard of statute, further proceedings will be directed as necessary pursuant to *N.J.A.C.* 6A:3-6.1(e)

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: 12/23/03

Date of Mailing: 12/30/03

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[4] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

684-03

DR. WILMA J. FARMER, :

PETITIONER, :
V. :

BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY, AND ANNETTE D. KNOX, SUPERINTENDENT, :

RESPONDENT, : COMMISSIONER OF EDUCATION

AND : DECISION

PAUL STEPHENSON, :

PETITIONER, :
V. :

BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY, AND ANNETTE D. KNOX, SUPERINTENDENT, AND CHARLES HIGHSMITH, :

RESPONDENTS. :

SYNOPSIS

In consolidated matter, petitioners, two unsuccessful finalists for Assistant Superintendent position, alleged the Board unlawfully appointed Respondent Highsmith to the position. They requested the appointment be declared null and void since respondent did not possess the requisite certification prior to the March 12, 2001 application deadline. Since the filing of the positions, Respondent Highsmith resigned; Petitioner Farmer retired; and the Board significantly restructured the position.

The ALJ concluded that there were no genuine issues of material fact and that the Board was entitled to prevail as a matter of law. Moreover, the ALJ determined that the Commissioner did not have the authority to appoint either petitioner to the position nor did he have the authority to award monetary damages. The ALJ dismissed the issues as moot.

The Commissioner concurred with the ALJ and dismissed the consolidated petitions.

December 23, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION – ORDER GRANTING RESPONDENTS' MOTION FOR SUMMARY DECISION

OAL DKT. NOS. EDU 6789-01
and EDU 6790-01 (Consolidated)
AGENCY DKT. NOS. 396-9/01
and 390-9/01

DR. WILMA J. FARMER,

Petitioner,

v.

BOARD OF EDUCATION CITY OF CAMDEN AND ANNETTE D. KNOX, CAMDEN COUNTY,

Respondents.

AND

PAUL STEPHENSON,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY AND ANNETTE D. KNOX, SUPERINTENDENT, AND CHARLES HIGHSMITH,

Respondents.

Michael A. Armstrong, Esq., for appellant Dr. Wilma J. Farmer

John T. Barbour, Esq., for appellant Paul Stephenson

Karen A. Murray, Esq., for respondents (Murray and Murray, attorneys)

James J. Breslin, III, Esq., for respondents (Lenox, Socey, Wilgus, Formidoni, Brown, Giordano & Casey, attorneys)

Record Closed: October 24, 2003 Decided: November 17, 2003

BEFORE **STEVEN C. REBACK**, ALJ:

STATEMENT OF THE CASE

The matter docketed EDU 6790-01 involving the petitioner Paul Stephenson (hereinafter "Stephenson") results in an appeal by Mr. Stephenson alleging that an open position for which he was one of two finalists was awarded to the other individual who lacked the requisite certification. He thus seeks to have such appointment voided. The matter was transmitted to the Office of Administrative Law as a contested case on October 26, 2001, pursuant to *N.J.S.A.* 52: 14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The second matter, docketed OAL Docket No. EDU 6789-01, is an appeal by the petitioner Dr. Wilma J. Farmer (hereinafter "Farmer") who contends that the respondent, the Camden County Board of Education, violated her rights under the education laws when it hired an individual with a provisional administrator certificate to be assistant superintendent. She seeks to void that decision by the Board and has appealed the matter, which was transferred to the Office of Administrative Law as a contested case on October 26, 2001. Both matters were initially assigned to then Administrative Law Judge Kathryn A. Clark (now retired) who maintained control of the cases until her retirement several months ago. As part of Judge Clark's actions on June 13, 2002, she granted a motion to consolidate the above-entitled matters. Thereafter, Camden instituted its motion for summary decision in each matter, and no action, unfortunately, was taken by Judge Clark prior to her retirement. The matter was thereafter referred to my chambers by Administrative Law Judge and Acting Director of the Office of Administrative Law Jeff Masin. By letter of August 13, 2003 to all counsel, he advised that Judge Clark was then on leave of absence and unable to complete the hearing or to issue an initial decision. Counsel were then advised that the matters were reassigned to my chambers, pursuant to *N.J.A.C.* 1:1-14.13(b).[1]

[1] It should be noted that prior to Judge Clark's involvement with the matter, the cases were originally scheduled to be heard by then Administrative Law Judge M. Kathleen Duncan. Then Judge Duncan resigned the position as an

Follow my initial review of the case files, I followed up Judge Masin's letter with one of my own addressed to counsel on August 25, 2003, reiterating the reassignment to my office and advising that I had received, as part of the case file, a motion for summary decision issued by Camden. The purpose of the letter was also to apprise the parties that because of the extended period of time between the appeals being taken and the matter now coming before me for judicial decision, I would give them the opportunity if they wished to have either an in-person conference or a telephone conference should the situation in the case change. Thereafter, I was advised by counsel that their preference would be to have me address the motion for summary decision, to which I have asceeded. I have closed the record in a manner most reasonable.

THE FACTS AND PROCEDURAL HISTORY

These cases arise from respondent, Camden City Board of Education's appointment of respondent Charles Highsmith (hereinafter "Highsmith") to the position of Assistant Superintendent for Administration and Support Services and Director for Curriculum and Instruction, Pre-K to 5. Both petitioners, Farmer and Stephenson, also applied for the position of Assistant Superintendent for Administration and Support Services and Director for Curriculum and Instruction. Petitioners originally filed separate petitions in this matter; however, pursuant to an Order by Administrative Law Judge Kathryn A. Clark, these matters were consolidated on June 13, 2002.

On February 13, 2001, the Board posted an opening for the position of Assistant Superintendent for Administration and Support Services and Director for Curriculum and Instruction. Four individuals applied. The minimum qualifications included, among other things, that the applicant have a valid New Jersey School Administrator's Certificate, a minimum of five years administrative experience in a public/private education setting at Principal's or higher level, and a demonstrated expertise in managing diverse educational programs. Additionally, the posting indicated that each applicant was responsible for providing the

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administrative law judge and has since served as Director, Office of Controversies and Disputes, Department of Education.

appropriate documentation in support of each application prior to the application deadline. The application deadline was March 12, 2001.

The Board contends that Highsmith was recommended first by the interview committee, Farmer was recommended second, and Stephenson was recommended fourth.[2] All four names were submitted to the Superintendent, consistent with Abbott regulations, who then selected a candidate from the submitted names.[3] In accord with the Committee's recommendations, the Superintendent recommended Highsmith to the Board, who was then duly appointed.

Petitioners contend that Highsmith was not in possession of a New Jersey School Administrator's Certificate prior to the March 12, 2001 application deadline. However, petitioners Farmer and Stephenson did possess the requisite certification. It appears that Highsmith may have obtained a Provisional New Jersey School Administrator's Certificate on June 1, 2001, nearly three months following the application deadline date. Despite Highsmith's failure to timely possess the requisite requirements for the position, his appointment was confirmed on June 25, 2001 by the Board.

As a consequence of Highsmith's appointment, Farmer filed a petition challenging Highsmith's "unlawful appointment." Farmer's petition requested that Highsmith's appointment be rescinded and other just and equitable relief, including appointment to the position, be awarded.[4] Stephenson also filed a petition, requesting that the Highsmith appointment be declared null and void and that Stephenson be appointed to the position. Stephenson's petition also sought back pay, front pay interest, damages and reasonable attorney's fees. Since the filing of these petitions, Highsmith has resigned from his position as Assistant Superintendent for Curriculum and Instruction, effective June 30, 2002. The position was restructured as part of a Central Administrative Reorganization and currently remains vacant. The Board contends that the position of assistant superintendent has since been significantly restructured. The job description has been modified, and the position has been separated into two positions.

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[2] The first interview committee ranked the applicants in this manner.
[3] *N.J.A.C.* 6A:24-1.1 – 9.6.
[4] The Board alleges that Farmer's salary would not have increased on account of her receiving the promotion.

The Board has petitioned for summary decision based on the arguments that the Commissioner of Education ("Commissioner") lacks the requisite power to afford petitioners the relief they seek, namely the power to order appointment to the position of assistant superintendent and award monetary damages. Furthermore, the Board contends that the issues presented by the petitioners are now moot, because Highsmith has resigned, Farmer has retired, and the position of Assistant Superintendent has been significantly restructured so that it essentially no longer exists.

Standard for Granting Motion for Summary Decision

Summary decision is available in the administrative process pursuant to *N.J.A.C.* 1:1-12.5, which provides that summary decision is appropriate when:

> the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. When a motion for summary decision is made and supported, an adverse party in order to prevail must be responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding. If the adverse party does not so respond, a summary decision, if appropriate, shall be entered.
>
> [*N.J.A.C.* 1:1-12.5(b).]

The summary decision rule is substantially the same to that of the summary judgment rule provided by the New Jersey Rules of Court, *R.* 4:46-2. *Contini v. Bd. of Ed. of Newark*, 286 *N.J.Super.* 106, 121 (App. Div. 1995) (recognizing that the summary decision standard in administrative proceedings is substantially similar to that of New Jersey Court Rule 4:46-2). *R.* 4:46-2 permits a party to move for summary judgment if:

> the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to judgment or order as a matter of law.
>
> [*R.* 4:46-2.]

The New Jersey Supreme Court in *Brill v. Guardian Life Ins. Co.*, 142 *N.J.* 520 (1995) has indicated that in the analysis of a motion for summary judgment, a motion judge is required to consider "whether the competent evidential material presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged dispute in favor of the non-moving party." *Id.* at 540. Therefore, where a moving party demonstrates by competent evidential material that no genuine and material issue of fact exists, the Court must grant the motion for summary judgment. Similarly, the rules governing administrative proceedings provide that summary decision may be granted if there is "no genuine issue of material fact and the moving party is entitled to prevail as a matter of law." *Borough of Lincoln Park Bd. of Ed. v. Bd. of Ed. of the Town of Boonton*, EDU 5944-02, Initial Decision (April 2, 2003) <http://lawlibrary.Rutgers.edu/oal/search.html>, *modified*, Comm'r. (May 15, 2003) <http://www.state.nj.us/njded/news/info.ntm>. Under *N.J.A.C.* 1:1-12.5(b), the determination to grant summary decision should be based on the papers presented as well as any affidavits filed with the application. *Ibid.*

In my view, in the matter *sub judice*, there are no genuine and material facts at issue and respondent's motion should be granted as a matter of law.

Authority of the Commissioner of Education

The jurisdiction of the Commissioner to hear controversies and disputes arising under school law is set forth in *N.J.S.A.* 18A:6-9, which provides that the Commissioner shall have jurisdiction to hear and determine, without cost to the parties, all controversies and disputes arising under the school laws, excepting those governing higher education, or under the rules of the State Board or of the Commissioner. The Commissioner is charged with the duty of supervising State schools and enforcing the rules prescribed by the State Board. *In the Matter of the Bd. of Educ. of City of Trenton*, 176 *N.J Super.* 553, 563 (1980) (citing *N.J.S.A.* 18A:4-23). "The Commissioner has long had significant responsibility and sweeping remedial powers for enforcing equal protection in the administration of the public education laws." *Balsley v. North Hunterdon Regional Sch. Dist. Bd. of Educ.*, 117 *N.J.* 434, 442 (1990). This is a judicial function, and in reviewing the administrative and managerial acts of boards of education, the

Commissioner is constrained to keep within the proper limits of judicial inquiry. *Boult v. Bd. of Educ. of the City of Passaic*, 1946 *S.L.D.* 7, 11. Generally, if the board of education acts within the authority conferred upon it by law, courts are without power to interfere in its actions or decisions in matters involving the exercise of discretion, in the absence of clear abuse. *Id.* at 12. The Commissioner should not interfere with local boards in the management of their schools unless they violate the law, act in bad faith, or abuse their discretion in a shocking manner." *Id.* at 13. When a school board acts within its authority, its decision is entitled to a presumption of correctness that will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious or unreasonable. *Thomas v. Bd. of Educ. of the Township of Morris*, 89 *N.J.Super.* 327, 332 (App. Div. 1965).

In the present case, the petitioners could have properly requested the Commissioner to review the actions of the Board to determine whether the appointment of Highsmith was arbitrary, capricious, or unreasonable. However, the petitioners, instead, seek to have the Commissioner usurp the power of the Board and award appointment and/or damages for the Board's actions.

The Commissioner Does Not Have the Authority to Order Appointment to a Position.

The Board of Education and not the Commissioner is lodged with the authority to make appointments. The Board has the authority to appoint officers and employees. *N.J.S.A.* 18A:27-4.1 provides that "[a] board of education shall appoint, transfer or remove a certificated or non-certificated officer or employee upon the recommendation of the chief school administrator and by a recorded roll call majority vote of the full membership of the board." The Legislature has expressly vested local school boards with the power to employ, promote, transfer, dismiss, and to adopt appropriate rules in connection therewith, subject to specific statutory provisions. *Dunellen Bd. of Educ. v. Dunellen Educ. Assoc.*, 64 *N.J.* 17, 23 (1973). Case law suggests that the board of education has the *ultimate* authority to promote. *Bd. of Educ. of the Township of North Bergen v. North Bergen Federation of Teachers*, 141 *N.J.Super.* 97, 103 (App. Div. 1976)

(emphasis added); *see also Lally v. Clark Bd. of Educ.*, 96 *N.J.A.R.*2d (EDU) 784, 787 (recognizing the board's "ultimate authority to make appointments").

While the Commissioner is provided broad supervisory power over schools, the authority sought by petitioners is not appropriate in this context. The Commissioner's power appears to be more of a remedial and supervisory nature. It has been recognized that the authority needed by the Commissioner must be sufficient to implement solutions to problems. *Deardon v. Bd. of Educ. of the City of Trenton*, 96 *N.J.A.R.*2d (EDU) 321, 328-29. However, the Commissioner's scope of review is limited to an evaluation of whether the school board has a reasonable basis for their conclusions. *Kopera v. Bd. of Educ. of the Town of West Orange*, 60 *N.J.Super.* 288, 295 (App. Div. 1960). The Commissioner must determine whether the action under review is violative of the law, and if so must then take the proper corrective action. *Id.* at 296. However, the Commissioner should not substitute his own judgment for that of those who made the initial evaluation but, instead, should determine whether they had a reasonable basis for their conclusions. *Ibid.*; *see also Boult v. Bd. of Educ. of the City of Passaic*, 1946 *S.L.D.* 7, 13 (the opinion of the Commissioner states that "it is not the function of the Commissioner in a judicial decision to substitute his judgment for that of the board members on manners which are by statute delegated to the local boards").

The authority of the Commissioner does not comport with the relief sought by the petitioners. In the instant case, the petitioners are not alleging that the Board engaged in discriminatory practices or vindictive termination. Rather they appear to be asking the Commissioner to assume the responsibility for hiring personnel. This request exceeds the statutorily granted authority of the Commissioner and usurps that of the Board of Education. Therefore, the Board's motion for summary decision should be granted.

The Commissioner Lacks the Authority to Award the Payments of any Damages other than Lost Earnings or Restoring an Increment, Which Has Been Improperly Withheld.

The Commissioner has authority to award money damages. However, the Commissioner is limited in the monetary damages that he may award. It has been consistently held that the Commissioner cannot award punitive damages. *Dunn v. Elizabeth Bd. of Educ.*, 96 *N.J.A.R.*2d (EDU) 279, 281 (citing *North Bergen Fed. of Teachers Bd. of Ed. of Bergen*, 1975 *S.L.D.* 461, 467). Additionally, the Commissioner may not award counsel fees or legal costs. *Ibid.* (citing *Balsley v. North Hunterdon Bd. of Ed.*, 117 *N.J.* 434, 442-43 (1990)). However, the Commissioner may award lost earnings or may restore an increment that has been improperly withheld. *Ibid.* (citing *McLean v. Bd. of Ed. of Glen Ridge*, 177 *S.L.D.* 311. 314; *Mith v. Bd. of Ed. of Hamilton*, OAL Dkt. No. EDU 5468-87 *adopted in part and rejected in part on other grounds*, Comm'r. (April 21, 1998)).

In the present case, Farmer seeks back pay for the year that she contends she was unlawfully denied the position. Stephenson, as well, seeks "as a minimum" front pay and back pay for respondents' wrongful conduct. As the facts have been presented, it appears that Farmer was recommended second to Highsmith and Stephenson was ranked last among the four applicants. Therefore, Farmer contends that, but for the unlawful appointment of Highsmith, she would have been appointed to the position of assistant superintendent. Stephenson, on the other hand, does not appear to be alleging that he would have otherwise been appointed. Rather, the money damages he seeks seem to be more punitive in nature. He seeks such damages on account of respondents' "wrongful conduct." As noted, the Commissioner cannot award punitive damages. *Ibid.* (citing *North Bergen Fed. Of Teachers Bd. of Ed. of Bergen*, 1975 *S.L.D.* 461, 467). Therefore, Stephenson is not entitled to any relief, and summary decision should be granted in favor of respondents.

Additionally Farmer has failed to establish that she was entitled to the position. As noted above, the Commissioner lacks the authority to appoint her to the position, and it logically follows that she should not be entitled to back pay. Despite the fact that she was recommended

second to Highsmith by the interview committee, she was not necessarily entitled to appointment based entirely on her rank within the applicants. Although the Board is obligated to consider the recommendation of the superintendent, it is not bound by that recommendation. *Rotondo v. Board of Education of Carlstadt*, 92 *N.J.A.R.*2d (EDU) 376, 377; *see also Primka v. Jamesburg Borough Bd. of Educ.*, 93 *N.J.A.R.*2d (EDU) 91, 93 (finding that the Board if not bound by the recommendation of the superintendent). Therefore, Farmer has failed to sufficiently show that she would have been appointed but for Highsmith's appointment. Moreover, the Board contends that she would not have earned a higher salary than she did in her previous position even if she had been appointed to the position. As such, respondent's motion for summary decision should be granted.

The Issues Presented by Petitioners Are Now Moot.

The Board contends that this matter should be dismissed because it is now moot based on the fact that Farmer has retired, Highsmith has resigned from the position, and the position has been significantly restructured and essentially no longer exists. An action is moot when it no longer presents a justiciable controversy because the question has become academic or when a determination of the controversy will have no practical effect. *Victoria v. Woodbridge Bd. of Educ.*, 1982 *S.L.D.* 1. It is well established that questions that have become moot or academic prior to judicial scrutiny generally have been held to be an improper subject for judicial review. *Anderson v. Sills*, 143 *N.J.Super.* 432, 437 (Ch. Div. 1976). The *Anderson* court reasoned that courts will not decide cases in which the issue is hypothetical and a judgment cannot grant relief. *Ibid.* The court went on the state that it is the premise of the Anglo-American judicial system that a contest engendered by genuinely conflicting self-interests of the parties is best suited to developing all relevant material before the court; therefore, when a change in circumstances occurs that creates doubt concerning the immediacy of the controversy, courts will ordinarily dismiss cases as moot. *Ibid.*

Similarly, the Commissioner of Education also does not decide moot cases. *J.B. v. Asbury Park Bd. of Ed.*, 1988 *S.L.D.* 2303; *Weehawken Educ. Assn. v. Weehawken Educ. Assn. v. Weehawken Bd. of Ed.*, 1978 *S.L.D.* 924. An event renders a controversy moot where it

precludes a court from granting effective relief. 2 *Am. Jr. 2d* Administrative Law 524 (6th ed. 1990).

In the present matter, the Board argues that the action is moot because there is no controversy. Highsmith no longer occupies the position of assistant superintendent. Without the authority to appoint one of the petitioners to the position, the petitioners' remedy would otherwise be removal, which would be unnecessary at this point. Furthermore, petitioner Farmer has since retired. Even if the Commissioner had the requisite authority to make such an appointment, Farmer is unavailable to be appointed to the position, and Stephenson has failed to establish any concrete entitlement to the position. Finally, the Board has changed the position of assistant superintendent, modifying the job description and separating it into two distinct positions. *See Nichols v. Bd. of Educ. of Jersey City*, 65 *N.J.Super.* 45, 49 (1961) (finding that petitioner's request for appointment or reinstatement could not be ordered because the position was presently non-existent and the issue was therefore moot). [5]

Finally, petitioner's challenge to the contention that these issues are moot on account of a public policy argument should be denied. Petitioners have failed to show that respondents engaged in any actual wrongdoing. The fact remains that Highsmith was appointed to a position that he apparently was not qualified to hold. However, the circumstances surrounding this appointment are unclear, and petitioners have failed to substantiate any allegations of intentional evasion of certification requirements.

Based upon the foregoing, I **CONCLUDE** that the respondent, Camden City Board of Education, has established that there are no genuine issues of material fact and that it is entitled to prevail as a matter of law. Accordingly, its motions for summary decision in these matters be and are hereby **GRANTED**. The Commissioner does not have the authority to appoint either petitioner to the position, nor does he have the authority to award the monetary damages sought by the petitioners. Finally, the issues presented by both petitioners are moot, because there is no justiciable controversy.

[5] The Commissioner could consider whether the restructuring of the position by the Board was arbitrary, capricious, or unreasonable. *Thomas v. Bd. of Educ. of the Township of Morris*, 89 *N.J.Super.* 327, 332 (App. Div. 1965). However, petitioners are not contending that the restructuring of the position was inappropriate action by the Board.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

11/17/03
DATE

Steven Reback
STEVEN C. REBACK, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

11/17/03
DATE

Mailed to Parties:

NOV 21 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cmo

DR. WILMA J. FARMER,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY, AND ANNETTE D. KNOX, SUPERINTENDENT,	:	
RESPONDENT,	:	COMMISSIONER OF EDUCATION
AND	:	DECISION
PAUL STEPHENSON,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY, AND ANNETTE D. KNOX, SUPERINTENDENT, AND: CHARLES HIGHSMITH,	:	
RESPONDENTS.	:	

The record of this consolidated matter and the Initial Decision of the Office of Administrative Law have been reviewed. In accordance with *N.J.A.C.* 1:1-18.4, the Board submitted an "exception" requesting correction of the Administrative Law Judge's (ALJ) statement, at page 4 of the Initial Decision, that Charles Highsmith was "confirmed" by the Board on June 25, 2001. The Board notes that, although Highsmith had been recommended by the Superintendent, only the Board can appoint, and the Board's action in June 25, 2001 was its

first and only official appointment of Highsmith, rather than the "confirmation" of an earlier Board action. Petitioners did not reply to the Board's submission.[1]

Upon careful and independent review of the record, the Commissioner concurs with the ALJ that summary decision is properly granted in favor of the Board. Accordingly, the Petitions of Appeal filed in this matter are dismissed for the reasons expressed in the Initial Decision.[2]

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 12/23/03

Date of Mailing: 12/30/03

[1] Petitioner Stephenson's and Respondent Highsmith's exceptions were untimely filed pursuant to *N.J.A.C.* 1:1-18.4(a), in that the Initial Decision was mailed to the parties on November 21, 2003 and their exceptions were filed on December 15, 2003 and December 19, 2003, respectively, outside the 13-day period prescribed by regulation. Such exceptions, therefore, were not considered in the Commissioner's determination of this matter.

[2] To the extent the Initial Decision might suggest otherwise, the Commissioner clarifies that determination of Highsmith's qualification is unnecessary to resolution in this matter and is not reached herein.

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

IN THE MATTER OF WENTFORD GAINES,:

JERSEY CITY COMMUNITY CHARTER	:	COMMISSIONER OF EDUCATION
SCHOOL, BOARD OF TRUSTEES,	:	DECISION
HUDSON COUNTY.	:	
_____	:	

December 23, 2003

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	
	:	**RESOLUTION**
WENTFORD GAINES	:	
Jersey City Community Charter School	:	**SEC Docket No.: T36-03**
Board of Trustees	:	
Hudson County	:	
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-33 requires new board members to attend training within one year of election or appointment to the board to gain the skills and knowledge necessary to serve as a school board member; and

WHEREAS, Wentford Gaines was appointed to the Jersey City Community Charter School in December 2001; and

WHEREAS, the New Jersey School Boards Association (NJSBA) advises prospective board members of the training requirement in the "candidate kit"; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on January 3, 2003 and February 19, 2003; and

WHEREAS, the NJSBA conducted seven training sessions between December 2001 and April 2003 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes;* and

WHEREAS, the last training session to fulfill the requirement was held in March 2003; and

WHEREAS, the Commission issued an Order against Mr. Gaines June 9, 2003, via regular and certified mail, directing him to Show Cause why he had not attended training up until that time; and

WHEREAS, the Commission granted an extension for similarly situated board members to attend one of the October training sessions; and

WHEREAS, Respondent responded to the Order by letter stating that he registered to attend the October 21, 2003 training session in Atlantic City; and

WHEREAS, Mr. Gaines did not attend the training in October 2003; and

WHEREAS, the Commission notified him by letter dated June 12, 2003, that the Commission would discuss this matter at its October 28, 2003 meeting, and if he did not attend training by that time, he could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission finds that this failure to attend board member training from December 2001 to April 2003 constitutes a violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds suspension to be the appropriate penalty for failure to attend through October; and

WHEREAS, the Commission finds that if Mr. Gaines fails to attend by the end of **January 2004**, the Commission finds that it would be appropriate to have him removed from the board;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Mr. Gaines violated N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education suspend him until he attends, but remove him from the board if he fails to attend one of the January 2004 training sessions.

Dated: October 29, 2003

Paul C. Garbarini, Chairperson

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed, the board member may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 River View Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on October 28, 2003.

Lisa James-Beavers, Executive Director

(psc/ljb/m: ethics/trainingresT36-03.doc)

AGENCY DKT. NO. 436-11/03

IN THE MATTER OF WENTFORD GAINES,:		
JERSEY CITY COMMUNITY CHARTER	:	COMMISSIONER OF EDUCATION
SCHOOL, BOARD OF TRUSTEES,	:	DECISION
HUDSON COUNTY.	:	
_____:		

Whereas, the School Ethics Commission (Commission) has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named Board member from office for failure to attend the Board member training sessions required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-1.6; and

Whereas, *N.J.S.A.* 18A:12-33 requires new school board members to attend training within one year of election or appointment to the board to gain skills and knowledge necessary to serve as a school board member; and

Whereas, the above-named Board member was appointed to the Jersey City Community Charter School in December 2001; and

Whereas, the above-named Board member was duly apprised of the training requirement via the New Jersey School Boards Association's (NJSBA) "candidate kit," together with correspondence to him dated January 3, 2003 and February 19, 2003; and

Whereas, the NJSBA conducted seven training sessions between December 2001 and April 2003 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

Whereas, the last training session to fulfill his requirement was held in March 2003; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.6(e), on June 9, 2003, the Commission issued an Order to Show Cause why he had not attended a training up until that time; and

Whereas, the Commission granted an extension for similarly situated board members to attend one of the October 2003 training sessions; and

Whereas, the above-named Board member responded to the order by letter stating that he had registered to attend the October 21, 2003 training session in Atlantic City; and

Whereas, the above-named Board member did not attend the training in October 2003; and

Whereas, the Commission notified him by letter dated June 12, 2003 that it would discuss this matter at its October 28, 2003 meeting and, if he did not attend the training session by that time, he could be found in violation of the School Ethics Act and receive a penalty up to removal; and

Whereas, the Commission finds that this failure to attend board member training from December 2001 until April 2003 constitutes a violation of *N.J.S.A.* 18A:12-33; and

Whereas, at its meeting on October 28, 2003, the Commission recommended that the above-named Board member be suspended from the Board until he attends the January 2004 session and removed if he fails to attend the January 2004 session, and memorialized such decision through a resolution forwarded to the Commissioner of Education, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, on November 12, 2003, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to said resolution; and

Whereas, neither the above-named school official nor anyone on his behalf submitted a response for the Commissioner's consideration; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the Commission and concurs with and adopts as his own the recommendations of the Commission; now therefore

IT IS ORDERED that the above-named Board member is suspended from office as of the filing of this decision and shall remain suspended pending completion of the requisite training, and, in the event he fails to complete the training session in January 2004, the above-named Board member shall be summarily removed from office as of that date.*

COMMISSIONER OF EDUCATION

Date of Decision: 12/23/03

Date of Mailing: 12/31/03

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

686-03

686-03SEC

IN THE MATTER OF CHAWN	:	
CHARLTON, GATEWAY CHARTER	:	COMMISSIONER OF EDUCATION
SCHOOL BOARD OF TRUSTEES,	:	DECISION
HUDSON COUNTY.	:	
	:	

December 23, 2003

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	
	:	**RESOLUTION**
CHAWN CHARLTON	:	
Gateway Charter School	:	**SEC Docket No.: T32-03**
Board of Trustees	:	
Hudson County	:	
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-33 requires new board members to attend training within one year of election or appointment to the board to gain the skills and knowledge necessary to serve as a school board member; and

WHEREAS, Chawn Charlton was appointed to the Gateway Charter School in June 2001; and

WHEREAS, the New Jersey School Boards Association (NJSBA) advises prospective board members of the training requirement in the "candidate kit"; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on January 3, 2003 and February 19, 2003; and

WHEREAS, the NJSBA conducted eight training sessions between June 2001 and April 2003 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes;* and

WHEREAS, the last training session to fulfill the requirement was held in March 2003; and

WHEREAS, the Commission issued an Order against Ms. Charlton on June 9, 2003, via regular and certified mail, directing her to Show Cause why she had not attended training up until that time; and

WHEREAS, the Commission granted an extension for similarly situated board members to attend one of the October training sessions; and

WHEREAS, Respondent provided no response to the Order; and

WHEREAS, the Commission notified her by letter dated June 12, 2003, that the Commission would discuss this matter at its October 28, 2003 meeting, and if she did not attend training by that time, she could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission finds that this failure to attend board member training from June 2001 to April 2003, well beyond the one year required by law, constitutes a violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds suspension to be the appropriate penalty for failure to attend through October; and

WHEREAS, the Commission finds that if Ms. Charlton fails to attend by the end of **January 2004**, the Commission finds that it would be appropriate to have her removed from the board;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Ms. Charlton violated N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education suspend her until she attends, but remove her from the board if she fails to attend one of the January 2004 training sessions.

Dated: October 29, 2003

Paul C. Garbarini, Chairperson

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed, the board member may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 River View Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on October 28, 2003.

Lisa James-Beavers, Executive Director

(psc/ljb/m: ethics/trainingresT31-03.doc)

AGENCY DKT. NO. 431-11/03

IN THE MATTER OF CHAWN	:	
CHARLTON, GATEWAY CHARTER	:	COMMISSIONER OF EDUCATION
SCHOOL BOARD OF TRUSTEES,	:	DECISION
HUDSON COUNTY.	:	
	:	

Whereas, the School Ethics Commission (Commission) has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named Board member from office for failure to attend the Board member training sessions required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-1.6; and

Whereas, *N.J.S.A.* 18A:12-33 requires new school board members to attend training within one year of election or appointment to the board to gain skills and knowledge necessary to serve as a school board member; and

Whereas, the above-named Board member was appointed to the Gateway Charter School in June 2001; and

Whereas, the above-named Board member was duly apprised of the training requirement via the New Jersey School Boards Association's (NJSBA) "candidate kit," together with correspondence to her dated January 3, 2003 and February 19, 2003; and

Whereas, the NJSBA conducted eight training sessions between June 2001 and April 2003 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

Whereas, the last training session to fulfill the requirement was held in March 2003; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.6(e), on June 9, 2003, the Commission issued an Order to Show Cause why she had not attended a training up until that time; and

Whereas, the Commission granted an extension for similarly situated board members to attend one of the October 2003 training sessions; and

Whereas, the above-named Board member provided no response to the Order; and

Whereas, the Commission notified her by letter dated June 12, 2003 that it would discuss this matter at its October 28, 2003 meeting and, if she did not attend the training session by that time, she could be found in violation of the School Ethics Act and receive a penalty up to removal; and

Whereas, the Commission finds that this failure to attend board member training from June 2001 until April 2003 constitutes a violation of *N.J.S.A.* 18A:12-33; and

Whereas, at its meeting on October 28, 2003, the Commission recommended that the above-named Board member be suspended from the Board until she attends a January 2004 session and removed if she fails to attend by the end of January 2004, memorializing such decision through a resolution forwarded to the Commissioner of Education, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, on November 12, 2003, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to said resolution; and

Whereas, no response was submitted; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the Commission and concurs with and adopts as his own the recommendations of the Commission; now therefore

IT IS ORDERED that the above-named Board member is suspended from office as of the filing of this decision and shall remain suspended pending completion of the requisite training, and, in the event she fails to complete a training session during January 2004, the above-named Board member shall be summarily removed from office as of the date of the final session offered that month.*

COMMISSIONER OF EDUCATION

Date of Decision: 12/23/03

Date of Mailing: 12/31/03

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

687-03

BLOOMFIELD EDUCATION ASSOCIATION, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY, : DECISION

RESPONDENT. :

SYNOPSIS

Petitioning Education Association alleged the Board violated *N.J.S.A.* 18A:28-8 when it unilaterally changed the retirement/resignation date of one of its members, Benedict Salamone, from October 1, 2001 to September 4, 2001, thus depriving the member of his full salary for the month of September. Salamone had notified the Board well in advance of the 60-day written notification requirement.

The ALJ determined that there were no cases that specifically addressed the problem as factually laid out in this matter. Once formal action was taken by the Board to accept the retirement/resignation date, only very unusual circumstances would allow rescission. The ALJ concluded that by unilaterally altering the date on the basis of alleged educational continuity, the Board did deprive Salamone of his full salary for the month of September, in essence reducing his income by having him accept a pension payment in lieu of salary. The ALJ found as a matter of equity Salamone was entitled to the difference between his pension payment for the month of September 2001 and his full salary for the month from the Board.

The Commissioner adopted the Initial Decision with modification, finding resolution compelled as a matter of law. The Commissioner determined that unilaterally changing petitioner's termination of active employment date, thereby purporting to retire him prematurely and involuntarily, was tantamount to an unlawful discharge. The Commissioner noted that *N.J.S.A.* 18A:28-8, governing the resignation of tenured individuals, must be read *in pari materia* with *N.J.S.A.* 18A:6-10, which specifies the circumstances under which a tenured individual may be dismissed. The Commissioner directed the Board to pay Salamone his full salary for the month of September 2001, less the amount of pension payment received by him for that month.

December 29, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

CROSS MOTIONS FOR SUMMARY DECISION

OAL DKT. NO.: EDU 8308-01

AGENCY DKT. NO. 466-11/1

BLOOMFIELD EDUCATION ASSOCIATION

Petitioner,

v.

BOARD OF EDUCATION OF BLOOMFIELD,

Respondent.

Sanford Oxfeld, Esq., for petitioner
(Oxfeld & Cohen, P.C., Attorneys)

Joseph DeFuria, Esq., for respondent
(Gaccione, Pomaco & Beck, Attorneys)

BEFORE **JEFFREY A. GERSON**, ALJ:

STATEMENT OF CASE

Benedict Salamone, a teacher in the Bloomfield School District, decided, after 40 years of service to resign his position effective October 1, 2001. He notified the Board in writing by letter dated July 9, 2001 that he intended to retire on September 30, 2001.

At its meeting of July 17, 2001, the Board of Education of Bloomfield excepted and approved Salamone's resignation and resignation date.

The Board of Education of Bloomfield on August 28, 2001 unilaterally changed Salamone's retirement date from September 30, 2001 to September 4, 2001.

Mr. Salamone's argues that by unilaterally moving up his retirement date, the Board violated his tenure rights since he was deprived of his full salary for the month of September.

PROCEDURAL HISTORY

This matter was received by the Office of Administrative Law on or about November 29, 2001 and cross-motions for Summary Decision were received early in January 2003.

The Petition of Appeal as originally filed was in three Counts of which only Count 1 remains contested. Count 2 is dependent upon the argument in Count 1 that a teaching staff member cannot have his tenure rights violated unilaterally while Count 3 involved a different employee and has been resolved.

FACTS

The pertinent facts in this matter are not in significant dispute.

Benedict Salamone began his employment with the Bloomfield Board of Education in September 1961. During the entire time of his employment, he taught either English or Reading.

By letter dated July 9, 2001, Mr. Salamone wrote to Thomas Dowd, the Superintendent of Schools in Bloomfield that he would be retiring as of September 30, 2001. His notification was approved by the Board on July 17, 2001. Mr. Salamone intended to return to his job on September 4, 2001 but having returned from vacation on that day, the received notification that the Board had approved his resignation but his resignation was to be effective on September 1, 2001.

The letter to Mr. Salamone indicated that the Board at its August 28, 2001 meeting had changed his resignation date to accommodate a replacement teacher who was available as of September 5, 2001.

Telephone conversations and e-mail exchanges did not alter the Board's position.

Mr. Salamone went to the Division of Pensions in Trenton and requested that his retirement be effective August 1, 2001 to prevent a lapse in his health insurance. After an unsuccessful grievance arbitration, a petition of appeal was filed with the Department of Education and subsequently forwarded to the Office of Administrative Law for disposition. Petitioner and respondent agreed that the sole issue presented in this matter is the appropriateness/legality of the Board of Education unilaterally changing Salamone's requested resignation date.

THE LAW

Petitioner rightfully points out that *N.J.S.A.* 18A:28-8 requires only that he gives sixty day written notice of his intention to relinquish his position. The statute reads in full as follows:

> Any teaching staff member, under tenure of service, desiring to relinquish his position should give the employing Board of Education at least sixty-days written notice of his intention, unless the Board shall approve of a release on shorter notice and if he fails to give such a notice, he shall be deemed guilty of unprofessional conduct and the Commissioner may suspend the certificate for not more than one year.

Salamone's letter exceeded the sixty-day requirement and was accepted by the Board of Education.

The Board concedes that Salamone's resignation with a date of September 30, 2001 was approved.

The Board's position in this matter is as follows:

". . . Continuity of classroom instruction was a compelling educational interest, and this was maintained by hiring a replacement for Mr. Salamone to begin at the commencement of the school year, in September, rather than having Mr. Salamone teach the class for one month and to then immediately replace him as of October 1st with a new teacher. The Board's goal of maintaining educational continuity in the classroom was in the best interest of the children, and was not an attempt to benefit the Board in any way, in its capacity as an employer."

Petitioner contends that *N.J.S.A.* 18A:6-10 which reads in pertinent part as follows:

> No person shall be dismissed or reduced in compensation (if he is tenured) except for inefficiency, incapacity, unbecoming conduct, or other just cause and then only after a hearing held pursuant to the sub-article by the Commission, or a person appointed by him to act in his behalf after a written charge or charges, of the cause or causes of the complaint, shall be profit against such persons signed by the person or persons making the same, who may or may not be a member or members of the Board of Education and filed and proceeded upon as in this sub-article provided.

The essence of the arguments by both sides is that, according to petitioner, there is no restriction on his choice of retirement date although the Board believes that the educational continuity of the students and their best interests allows the Board to in fact unilaterally alter Mr. Salamone's chosen retirement date.

DISCUSSION

The Collective Bargaining Unit between the Bloomfield Education Association of which Salamone is a member and the Bloomfield Board of Education is silent with respect to acceptance or alteration of a submitted retirement date.

There are no cases which specifically address the problem as factually laid out in this matter.

The sixty-day notice required pursuant to *N.J.S.A.* 18A:28-8 is undoubtedly intended to provide the Board with an adequate amount of time to seek a replacement for the retiring or resigning teaching staff member. Although the statute allows for a shortening of the sixty-day time period for the acceptance of a notice, it amounts to no more than a restriction on the conduct of the tenured teacher for it provides a penalty in the event the notice is not timely. It does not however, preclude a retirement nonetheless nor does it mandate any action by the Board of Education which if not undertaken would warrant a penalty.

There are some general rules culled from prior cases that afford some guidance in this matter.

In *Hanley v. Board of Education of Township of East Brunswick*, 1988 *S.L. D.* 1149 read in conjunction with *In The Matter of Fisher v. The Board of Education of City of East Orange* 1988 *S.L.D.* 31 confirmed that an effective resignation must be unambiguous and voluntary to end up in a relinquishment of the position.

As a general rule, an employee may rescind a resignation prior to its formal acceptance by the Board of Education. *Kozak v. Board of Education of Waterford Township*, 1976 *S.L.D.* 633. Formal acceptance does require a motion or resolution by the Board. *Lippincot v. Board of Education of the Borough of Riverton*, 1990 *S.L.D.* 639.

Once formal action is taken by the Board only very unusual circumstances will allow the resignation to be rescinded. *Evaul v. Board of Education of the City of Camden*, 35 *N.J.* 244 (1961).

The Board's argument in this matter would have been more compelling had they not accepted Salamone's notice of retirement. The notice given by Salamone was in accordance with his statutory responsibility, which in theory and actually in practice gives the Board sufficient time to seek a replacement. The Board not only sought the replacement but once they found the replacement, they "unilaterally" altered their agreement with Salamone with not even the slightest consideration of how that alteration may affect Salamone. Equitably speaking, I see little to refute the argument that this conduct by the Board was patently unfair. It is however, not prohibited by statute or regulation nor precluded by agreement in the Collective Bargaining Contract.

Anger, aggravation, irritation and disappointment experienced by Salamone are understandable responses but not a basis for compensation in this matter. However, there is some validity to the creative argument that Salamone has lost the difference between what he received in pension for the month of September and what he would have received in salary for that month had his retirement date not been unilaterally altered. No charges, no hearing, no notice, no loss of salary. In a nutshell, that is Salamone's contention with respect to the purported violation of his tenure rights.

If the Board did not want to accept Salamone's purposed retirement date contained in his notice, they could have at very minimum discussed it with him at the time he submitted. The interest of the children and the continuity of their education were no different then than it was when they found a replacement for Mr. Salamone. Although it might seem quite logical to require a teacher's retirement to take place at the least disruptive time to the students, that most likely being in September, or at the end of the school year, there is no statute, regulation or agreement mandating such logic.

The facts of this case as applied to Mr. Salamone and the Board are situationally unique. The principal that the Board can unilaterally move up a retirement date would fall in the category of ludicrous if examined from the standpoint of an attempt by a Board to

move up a retirement date for example, six-months. An analysis of a Board's attempt to so alter a retirement request leads to the conclusion that it is simply inequitable. Salamone followed all of the mandates required of him in order to retire. He has no obligation to either explain his chosen retirement date nor give a reason for why he chose it. Most disturbing in the factual context of this matter, is that the Board did accept not only Salamone's resignation, but also the date that he chose. By unilaterally altering that date, with what appears to be a pretextual contention that educational continuity would benefit from the unilateral change, they did deprive Salamone of his full salary for the month of September, in essence reducing his income by having him accept a pension payment in lieu of salary.

The Board's action was equitably wrong. A wrong shall have a remedy.

ORDER

It is so **ORDERED** that the Board of Education of Bloomfield should pay to Benedict Salamone the difference between his pension payment for the month of September 2001 and his full salary for the month.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

NOV 18 03

DATE

JEFFREY A. GERSON, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

11/18/03

DATE

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

NOV 19 2003

DATE

OFFICE OF ADMINISTRATIVE LAW

sej

OAL DKT. NO. EDU. 8308-01
AGENCY DKT. NO. 466-11/01

BLOOMFIELD EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The Board's exceptions and petitioner's reply thereto were filed in accordance with the provisions of *N.J.A.C.* 1:1-18.4.

The Board's exceptions charge that the Administrative Law Judge's (ALJ) determination in this matter was premised solely on "sympathy" for Mr. Salamone because he found the result here "inequitable and unfair." (Board's Exceptions at 1) However, as the ALJ recognized, there is no law, regulation or bargaining agreement which prohibited the Board's actions in this regard. The Board argues that it is the responsibility of the OAL to interpret and apply the laws of the State. The Board's actions here were not violative of any law or regulation. To the contrary, the Board asserts, *N.J.S.A.* 18A:28-8, which was enacted to protect boards of education by requiring teachers to provide sufficient notice of their intent to resign/retire so as to permit boards to secure replacements, specifically authorizes such action by a board.[1] As such, the Board urges the Commissioner to reverse the decision of the OAL. (*Id.* At 2)

[1] The Commissioner notes that *N.J.S.A.* 18A:28-8., **Notice of intention to resign required,** specifies:

In reply, petitioner contends that the fundamental issue to be resolved here "is the ability of a Board of Education to assign a termination date for a tenured teacher, without the teacher's consent and without the filing of tenure charges." (Petitioner's Reply Exceptions at 2) Petitioner charges that the Board's reliance on language in *N.J.S.A.* 18A:28-8 in support of its action is misplaced, professing

> [c]learly the phrase indicating that the Board may approve release on shorter notice contemplates that the individual giving the notice must first have requested a period shorter than the 60 days set for[th] in the statute. It is the Board of Education's prerogative to then "approve" a release on shorter notice if it so desires. If the Board does not so approve, it can seek to have the teacher's certification suspended for up to one year. It must be emphasized that the statute does not give the Board of Education the right to "grant" release on shorter notice. In short, if the teacher makes a request to resign with shorter notice, the Board of Education has the right to either approve or not approve, but the statute in no way contemplates the Board of Education of its own accord giving a teacher a shorter period of notification than the teacher requested. (Petitioner's Reply Exceptions at 2-3)

Here, petitioner argues, Mr. Salamone submitted notification of his intention to leave the District on October 1, 2001, by letter dated July 9, 2001, in full compliance with the requisite statutory notification period. The Board accepted such notification, pursuant to its terms, on July 17, 2001. At no time did Mr. Salamone request a reduced notification period but, rather, the Board, subsequently, unilaterally changed his termination date. Petitioner contends that the impropriety of such an action is readily apparent when *N.J.S.A.* 18A:28-8, which is solely applicable to tenured individuals, is read *in pari materia* with *N.J.S.A.* 18A:6-10, **Dismissal and**

> Any teaching staff member, under tenure of service, desiring to relinquish his position shall give the employing board of education at least 60 days written notice of his intention, unless the board shall approve of a release on shorter notice and if he fails to give such notice he shall be deemed guilty of unprofessional conduct and the commissioner may suspend his certificate for not more than one year.

reduction in compensation of persons under tenure in public school systems, which, in pertinent part, specifies:

> [n]o person shall be dismissed or reduced in compensation [if he is tenured] except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to the sub-article, by the Commissioner, or a person appointed by him to act in his behalf, after a written charge or charges, of the cause or causes of the complaint, shall be preferred against such person, signed by the person or persons making the same, who may or may not be a member or members of the Board of Education, and filed and then proceeded upon as in this sub-article provided.
> (Petitioner's Reply Exceptions at 4)

Such an examination, petitioner opines, evidences that there are only two ways that a board of education and a tenured teacher can permanently sever their employment relationship, *i.e.*, the tenured teaching staff member can submit a letter of resignation pursuant to *N.J.S.A.* 18A:28-8 or the board can file tenure charges against the teaching staff member pursuant to *N.J.S.A.* 18A:6-10. (*Ibid.*) As it is undisputed that Mr. Salamone provided the requisite notice, the law is clear that the only way he could have been forced to leave his employment is by the filing of tenure charges, which never happened in this matter. (*Id.* At 7) Petitioner, therefore, submits that the decision of the ALJ should be affirmed.

Upon his full and independent review of the record, Initial Decision and the parties' exception arguments, while the Commissioner agrees with and adopts the ALJ's determination that the Board improperly deprived petitioner of his full salary for the month of September 2001, he provides the following modification. Notwithstanding that there is no statutory provision which specifically addresses the effect of retirement/resignation notifications and that prior case law deals with situations where individuals sought, under various circumstances, to rescind their retirement/resignation notification subsequent to acceptance of such notifications by their boards of education rather than the question of unilateral action by a

board as occurred here, the Commissioner concludes that foundational precepts contained in these prior decisions of the Commissioner compel the outcome of this case as a matter of law.

Initially, it is well-established in school law that in the absence of statutory provisions dealing with the effect of resignations and their rescission or modification, principles of contract law are applicable. *Cutro v. Hazlet Township Board of Education*, 94 *N.J.A.R.* 2d (EDU) 402, *affirmed with modification* by the State Board of Education, 97 *N.J.A.R.* 2d (EDU) 557. The provisions of *N.J.S.A.* 18A:28-8 require tenured teaching staff members desiring to relinquish their position to give the employing board of education written notice of their intent to resign at least 60 days prior to their intended departure date. It is by now well recognized that upon acceptance of that letter of resignation/retirement by the board the teaching staff member does not have a right to unilaterally rescind the resignation. *See F. Rupert Belles v. Wayne Township Board of Education*, 1938 *S.L.D.* 556; *Kozak v. Waterford Township Board of Education*, 1976 *S.L.D.* 633; *Cutler v. Board of Education of the Township of Parsippany-Troy Hills*, 1990 *S.L.D.* 725. Ordinary principles of contract law compel the conclusion that the Board is similarly bound by the accepted terms of the resignation. Thus, petitioner's tendered notification of retirement, by letter dated July 9, 2001, with an effective date of October 1, 2001, was legally binding on both parties upon acceptance of its proffered terms by the Board on July 17, 2001, and could not thereafter be unilaterally rescinded or modified. *See Cutro,* supra; *Lisette R. Delgado v. BOE of the City of Union, Hudson County*, 93 *N.J.A.R.* 2d (EDU) 744; *Ronald Fischer v. Board of Education of the City of East Orange, Essex County*, 1988 *S.L.D.* 31. Therefore, the Board's subsequent action on August 28, 2001, unilaterally changing petitioner's termination of active employment date, thereby purporting to retire him prematurely and involuntarily, was tantamount to an unlawful discharge.

The Commissioner specifically rejects the Board's contention that *N.J.S.A.* 18A:28-8 provided authorization for its August 28 action. Rather, he concurs with petitioner that *N.J.S.A.* 18A:28-8, governing the resignation of tenured individuals, must be read *in pari materia* with *N.J.S.A.* 18A:6-10, which specifies the circumstances under which a tenured individual may be dismissed. To find otherwise would render meaningless tendered notification of retirement/resignation and the Board's acceptance thereof, as the Board would be free to unilaterally alter the agreement prior to the effective date, thereby serving to eviscerate the tenure protections guaranteed these individuals by law.

Accordingly, the Initial Decision of the OAL is adopted as modified herein. The Board is hereby directed to pay Mr. Salamone his full salary for the month of September 2001, less the amount of pension payment received by him for that month.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 12/29/03

Date of Mailing: 12/31/03

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

688-03

IN THE MATTER OF THE TENURE	:	
HEARING OF JOHN CROWELL,	:	
SCHOOL DISTRICT OF THE CITY	:	COMMISSIONER OF EDUCATION
OF TRENTON, MERCER COUNTY.	:	DECISION
	:	

December 23, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 4580-02

AGENCY DKT. NO. 192-6/02

CITY OF TRENTON BOARD
OF EDUCATION, MERCER COUNTY,

Petitioner,

v.

JOHN CROWELL

Respondents.

Thomas W. Sumners, Jr., Esq., for petitioner (Sumners George, attorneys)
Michael T. Barrett, Esq., for respondent (Bergman & Barrett, attorneys)

Record Closed: November 5, 2003 Decided: November 5, 2003

BEFORE **ROBERT S. MILLER**, ALJ:

This matter was transmitted to the Office of Administrative Law on July 18, 2002, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 5, 2003
DATE

ROBERT S. MILLER, ALJ

Receipt Acknowledged:

November 12, 2003
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 13 2003

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

tmp

SUMNERS GEORGE
A Professional Corporation
849 West State Street
Trenton, NJ 08618
(609) 393-6604
Attorneys for Petitioner, Trenton Board of Education

	: BEFORE THE COMMISSIONER OF EDUCATION, STATE OF NEW JERSEY
IN THE MATTER OF TENURE CHARGES AGAINST JOHN CROWELL, BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY	: AGENCY DOCKET NO. 192-6/02 : OAL DOCKET NO. EDUTH 4580-02S
	: ***SETTLEMENT AGREEMENT***

WHEREAS, this Settlement Agreement is entered into by and between the Petitioner, Board of Education of the City of Trenton, Mercer County, New Jersey, and the Respondent, John Crowell.

WHEREAS, the Respondent is a tenured teacher within the meaning of the education Laws and regulations covering the State of New Jersey employed by the Petitioner. On June 17, 2002, the Petitioner certified tenure charges against the Respondent seeking his dismissal from his teacher's position. The tenure charges were filed by the Petitioner with the Commissioner of Education's office on June 28, 2002. On July 12, 2002, the Respondent filed an Answer to the tenure charges denying the allegations set forth in the tenure charges.

WHEREAS, on July 18, 2002, the tenure charges were transmitted by the Commissioner to the Office of Administrative Law and assigned to Administrative Law Judge Robert Miller to conduct a plenary hearing. The hearing was commenced on April 23, 2003 before ALJ Miller and a settlement conference was conducted between the parties resulting in the within agreement.

WHEREAS, the tenure charges against the Respondent involve the following three separate incidents which occurred during the 2000-2001 and 2001-2002 school years:

1. On June 11, 2001, it is alleged that Trenton Central High School student, Tameka Jones, after receiving her failing grade and the possibility that she might not graduate, told Respondent that she would do anything to increase her grade. Respondent replied, "Would you have sex with me every day?" Respondent acknowledges that he made the statement but it was intended to be a joke, albeit an inappropriate joke. There is only one student who is available to testify regarding this statement and she has acknowledged in her statement, and it would be confirmed in her testimony, that Respondent may have been joking.

2. On January 3, 2002, it is alleged that Respondent forcibly removed the headband of a student and used it to wipe the chalkboard. It is further alleged that when the student attempted to retrieve the headband, the Respondent kicked him several times in front of other students. Respondent claims that he did not forcibly remove the headband. He also claims that when the student grabbed a calculator from his shirt pocket, he grabbed the student's hand to prevent his pocket from tearing and in response, the student kicked him in the ankle. Respondent claims that he attempted to defend himself by putting his foot out to stop the student from kicking him. The student who claimed to be the victim of Respondent's conduct is not available to testify. In addition, only one of three other possible witnesses is available to testify.

3. On February 13, 2002, it is alleged that the Respondent kneed a student three times when she returned to the classroom after being dismissed for being disruptive. Respondent claims that he never kicked the student with any part of his body but as she attempted to punch him, he lifted his knee for protection. A disorderly conduct complaint was filed against Respondent by the student's mother in Trenton Municipal Court. A

hearing was conducted and a Municipal Court judge dismissed the complaint based upon his finding that the victim's story was not credible and that Respondent's action was done in self defense. Although the student victim is available to testify, there are no other witnesses available to substantiate her allegations.

WHEREAS, the petitioner feels this settlement is appropriate because the strength of it's case may be effected by the unavailability of many of the witnesses as set forth above who it intended to produce at the hearing and that a municipal court trial related to the above mentioned February 13, 2002 charge alleging assault against a student resulted in a dismissal of simple assault charges against Respondent on the grounds that he acted in self-defense.

WHEREAS, Respondent contends that the allegations against him, separately and together, do not constitute unbecoming conduct on the grounds that they can not be supported by facts based upon a preponderance of evidence, and even if there may be some factual support for the allegations, they do not constitute unbecoming conduct as defined by law, and moreover, if it was determined that some of his conduct was not consistent with the law or district policy, his tenure would not be terminated when he had not previously been disciplined as a principal beyond a written warning, or even during his prior experience in the School District as a teacher and assistant principal, over the course of his 20 years of employment in the District; and

WHEREAS, It is now the desire of both parties to resolve any and all issues and disputes in this proceeding because of the uncertainty of the outcome should this matter proceed to hearing. In consideration for the mutual promises and covenants contained herein, the parties agree as follows:

1. The Respondent will be reinstated to his former position as a tenured teacher upon the approval of this settlement agreement by the Commissioner of Education.

2. The parties also agree and understand that based upon the needs of the Petitioner, the Respondent's assignment may change from the assignment that he held at the time the tenure charges were certified, provided that such change is consistent with the laws and regulations of the State of New Jersey, policies and practices of the Petitioner, and the collective bargaining agreement between the Petitioner and the Trenton Education Association.

3. In accordance with state tenure laws, the Respondent was suspended without pay for 120 days following certification of the tenure charges. The parties agree that this period of suspension without pay shall be deemed to be a disciplinary suspension without pay and may be treated as a disciplinary suspension by the Petitioner for purposes of the Respondent's employment record with the Petitioner.

4. It is agreed that the Respondent's acceptance of this disciplinary suspension without pay does not constitute an admission of guilt by him to any of the allegations set forth in the tenure charges or an acknowledgment that he engaged in any wrongdoing of any kind, including that set forth in the tenure charges. Respondent has entered into this settlement agreement due to the uncertainty of the outcome and in an effort to dispose of this matter in a way that will allow him to return to work.

5. Respondent acknowledges that he is not entitled to any back pay as a part of this settlement agreement, nor is he entitled to have any of his attorney's fees paid by the Petitioner.

6. Respondent understands that the Commissioner, pursuant to NJAC 6:11-3.6 has the authority to refer tenure decisions to the State Board of Examiners for possible revocation of certification

7. This agreement constitutes a full and final settlement of all claims in dispute, which were raised, or could have been raised, in this matter. Both parties waive any rights to any further appeals with respect to this matter, or any other proceedings to contest the matters which were raised in this proceeding, or could have been raised, except that either party may file an appropriate action to enforce the terms of this settlement agreement.

8. The parties agree that this settlement agreement will be incorporated as part of an Initial Decision issued by the Honorable Robert Miller, ALJ, and will be presented to the Commissioner of Education to accept as a final decision in this matter.

9. The Respondent by signing this agreement below represents and warrants that he has had an opportunity to review this agreement with his attorney, Michael T. Barrett, Esq., Bergman and Barrett, and warrants that he is satisfied with the services of Mr. Barrett and his firm and with the representation that he has received from the Trenton Education Association.

10. This agreement is entered into voluntarily, without duress and of free will and that there are no agreements between the parties other than that which are set forth herein.

11. The representatives of the Petitioner signing this agreement represents and warrants that they are authorized by the Petitioner to enter into this agreement based upon a

public action approving the agreement by the Petitioner and their signatures bind the Petitioner to the terms set forth herein.

Joyce M. Kersey, President
Trenton Board of Education
Petitioner

10/16/03
Date

Melvin L. Wyns, Board Secy.
Trenton Board of Education
Petitioner

Michael T. Barrett, Esq.
Respondent's Attorney

9-26-03
Date

John Crowell
Respondent

OAL DKT. NO. EDU 4580-02
AGENCY DKT. NO. 192-6/02

IN THE MATTER OF THE TENURE	:	
HEARING OF JOHN CROWELL,	:	
SCHOOL DISTRICT OF THE CITY	:	COMMISSIONER OF EDUCATION
OF TRENTON, MERCER COUNTY.	:	DECISION
	:	

The record, Settlement Agreement and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review of the Settlement Agreement and the charges certified by the District, as well as the written statements in evidence appended thereto and respondent's Answer to such charges, the Commissioner is compelled to reject such agreement, since he cannot be satisfied that it meets the *Cardonick* standards for settlement of tenure matters. *In re Cardonick*, 1990 *S.L.D.* 842, 846.

It is well-established that, having once taken up the burden of tenure charges, the District may not lay it down without spreading forth on the record a reasonably specific explanation of why such charges can no longer be pursued or why it is now in the public interest not to pursue them. (*In the Matter of the Tenure Hearing of Kenneth S. Smith, School District of the City of Orange, Essex County*, decided by the Commissioner March 22, 1982, decision on remand June 16, 1983, 1983 *S.L.D.* 420; *affirmed with modification* by the State Board of Education November 2, 1983, 1983 *S.L.D.* 489; *affirmed* N.J. Superior Court, Appellate Division, January 30, 1986.) Specifically, the Commissioner finds that the charges delineated

herein are of a serious nature, involving allegations of two separate instances of corporal punishment against students in January and February 2002, respectively, and an allegation that respondent propositioned a female student in his classroom in June 2001, telling her that she could graduate if she slept with him every night. Although the District asserts that the "strength of [its] case may be [affected] by the unavailability of many of the witnesses***and that a municipal court trial related to the above mentioned February 13, 2002 [corporal punishment] charge alleging assault against a student resulted in a dismissal of simple assault charges against Respondent on the grounds that he acted in self-defense" (Settlement Agreement at 3), the Commissioner is simply not persuaded that the District lacks the ability to go forward. The proposed agreement indicates that there is at least one witness on each of the charges "available" to testify, including the victim in one of the corporal punishment charges. The record further contains written documentation of two investigative reports of the school principal, Ms. Dawson, which involved her interviewing of respondent with respect to each of the two corporal punishment incidents, and in one of these incidents there is an incident statement of a teaching staff member. Presumably, availability of these school personnel should be assured. Moreover, the outcome of a charge in municipal court would not foreclose establishment of unbecoming conduct in this forum based on the identified conduct largely because of the significant difference in the required burdens of proof in the respective forums, *i.e.*, beyond a reasonable doubt vs. preponderance of the credible evidence.

Particularly troubling here is that the proposed Settlement Agreement appears to contemplate respondent's reinstatement to his position and, concomitantly, a return to his instructional duties. Given the serious nature of the charges filed by the District, the Commissioner cannot approve any agreement which contemplates respondent's unconditioned

return to the classroom absent successful adjudication of the charges without *detailed elaboration* as to how this result serves the public interest.

Accordingly, the within Settlement Agreement is rejected and this matter is remanded to the OAL for further action consistent with this determination.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 12/23/03

Date of Mailing: 12/31/03

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*